

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT

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4  
5 August Term, 2009

6  
7 (Argued: April 16, 2010 Decided: March 21, 2011)

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9 Docket No. 09-4112-cv  
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AMNESTY INTERNATIONAL USA, GLOBAL FUND FOR WOMEN, GLOBAL H

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14 NATION MAGAZINE, PEN AMERICAN CENTER, SERVICE EMPLOYEES INTERNATIONAL  
15 UNION, WASHINGTON OFFICE ON LATIN AMERICA, DANIEL N. ARSHACK, DAVID NEVIN,  
16 SCOTT MCKAY, SYLVIA ROYCE,

17  
18 *Plaintiffs-Appellants,*

19  
20 — v. —

21  
22 JAMES R. CLAPPER, JR., in his official capacity as Director of National  
23 Intelligence,\* KEITH B. ALEXANDER, in his official capacity as Director of the National  
24 Security Agency and Chief of the Central Security Service, ERIC H. HOLDER, JR., in his  
25 official capacity as Attorney General of the United States,

26  
27 *Defendants-Appellees.*

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30 B e f o r e:

31 CALABRESI, SACK, AND LYNCH, *Circuit Judges.*  
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\* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), James R. Clapper, Jr., the Director of National Intelligence is automatically substituted as a defendant herein for his predecessor. The Clerk of Court is directed to amend the caption to read as shown above.

1 Appellants – attorneys, journalists, and labor, legal, media, and human rights  
2 organizations – facially challenged the constitutionality of Section 702 of the Foreign  
3 Intelligence Surveillance Act of 1978 (“FISA”), 50 U.S.C. § 1881a, which was added to  
4 FISA by Section 101(a)(2) of the FISA Amendments Act of 2008 (the “FAA”). The  
5 district court (John G. Koeltl, *Judge*) awarded summary judgment in favor of appellees,  
6 finding that appellants lacked standing. We conclude that on the facts accepted by  
7 appellees for purposes of summary judgment, appellants have established their standing  
8 to sue.

9 VACATED AND REMANDED.

10  
11 JAMEEL JAFFER, American Civil Liberties Union Foundation, New  
12 York, New York (Melissa Goodman and Laurence M. Schwartztol,  
13 American Civil Liberties Union Foundation, New York, NY;  
14 Christopher T. Dunn and Arthur N. Eisenburg, New York Civil  
15 Liberties Union Foundation, New York, NY; Charles S. Sims,  
16 Theodore K. Cheng, Matthew J. Morris, Proskauer Rose LLP, New  
17 York, NY, *on the brief*), *for Plaintiff-Appellant*.

18  
19 DOUGLAS N. LETTER, Appellate Staff, Civil Division, United States  
20 Department of Justice, Washington, D.C. (Tony West, Assistant  
21 Attorney General, Civil Division, United States Department of  
22 Justice, Washington, D.C.; Daniel J. Lerner, Appellate Staff, Civil  
23 Division, United States Department of Justice, Washington, D.C.;  
24 Preet Bharara, United States Attorney for the Southern District of  
25 New York, New York, NY, *on the brief*), *for Defendants-Appellees*.

26  
27  
28 Barbara Moses, Morvillo, Abramowitz, Grand, Iason, Anello &  
29 Bohrer, P.C., New York, NY; Emily Berman and Elizabeth Goitein,



1 Intelligence Surveillance Act of 1978 (“FISA”), which was added to FISA by Section  
2 101(a)(2) of the FISA Amendments Act of 2008 (the “FAA”), and codified at 50 U.S.C.  
3 § 1881a. Section 702 creates new procedures for authorizing government electronic  
4 surveillance targeting non-United States persons outside the United States for purposes of  
5 collecting foreign intelligence. The plaintiffs complain that the procedures violate the  
6 Fourth Amendment, the First Amendment, Article III of the Constitution, and the principle  
7 of separation of powers because they “allow[] the executive branch sweeping and virtually  
8 unregulated authority to monitor the international communications . . . of law-abiding U.S.

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<sup>1</sup> Throughout this opinion, references to the FAA’s new procedures challenged by the plaintiffs refer to the procedures set forth in Section 702.

1 of future injury and costs incurred to avoid that injury, and the plaintiffs have established  
2 that they have a reasonable fear of injury and have incurred costs to avoid it, we agree that  
3 they have standing. We therefore reverse the district court's judgment.

## 4 **BACKGROUND**

### 5 **I. Statutory Scheme at Issue**

6 In 1978, Congress enacted FISA to establish procedures under which federal  
7 officials could obtain authorization to conduct electronic surveillance for foreign  
8 intelligence purposes, including surveillance of communications between persons located  
9 within the United States and surveillance of communications between persons located  
10 within the United States and persons located outside the United States.<sup>2</sup> See 50 U.S.C.

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<sup>2</sup> FISA defined electronic surveillance to include:

- (1) the acquisition by an 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, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;
- (2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States, but does not include the acquisition of those communications of computer trespassers that would be permissible under section 2511(2)(i) of Title 18;
- (3) the intentional acquisition by an electronic, mechanical, or

1 §§ 1801(f), 1804(a)(6)(A). The 2008 FAA amends FISA. It leaves much of the  
2 preexisting surveillance authorization procedure intact, but it creates new procedures for  
3 the authorization of foreign intelligence electronic surveillance targeting non-United States  
4 persons located outside the United States.<sup>3</sup> See *id.* § 1881a; see also 154 Cong. Rec. S227,  
5 228 (daily ed. Jan. 24, 2008) (statement of Sen. Rockefeller) (“[W]e wanted to ensure that  
6 activities authorized by this bill are only directed at persons outside the United States. . . .  
7 For individuals inside the United States, the existing procedures under FISA continue to  
8 apply.”). The plaintiffs complain that the new procedures unlawfully permit broader  
9 collection of intelligence with less judicial oversight.

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other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or  
(4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

50 U.S.C. § 1801(f).

<sup>3</sup> “‘United States person’ means ‘a citizen of the United States, an alien lawfully admitted for permanent residence . . . , an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power . . . .’” 50 U.S.C. § 1801(i).

1           A. Surveillance Authorization Procedures Prior to the FAA

2           FISA established procedures requiring federal officials to obtain authorization to  
3           conduct electronic surveillance for foreign intelligence purposes. It created the Foreign  
4           Intelligence Surveillance Court (“FISC”), to which the government had to apply for  
5           authorization to conduct foreign intelligence surveillance. See 50 U.S.C. §§ 1803, 1804.

6           To obtain authorization, a federal officer had to submit an application, approved by  
7           the Attorney General, that included: the identity of the officer making the application; the  
8           identity, if known, or a description of, the individual to be monitored by the surveillance  
9           (“the target”); the bases for believing both that the target was a foreign power or an agent  
10          of a foreign power, and that a foreign power or an agent of a foreign power was using or  
11          was about to use each of the facilities at which the surveillance was directed; proposed  
12          minimization procedures; the nature of the information sought and the type of  
13          communications or activities to be surveilled; a certification that a significant purpose of  
14          the surveillance was to obtain foreign intelligence information, and that the information  
15          could not reasonably be obtained by normal investigative techniques; the means by which  
16          the surveillance would be effected; a description of any previous surveillance applications;  
17          and the period during which the surveillance was to be maintained. Id. § 1804(a)(1)-(9).

18          Before approving an application, a FISC judge<sup>4</sup> had to find that: the application met  
19          the above criteria; there was probable cause to believe both that the target was a foreign

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<sup>4</sup> The Chief Justice of the United States publicly designates eleven district court judges to serve on the FISC. 50 U.S.C. § 1803(a)(1).

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<sup>5</sup> 50 U.S.C. § 1801(h) defines minimization procedures, in relevant part, as:

(1) specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information



1 of the target; the nature and location of the places to be monitored; the type of information  
2 sought to be acquired; the means of surveillance, and the time period for which  
3 surveillance was approved. Id. § 1805(c)(1). The order also had to direct the government  
4 to follow the approved minimization procedures. Id. § 1805(c)(2)(A). During the  
5 authorized surveillance period, the FISC could monitor compliance with these  
6 minimization procedures “by reviewing the circumstances under which information  
7 concerning United States persons was acquired, retained, or disseminated.” Id.  
8 § 1805(d)(3).

9 B. Surveillance Authorization Procedures After the FAA

10 The FAA leaves much of the FISA framework intact, but the new Section 702  
11 creates new procedures for the authorization of foreign intelligence surveillance targeting  
12 non-United States persons located outside the United States.

13 The FAA, in contrast to the preexisting FISA scheme, does not require the  
14 government to submit an individualized application to the FISC identifying the particular  
15 targets or facilities to be monitored. Instead, the Attorney General (“AG”) and Director of  
16 National Intelligence (“DNI”) apply for a mass surveillance authorization by submitting to  
17 the FISC a written certification and supporting affidavits attesting generally that “a  
18 significant purpose of the acquisition is to obtain foreign intelligence information” and that  
19 that information will be obtained “from or with the assistance of an electronic  
20 communication service provider.” 50 U.S.C. § 1881a(g)(2)(A)(v), (vi). The certification

1 must also attest that adequate targeting and minimization procedures have been approved  
2 by the FISC, have been submitted to the FISC for approval, or are being submitted with  
3 the certification. Id. § 1881a(g)(2)(A)(i), (ii). “Targeting procedures” are procedures  
4 designed to ensure that an authorized acquisition is “limited to targeting persons  
5 reasonably believed to be located outside the United States,” and is designed to “prevent  
6 the intentional acquisition of any communication as to which the sender and all intended  
7 recipients are known at the time of the acquisition to be located in the United States.” Id.  
8 § 1881a(d)(1), 1881a(g)(2)(A)(I). “Minimization procedures” for electronic surveillance  
9 under the FAA must meet the definition of minimization procedures for electronic  
10 surveillance under FISA, set out in 50 U.S.C. § 1801(h). The government’s certification  
11 must further attest that the surveillance procedures, which must be included with the

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<sup>6</sup> In exigent circumstances, the government may start wiretapping before applying for FISC authorization, so long as the government applies to the FISC for authorization

1 as well as the congressional intelligence committees and the Senate and House Judiciary  
2 Committees. *Id.* § 1881a(l)(1). In its summary judgment submissions, the government  
3 asserted that “[s]hould such reporting reveal particular minimization procedures to be  
4 ineffective in any respect, the FISC has the authority to disapprove such procedures in  
5 future § 1881a proceedings.” Defs.’ Mem. in Opp’n to Pls.’ Mot. for Summ. J. at 52-53,  
6 Amnesty Int’l USA v. McConnell, 646 F. Supp. 2d 633 (S.D.N.Y. 2009) (No. 08 Civ.  
7 6259). But the government has not asserted, and the statute does not clearly state, that the  
8 FISC may rely on these assessments to revoke earlier surveillance authorizations.

9 The head of each element of the intelligence community acquiring communications  
10 by means of authorized surveillance also must review the ongoing surveillance procedures  
11 by conducting “an annual review to determine whether there is reason to believe that  
12 foreign intelligence information has been or will be obtained from the acquisition.” 50  
13 U.S.C. § 1881a(l)(3)(A). These reviews of authorized acquisitions must indicate how  
14 many United States persons were overheard or were referred to in intercepted  
15 communications that were collected under surveillance designed to target non-United  
16 States persons.<sup>7</sup> The relevant intelligence heads who conduct such annual reviews must  
17 use them “to evaluate the adequacy of the minimization procedures,” *id.* § 1881a(l)(3)(B),

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<sup>7</sup> More specifically, the FAA requires that these reviews provide, inter alia, a count of “disseminated intelligence reports containing a reference to a United States-person identity” and “the number of [surveillance] targets that were later determined to be located in the United States and, to the extent possible, whether communications of such targets were reviewed.” 50 U.S.C. § 1881a(l)(3)(A).

1 and they must provide these annual reviews to the FISC, the AG, the DNI, the  
2 congressional intelligence committees, and the Senate and House Judiciary Committees,  
3 id. § 1881a(l)(3)(C).

#### 4 C. Comparison of Pre- and Post-FAA Surveillance Authorization Procedures

5 The plaintiffs highlight two differences between the pre- and post-FAA surveillance  
6 authorization procedures. First, whereas under the preexisting FISA scheme the  
7 government had to submit an individualized application for surveillance identifying the  
8 particular target, facility, type of information sought, and procedures to be used, under the  
9 FAA, the government need not submit a similarly individualized application – it need not  
10 identify the particular target or facility to be monitored. Compare 50 U.S.C. § 1805(c)(1),  
with id

1 individuals or facilities. Under the FAA, by contrast, the plaintiffs allege that an  
2 acquisition order could seek, for example, “[a]ll telephone and e-mail communications to  
3 and from countries of foreign policy interest – for example, Russia, Venezuela, or Israel –  
4 including communications made to and from U.S. citizens and residents.” Moreover, the  
5 specific showing of probable cause previously required, and the requirement of judicial  
6 review of that showing, have been eliminated. The government has not directly  
7 challenged this characterization.<sup>8</sup>

8 An additional distinction concerns who monitors compliance with statutory  
9 limitations on the surveillance procedures. The preexisting FISA scheme allowed ongoing  
10 judicial review by the FISC. *Id.* § 1805(d)(3). But under the FAA, the judiciary may not  
11 monitor compliance on an ongoing basis; the FISC may review the minimization  
12 procedures only prospectively, when the government seeks its initial surveillance  
13 authorization. Rather, the executive – namely the AG and DNI – bears the responsibility  
14 of monitoring ongoing compliance, and although the FISC receives the executive’s  
15 reports, it cannot rely on them to alter or revoke its previous surveillance authorizations.

Compare 50 U.S.C. § 1805(d)(3), with

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<sup>8</sup> In its brief, the government says that it “disputes” the plaintiffs’ interpretation of “the *scope* of [the FAA],” but it does not identify what is wrong with the plaintiffs’ interpretation, or what a more appropriate interpretation would be. At oral argument, we asked the government to clarify what it found inaccurate in the plaintiffs’ characterization, and again it failed to do so.

1           A. Parties

2           The plaintiffs are attorneys and human rights, labor, legal, and media organizations  
3 whose work requires international communications with individuals they believe the  
4 government will likely monitor under the FAA.<sup>9</sup> The plaintiffs sued the DNI, the AG, and  
5 the Director of the National Security Agency (“NSA”) in their official capacities  
6 (collectively, “the government”).

7           B. Complaint

8           On July 10, 2008, the same day Congress enacted the FAA, the plaintiffs filed their

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<sup>9</sup> The nature of and need for these communications with such individuals is fleshed out below.

1 The plaintiffs sought a declaration that the FAA is unconstitutional. The government, in  
2 addition to defending the FAA’s constitutionality on the merits, argued that the plaintiffs  
3 lacked standing to challenge the facial validity of the statute, contending that the Act could  
4 be challenged only by persons who had been electronically surveilled in accordance with  
5 its terms and the plaintiffs could not show that they had been so surveilled. The plaintiffs  
6 advanced what they characterized as two independent bases for standing to challenge the  
7 FAA’s constitutionality: first, that they have an actual and well-founded fear that their  
8 communications will be monitored in the future; and, second, that in light of that fear they  
9 have taken costly and burdensome measures to protect the confidentiality of certain  
10 communications.

11 In support of their standing arguments, the plaintiffs filed declarations and a  
12 Statement of Undisputed Facts pursuant to Local Rule 56.1 (“56.1 Statement”). The  
13 plaintiffs’ evidence tended to show that their work “requires them to engage in sensitive  
14 and sometimes privileged telephone and e-mail communications with colleagues, clients,  
15 journalistic sources, witnesses, experts, foreign governmental officials, and victims of  
16 human rights abuses located outside the United States.”<sup>10</sup> The individuals with whom the  
17 plaintiffs communicate include “people the U.S. Government believes or believed to be  
18 associated with terrorist organizations,” “political and human rights activists who oppose

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<sup>10</sup> As more fully discussed below, the government does not dispute the accuracy of plaintiffs’ factual assertions.



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<sup>11</sup> The plaintiffs submitted a number of declarations providing examples of such individuals: Attorney Scott McKay, for instance, communicates with his client Sami Omar Al-Hussayen, a Saudi Arabian resident who has faced criminal charges in connection with the September 11 terrorist attacks and is now a defendant in several related civil cases. McKay also helps represent Khalid Sheik Mohammed, who is being held at Guantanamo Bay for alleged acts of terrorism, and in the course of this representation McKay regularly communicates with Mohammed's family members, experts, and investigators around the world. Attorney Sylvia Royce represents Mohammedou Ould Salahi, a Mauritanian national and Guantanamo Bay prisoner, who allegedly acted as a liaison between al Qaeda and German Islamic radicals. Royce communicates information about Salahi's case with his brother in Germany, and with her Mauritanian and French co-counsel.

Attorney Joanne Mariner, who directs Human Rights Watch's Terrorism and Counterterrorism Program, which reports on human rights abuses by governments and non-state actors throughout the world, regularly speaks with human rights researchers,

1 they exchange information that “constitutes ‘foreign intelligence information’ within the  
2 meaning of the FAA.” The plaintiffs believe that, because of the nature of their  
3 communications with these individuals, the communications will likely be “acquired,  
4 retained, analyzed, and disseminated” under the FAA.

5 Their fear of future surveillance, according to the plaintiffs, inflicts present injuries.  
6 For instance, in order to protect the confidentiality of sensitive and privileged  
7 communications the plaintiffs have “ceased engaging in certain conversations on the  
8 telephone and by e-mail,” which, in turn, “compromises [their] ability to locate witnesses,  
9 cultivate sources, gather information, communicate confidential information to their  
10 clients, and to engage in other legitimate and constitutionally protected communications.”  
11 In addition, the FAA has “force[d] plaintiffs to take costly and burdensome measures,”  
12 such as traveling long distances to meet personally with individuals.

13 The attorney plaintiffs assert that they are obligated to take these measures in order  
14 to comply with their “ethical obligation to avoid communicating confidential information  
15 about client matters over telephone, fax, or e-mail if they have reason to believe that it is  
16 likely to be intercepted by others.” In support of this assertion, the plaintiffs filed a  
17 declaration from Professor Stephen Gillers, an expert in legal ethics, stating that it is “the  
18 duty of a lawyer to safeguard confidential information.”

19 Gillers attested that “[d]eterminative of how the lawyer may proceed is . . . whether  
20 the lawyer has good reason to believe that his or her communications are reasonably likely



1           D. District Court’s Summary Judgment Opinion

2           The district court held that the plaintiffs lacked standing to challenge the FAA, and  
3 therefore granted summary judgment for defendants without reaching the merits of the  
4 plaintiffs’ claims. After identifying the three constitutional requirements for standing – an  
5 injury in fact, a causal connection between the injury and the challenged statute, and  
6 redressability – the court stated that “[t]his case turns on whether the plaintiffs have met  
7 the irreducible constitutional minimum of personal, particularized, concrete injury in fact.”  
8 Id. at 643-44. The court denied standing because it found that neither of the plaintiffs’  
9 asserted injuries – their actual and well-founded fear of being monitored, and the resulting  
10 professional and economic costs they have incurred to protect the confidentiality of their  
11 communications – constituted the requisite injury in fact.

12                   1. Fear of Future Surveillance

13           The district court found the plaintiffs’ fear of future surveillance too speculative to  
14 confer standing. It stated:

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Statement said that “[t]he threat of surveillance under the new law has a much greater impact on [their] work than previous U.S. government surveillance.” The time to challenge the accuracy of the plaintiffs’ assertions in their declarations has passed. The government could have filed its own evidence, or sought an evidentiary hearing on the accuracy of the plaintiffs’ claims, but it did neither. See Gubitosi v. Kapica, 154 F.3d 30, 31 n.1 (2d Cir. 1998) (deeming admitted all material facts contained in an unopposed Rule 56.1 statement); see also S.D.N.Y. Local R. 56.1(c) (“Each numbered paragraph in the statement of material facts set forth in the statement required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.”).

1 The plaintiffs have failed to establish standing to challenge the  
2 constitutionality of the FAA on the basis of their fear of  
3 surveillance. The plaintiffs can only demonstrate an abstract  
4 fear that their communications will be monitored under the  
5 FAA. The FAA creates a framework within which intervening  
6 federal officials may apply for approval from the FISC to  
7 authorize surveillance targeting non-United States persons  
8 located outside the United States to acquire foreign  
9 intelligence information. The FAA sets forth the requirements  
10 that an application to obtain a surveillance order from the FISC  
11 must satisfy. Contrary to the characterization of the statute in  
12 the plaintiffs' motion papers, the FAA itself does not authorize  
13 the surveillance of the plaintiffs' communications. Indeed, the  
14 FAA neither authorizes surveillance nor identifies on its face a  
15 class of persons that includes the plaintiffs. Rather the FAA  
16 authorizes specified federal officials to seek a surveillance  
17 order from the FISC. That order cannot target the plaintiffs  
18 and whether an order will be sought that affects the plaintiffs'  
19 rights, and whether such an order would be granted by the  
20 FISC, is completely speculative.

21  
22 Id. at 645.

23 To arrive at this conclusion, the district court relied on three lines of cases. First,  
24 the court looked to cases where plaintiffs have sought standing to challenge electronic  
25 surveillance schemes, namely United Presbyterian Church in the U.S.A. v. Reagan, 738  
26 F.2d 1375 (D.C. Cir. 1984), and ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007). Both of  
27 these cases rejected the plaintiffs' standing arguments, which were based on their fear of  
28 future injuries, because the plaintiffs' respective fears were too speculative. The district  
29 court found those cases apposite and persuasive. See Amnesty Int'l, 646 F. Supp. 2d at  
30 645-47.

1           Second, the court examined “‘physical surveillance cases’ where the Supreme  
2 Court reached the merits of challenges to laws or policies authorizing drug or alcohol  
3 testing for specific classes of persons, without requiring that the plaintiffs had actually  
4 submitted to such testing before bringing such challenges.” Id. at 647-48. The district  
5 court held that those cases have “no application to this case, where the plaintiffs are not  
6 required to do anything or to submit to anything, and where there is no showing that the  
7 Government has authorized any action against [a class of persons including] the  
8 plaintiffs.” Id. at 648.

9           Finally, the district court examined standing cases outside the surveillance context,  
10 and said those cases:

11                   stand for the proposition that a plaintiff may challenge a  
12 specific law or regulation before it is enforced against the  
13 plaintiff if the plaintiff is subject to that law or regulation and  
14 has a well-founded fear that it will be so enforced. The  
15 plaintiffs in this case have made no showing that they are  
16 subject to any specific law or regulation that they seek to  
17 challenge. The FAA does not require that the plaintiffs do  
18 anything or refrain from doing anything such that they might  
19 have a well-founded fear that the Government would take  
20 action against them for failing to abide by the statute.  
21 Moreover, the FAA does not authorize surveillance of the  
22 plaintiffs’ communications and the plaintiffs have made no  
23 showing that the Government has sought any such surveillance  
24 pursuant to the general framework set forth in the statute or  
25 that such surveillance has been authorized.

26  
27 Id. at 649.

28           2. Economic and Professional Costs Incurred to Protect Communications

1 As for the plaintiffs’ economic and professional costs, the court found that those  
2 injuries are “not truly independent of the [plaintiffs’] first basis” for standing, because  
3 those costs “flow directly from the plaintiffs’ fear of surveillance.” Id. at 653. The court  
4 said that “[t]o allow the plaintiffs to bring this action on the basis of such costs would  
5 essentially be to accept a repackaged version of the first failed basis for standing.” Id.  
6 Moreover, the court held that “because the plaintiffs have failed to show that they are  
7 subject to the FAA and that they face a threat of harm from its enforcement, the chilling of  
8 their speech that they attribute to the statute is actually the result of their purely subjective  
9 fear of surveillance.” Id. The court went on to state that the Supreme Court has held in  
10 Laird v. Tatum, 408 U.S. 1 (1972), that such a subjective chill “is insufficient to support  
11 standing.” Amnesty Int’l, 646 F. Supp. 2d at 653.

## 12 DISCUSSION

13 This opinion addresses only the question of whether plaintiffs have standing to  
14 challenge the FAA. It does not address the FAA’s constitutionality. The district court did  
15 not reach that issue, and the parties did not brief it. The question before this Court is only  
16 whether the plaintiffs may maintain this lawsuit, a question that “in no way depends on the  
17 merits of the plaintiff’s contention that particular conduct is illegal.” Warth v. Seldin, 422  
18 U.S. 490, 500 (1975). “We review questions of standing *de novo*.” Carver v. City of New  
19 York, 621 F.3d 221, 225 (2d Cir. 2010).

1 **I. Elements and Principles of Standing**

2 Article III of the United States Constitution empowers federal courts to hear only  
3 “cases” and “controversies.” U.S. Const. art. III, § 2. Standing doctrine determines  
4 “whether the plaintiff has made out a ‘case or controversy’ between himself and the  
5 defendant within the meaning of Art. III,” and is therefore “entitled to have the court  
6 decide the merits of the dispute or of particular issues.” Warth, 422 U.S. at 498; see also  
7 Whitmore v. Arkansas, 495 U.S. 149, 155 (1990). A citizen who dislikes a particular law  
8 may not require a court to address its constitutionality simply by stating in a complaint his  
9 belief, however deeply held, that the law is inconsistent with some provision of the  
10 Constitution. “[T]he [Supreme] Court has rejected all attempts to substitute abstract



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<sup>14</sup> Where a plaintiff seeks injunctive relief, he must show that he is “under threat of suffering [an] injury in fact,” a requirement that is discussed more fully below. Summers, 129 S. Ct. at 1149 (internal quotation marks omitted).

1 Wright, 468 U.S. 737, 752 (1984). “[T]he judicial power of the United States defined by  
2 Art. III is not an unconditioned authority to determine the constitutionality of legislative or  
3 executive acts.” Hein v. Freedom From Religion Found., 551 U.S. 587, 598 (2007)  
4 (internal quotation marks omitted). By limiting the exercise of judicial review of other  
5 branches of government to cases where it is necessary to protect a complaining party’s  
6 interests, standing doctrine is “founded in concern about the proper – and properly limited  
7 – role of the courts in a democratic society.” Warth, 422 U.S. at 498. If we had no  
8 standing doctrine and instead simply allowed the courts to “oversee legislative or  
9 executive action,” that would “significantly alter the allocation of power away from a  
10 democratic form of government.” Summers, 129 S. Ct. at 1149 (internal quotation marks  
11 and ellipsis omitted).

12 Standing doctrine also serves to improve judicial decision-making by ensuring that  
13 a concrete case informs the court of the consequences of its decisions, and by ensuring that  
14 the party bringing the case has “such a personal stake in the outcome of the controversy as  
15 to assure that concrete adverseness which sharpens the presentation of issues upon which  
16 the court so largely depends for illumination of difficult constitutional questions.” Baker  
17 v. Carr, 369 U.S. 186, 204 (1962); see also Lujan, 504 U.S. at 581 (Kennedy, *J.*,  
18 concurring in part) (standing requirements “preserve[] the vitality of the adversarial  
19 process by assuring both that the parties before the court have an actual . . . stake in the  
20 outcome, and that the legal questions presented will be resolved, not in the rarefied

1 atmosphere of a debating society, but in a concrete factual context conducive to a realistic  
2 appreciation of the consequences of judicial action” (internal quotation marks and ellipsis  
3 omitted)).<sup>15</sup>

## 4 **II. Plaintiffs’ Asserted Grounds for Standing**

5 On appeal, the plaintiffs reassert that they have suffered two types of injuries. First,  
6 they claim that they fear that the government will intercept their sensitive international  
7 communications, because the FAA “plainly authorizes the acquisition of [their]  
8 international communications,” and their communications are “likely to be monitored  
9 under it.” Second, they claim that anticipation of this future injury also inflicts a present  
10 injury “by compelling them to take costly and burdensome measures to protect the  
11 confidentiality of their international communications” and by compromising their “ability  
12 to locate witnesses, cultivate sources, gather information, communicate confidential

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<sup>15</sup> Standing has been said to serve a number of other values, as well, including: promoting judicial efficiency and effectiveness by preventing the courts from being overwhelmed with cases where plaintiffs have only an ideological stake, see United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, *J.*, concurring) (“[W]e risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens.”); and promoting fairness, by ensuring that plaintiffs enforce only their own rights rather than third parties’ rights, see Singleton v. Wulff, 428 U.S. 106, 113-14 (1976) (“First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. Second, third parties themselves usually will be the best proponents of their own rights.” (citation omitted)).

1 information to their clients, and to engage in other legitimate and constitutionally protected  
2 communications.”

3           The district court and the parties have focused on whether the plaintiffs’ asserted  
4 injuries satisfy the injury-in-fact component of the standing inquiry. Although they are  
5 correct that the plaintiffs’ first asserted injury – the possibility of being monitored in the  
6 future – raises a question of injury in fact, because probabilistic injuries constitute injuries  
7 in fact only when they reach a certain threshold of likelihood, see City of Los Angeles v.  
8 Lyons, 461 U.S. 95, 107 n.8 (1983), the plaintiffs’ second asserted injury alleges the most  
9 mundane of injuries in fact: the expenditure of funds. The plaintiffs’ declarations, which,  
10 as discussed above, we must accept as true, establish that they have already incurred  
11 professional and economic costs to avoid interception. Having accepted the truthfulness  
12 of the plaintiffs’ declarations for purposes of the summary judgment motion, the  
13 government cannot now dispute whether the plaintiffs genuinely fear being intercepted, or  
14 whether the plaintiffs have actually incurred the costs they claim to have incurred. Thus,  
15 we have little doubt that the plaintiffs have satisfied the injury-in-fact requirement.

16           As to the second asserted injury – their present-injury theory – that the plaintiffs  
17 have demonstrated injuries in fact is not sufficient in itself to establish standing. The  
18 plaintiffs must also prove that the injuries are caused by the challenged statute and that a  
19 favorable judgment would redress them. The government’s challenge to the plaintiffs’  
20 standing based on their incurred professional and economic costs focuses on whether there

1 is a “causal connection between [the plaintiffs’] injury and the [legislation] complained  
2 of.” Lujan, 504 U.S. at 560. The causal chain can be broken where a plaintiff’s self-  
3 inflicted injury results from his “unreasonable decision . . . to bring about a harm that he  
4 knew to be avoidable.” St. Pierre v. Dyer, 208 F.3d 394, 403 (2d Cir. 2000). However,  
5 “[s]tanding is not defeated merely because the plaintiff has in some sense contributed to  
6 his own injury. . . . Standing is defeated only if it is concluded that the injury is so  
7 completely due to the plaintiff’s own fault as to break the causal chain.” 13A Charles  
8 Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure  
9 § 3531.5, at 361-62 (3d ed. 2008) (footnotes omitted).

10 If the plaintiffs can show that it was not unreasonable for them to incur costs out of  
11 fear that the government will intercept their communications under the FAA, then the  
12 measures they took to avoid interception can support standing. If the possibility of  
13 interception is remote or fanciful, however, their present-injury theory fails because the  
14 plaintiffs would have no reasonable basis for fearing interception under the FAA, and they  
15 cannot bootstrap their way into standing by unreasonably incurring costs to avoid a merely  
16 speculative or highly unlikely potential harm. Any such costs would be gratuitous, and  
17 any ethical concerns about not taking those measures would be unfounded. In other  
18 words, for the purpose of standing, although the plaintiffs’ economic and professional  
19 injuries are injuries in fact, they cannot be said to be “fairly traceable” to the FAA – and  
20 cannot support standing – if they are caused by a fanciful, paranoid, or otherwise

1 unreasonable fear of the FAA. “If causation is to be required at all, it should demand a  
2 meaningful level of probability,” but “[a]s with other elements of standing, the showing  
3 required might be tailored to the other facts that make it more or less appropriate to decide  
4 the case.” Wright, Miller & Cooper, supra, § 3531.5, at 328.

5 Here, the plaintiffs’ actions were “fairly traceable” to the FAA. Because, as we  
6 shall explain, the plaintiffs’ fears were reasonable even under the stringent reasonableness  
7 standards found in *future-injury* cases, and because the plaintiffs incurred these  
8 professional and economic costs as a direct result of that reasonable fear, their present  
9 injuries in fact clearly satisfy the requirements for standing. We therefore need not and do  
10 not decide whether the degree of likelihood necessary to establish a causal relationship  
11 between an actual present injury and the challenged governmental action is as stringent as  
12 that necessary for a potential harm in itself to confer standing. However, the line of  
13 future-injury standing cases provides a helpful framework for analyzing the plaintiffs’  
14 present-injury arguments. Those cases bolster our conclusion that the professional and  
15 economic harms the plaintiffs suffered here were fairly traceable to the FAA, and were not  
16 the result of an “unreasonable decision” on their part “to bring about a harm that [they]  
17 knew to be avoidable.” St. Pierre, 208 F.3d at 403.

18 In addition to their present-injury theory, the plaintiffs advance a future-injury  
19 theory of standing. A future injury or threat of injury does not confer standing if it is

1 U.S. 488, 494 (1974) (internal quotation marks omitted). To determine whether the  
2 plaintiffs have standing under their future-injury theory, we would need to determine  
3 whether the FAA creates an objectively reasonable likelihood that the plaintiffs'  
4 communications are being or will be monitored under the FAA. As noted above, we  
5 conclude that the future injuries alleged by the plaintiffs are indeed sufficiently likely to  
6 confer standing under the test established in the case law for basing standing on the risk of  
7 future harm.

8 The government's first argument against the plaintiffs' standing – on both theories  
9 – is that the FAA does not create a sufficiently high likelihood that those communications  
10 will be monitored. In our judgment, however, for the reasons set forth in Part III, below,  
11 the plaintiffs have established that they reasonably fear being monitored under the  
12 allegedly unconstitutional FAA, and that they have undertaken costly measures to avoid it.  
13 Those present injuries – fairly traceable to the FAA and likely to be redressable by a  
13 favorable judgment – support the plaintiffs' standing to challenge the statute.

1 linking the plaintiffs' injuries to the FAA. For the reasons set forth in Part IV, below, we  
2 disagree.

### 3 **III. Likelihood of Government Action**

4 The government argues that the plaintiffs can obtain standing only by showing  
5 either that they have been monitored or that it is "effectively certain" that they will be  
6 monitored. The plaintiffs fall short of this standard, according to the government, because  
7 they "simply speculate that they will be subjected to governmental action taken pursuant to  
8 [the FAA]."

9 But the government overstates the standard for determining when a present injury  
10 linked to a contingent future injury can support standing. The plaintiffs have demonstrated  
11 that they suffered present injuries in fact – concrete economic and professional harms –  
12 that are fairly traceable to the FAA and redressable by a favorable judgment. The  
13 plaintiffs need not show that they have been or certainly will be monitored. Indeed, even  
14 in cases where plaintiffs allege an injury based solely on prospective government action,  
15 they need only show a "realistic danger" of "direct injury," Babbitt v. United Farm  
16 Workers Nat'l Union, 442 U.S. 289, 298 (1979); and where they allege a prospective  
17 injury to First Amendment rights, they must show only "an actual and well-founded  
18 fear" of injury, Vt. Right to Life Comm. v. Sorrell, 221 F.3d 376, 382 (2d Cir. 2000),



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<sup>16</sup> For a comparison of the “realistic danger” and “well-founded fear” standards, see Amnesty Int’l

1           In Lyons, the seminal case on standing based on probabilistic or prospective harm,  
2 the plaintiff sued the City of Los Angeles and certain police officers alleging that officers  
3 stopped him for a traffic violation and, without provocation, applied a chokehold,  
4 rendering him unconscious and damaging his larynx. Lyons, 461 U.S. at 97-98. In  
5 addition to seeking damages, he sought to enjoin police officers’ use of chokeholds. Id. at  
6 98.

7           The Court said, “Lyons’ standing to seek the injunction requested depended on  
8 whether he was likely to suffer future injury from the use of the chokeholds by police  
9 officers,” id. at 105, emphasizing that “[t]he reasonableness of [the plaintiff’s] fear [of  
10 future injury] is dependent upon the likelihood of a recurrence of the allegedly unlawful  
11 conduct. It is the *reality* of the threat of repeated injury that is relevant to the standing  
12 inquiry, not the plaintiff’s subjective apprehensions.” Id. at 107 n.8 (emphasis in original).

13           The Court held that Lyons lacked standing to pursue injunctive relief, because he  
14 did not show a sufficient likelihood that he would be injured. Id. at 111-12. It said, “[w]e  
15 cannot agree that the odds that Lyons would not only again be stopped for a traffic  
16 violation but would also be subjected to a chokehold without any provocation whatsoever  
17 are sufficient to make out a federal case for equitable relief.” Id. at 108 (internal citation  
18 and quotation marks omitted). Without a “sufficient likelihood that he will again be

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stringent reasonableness standards they impose for future-injury standing, to demonstrate just how strong the plaintiffs’ present-injury standing claims here truly are.

1 wronged in a similar way,” Lyons was “no more entitled to an injunction than any other  
2 citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens

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<sup>18</sup> The Court stated:

In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either, (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning or, (2) that the City ordered or authorized police officers to act in such manner.

Lyons, 461 U.S. at 105-06.

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<sup>19</sup> For examples of cases where courts have granted standing based on probabilistic injuries, see Davis v. FEC, 554 U.S. 724, 735 (2008) (granting standing to congressional candidate to challenge campaign finance law that raised restrictions on contributions to competitors in certain circumstances, despite the fact that the raised restrictions had not yet been triggered when plaintiff filed suit, because “the record at summary judgment indicated that most candidates who had the opportunity to receive expanded contributions had done so”); Pennell v. City of San Jose, 485 U.S. 1, 8 (1988) (“The likelihood of enforcement, with the concomitant probability that a landlord’s rent will be reduced below what he or she would otherwise be able to obtain in the absence of the Ordinance, is a sufficient threat of actual injury to satisfy Art. III’s requirement that a plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute’s operation or enforcement.” (internal quotation marks and bracket omitted)); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 74 (1978) (granting plaintiffs standing to challenge statute that capped liability for nuclear reactor accidents, because statute created incentives for defendant to build and operate nearby nuclear reactor that would release small quantities of radiation into the air and water, and injury from that radiation was “uncertain[.]” but sufficiently likely); Baur v. Veneman, 352 F.3d 625 (2d Cir. 2003) (granting plaintiff standing to challenge regulation that allowed downed cattle to be processed for human consumption, because it increased chances of plaintiff contracting disease from such meat).



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<sup>21</sup> At oral argument, the government contended that required minimization procedures combined with the fact that the government must convince an Article III judge to approve any surveillance order “makes less certain the injury here.” This line of

1 officers who would have been acting outside the law, making the injury less likely to  
2 occur. Here, the fact that the government has authorized the potentially harmful conduct  
3 means that the plaintiffs can reasonably assume that government officials will actually  
4 engage in that conduct by carrying out the authorized surveillance. It is fanciful,  
5 moreover, to question whether the government will ever undertake broad-based  
6 surveillance of the type authorized by the statute. The FAA was passed specifically to  
7 permit surveillance that was not permitted by FISA but that was believed necessary to  
8 protect the national security. See, e.g., 154 Cong. Rec. S227, 227-28 (daily ed. Jan. 24,  
9 2008) (statement of Sen. Rockefeller) (explaining “why it is necessary for us to update”

1 “political and human rights activists who oppose governments that are supported  
2 economically or militarily by the U.S. government,” and “people located in geographic  
3 areas that are a special focus of the U.S. government’s counterterrorism or diplomatic  
4 efforts.” The plaintiffs’ assessment that these individuals are likely targets of FAA  
5 surveillance is reasonable, and the government has not disputed that assertion.

6 On these facts, it is reasonably likely that the plaintiffs’ communications will be  
7 monitored under the FAA. The instant plaintiffs’ fears of surveillance are by no means  
8 based on “mere conjecture,” delusional fantasy, or unfounded speculation. Baur, 352 F.3d



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<sup>22</sup> See, e.g.

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<sup>23</sup> Moreover, under the FAA the government can often conduct surveillance without FISC authorization. In exigent circumstances, for example, the government may start wiretapping before applying for FISC authorization, so long as the government applies for authorization within 7 days. 50 U.S.C. § 1881a(c)(2), 1881a(g)(1)(B). In addition, if the FISC denies any application for a surveillance order, the government may

1 FISC interposes a significant intervening step, we cannot find that the mere existence of  
2 this intervening step prevents the plaintiffs from obtaining standing to challenge the FAA.

3 Because the plaintiffs’ undisputed testimony clearly establishes that they are  
4 suffering injuries in fact, and because we find those injuries are causally connected to the  
5 FAA – because they are taken in anticipation of future government action that is  
reasonably likely to occur – and are redressable by a favorable judgment,<sup>24</sup>

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<sup>24</sup> Neither the district court nor the parties discuss the third constitutional standing requirement – redressability – in any depth. To demonstrate redressability, “a plaintiff must show the substantial likelihood that the requested relief will remedy the alleged injury in fact.” McConnell v. FEC, 540 U.S. 93, 225-26 (2003), overruled on other grounds by Citizens United v. FEC, 130 S. Ct. 876 (2010); see also Larson v. Valente, 456 U.S. 228, 243 n.15 (1982) (“[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself.”). The requirement turns on the “causal connection between the alleged injury and the judicial relief requested.” Allen v. Wright, 468 U.S. 737, 753 n.19 (1984). The plaintiffs have established that the relief they seek would redress their asserted injuries in fact, because their injuries stem from their reasonable fear of being monitored by FAA-authorized government surveillance, and if a court grants their requested relief – an injunction prohibiting the government from conducting surveillance under the FAA – the feared surveillance would no longer be permitted and therefore would, presumably, no longer be carried out.



1 Summers, 129 S. Ct. at 1149 (internal quotation marks omitted).

2 As a fundamental requisite to establishing standing, a plaintiff seeking standing on  
3 the basis of indirect injury must satisfy the three constitutional requirements for standing  
4 discussed above: (1) an injury in fact (2) that is causally related to the challenged statute or  
5 conduct and (3) is likely to be redressed by a favorable judicial decision. See Lujan, 504  
6 U.S. at 560-61; Duke Power, 438 U.S. at 72. Despite not being directly regulated, a  
7 plaintiff may establish a cognizable injury in fact by showing that he has altered or ceased  
8 conduct as a reasonable response to the challenged statute. See, e.g., Friends of the Earth,  
9 Inc. v. Laidlaw Env'tl. Servs., 528 U.S. 167, 184-85 (2000) (granting environmental groups  
10 standing to sue a corporation under the Clean Water Act because the defendant  
11 corporation's alleged environmental damage deterred members of the plaintiff  
12 organizations from using and enjoying certain lands and rivers). If the plaintiff makes  
13 such an allegation, he must identify the injury with "specificity," Socialist Workers Party  
14 v. Att'y Gen., 419 U.S. 1314, 1319 (1974) (Marshall, *Circuit Justice*), and he "must  
15 proffer some objective evidence to substantiate his claim that the challenged conduct has  
16 deterred him from engaging in protected activity," Bordell v. Gen. Elec. Co., 922 F.2d  
17 1057, 1061 (2d Cir. 1991).

18 The plaintiffs have satisfied these requirements through their uncontroverted  
19 testimony that they have altered their conduct and thereby incurred specific costs in  
20 response to the FAA. As discussed above, we must accept that undisputed testimony, so

1 the plaintiffs have established the first constitutional requirement for standing – an injury  
2 in fact.

3 The heart of the government’s challenge to the plaintiffs’ standing based on the  
4 indirectness of their injury – much like the government’s challenge to the plaintiffs’  
5 standing based on the likelihood of future injury – goes to whether the plaintiffs’ injuries  
6 are causally connected to the challenged legislation. The causal chain linking the  
7 plaintiffs’ indirect injuries to the challenged legislation is similar to that discussed above:  
8 it turns on the likelihood that the plaintiffs’ communications with the regulated third  
9 parties will be monitored. If the FAA does not make it likely that the plaintiffs’  
10 communications with regulated third parties will be monitored, then the costs the plaintiffs  
11 have incurred to avoid being monitored are the product of their own decisions and are not  
12 sufficiently linked to the FAA; for this reason, they would not be “fairly traceable to the  
13 challenged action,” Lujan, 504 U.S. at 560. Conversely, if the plaintiffs’ communications  
14 with regulated third parties will likely be monitored despite the fact that the FAA does not  
15 directly regulate the plaintiffs, then those costs are sufficiently tied to the FAA to support  
16 standing.

17 The Supreme Court and this Court have frequently found standing on the part of  
18 plaintiffs who were not directly subject to a statute, and asserted only indirect injuries.  
19 Most notably, in Meese v. Keene, 481 U.S. 465 (1987), the Supreme Court found standing  
20 in a plaintiff who, like the instant plaintiffs, was not directly regulated by the statute, and

1 alleged only indirect injuries. The plaintiff, a lawyer and state legislator, challenged a  
2 statute that required certain films to be labeled “political propaganda.” Id. at 467. The  
3 district court in that case made clear that “[a]ccording to the authoritative agency  
4 interpretation of the Act and the regulations, plaintiff [wa]s free to remove the [‘political  
5 propaganda’] label before exhibiting the films.” Keene v. Smith, 569 F. Supp. 1513, 1516  
6 (E.D. Cal. 1983); see also id. at 1519 (“[P]laintiff has no obligation with respect to the  
7 label, and . . . is free to remove the label if he chooses.”). Hence, as in the instant case, the  
8 Meese statute did not directly regulate the plaintiff or require him to do, or refrain from  
9 doing, anything at all. The Meese plaintiff, however, was injured indirectly. He wanted to  
10 show three labeled films, but because he did “not want the Department of Justice and the  
11 public to regard him as the disseminator of foreign political propaganda,” he abstained  
12 from screening the films. Meese, 481 U.S. at 467-68. He sued to enjoin the application of  
13 the statute to these films.

14 That the statute did not regulate him directly was no barrier to standing. The Court  
15 found he had established a cognizable harm by alleging “the need to take . . . affirmative  
16 steps to avoid the risk of harm to his reputation.” Id. at 475. This reaction was reasonable  
17 and was causally linked to the statute, because the plaintiff averred, with support from  
18 expert affidavits, that if he showed the films “his personal, political, and professional  
19 reputation would suffer and his ability to obtain re-election and to practice his profession  
20 would be impaired.” Id. at 473. The Court approved the district court’s conclusion that

1 “the Act puts the plaintiff to the Hobson’s choice of foregoing the use of the three  
2 Canadian films for the exposition of his own views or suffering an injury to his  
3 reputation.” Id. at 475 (internal quotation marks omitted). Either way, the statute affected  
4 him in such a way as to give him standing to challenge it.

5 More recently, in Friends of the Earth v. Laidlaw, the Supreme Court recognized  
6 plaintiffs’ standing to challenge a corporation’s alleged Clean Water Act violation. The  
7 plaintiffs did not claim that the defendant took direct actions against them. Instead, they  
8 showed that because they feared exposure to the defendant’s pollution they had ceased to  
9 engage in certain recreational activities in the area, such as swimming, camping, and  
10 birdwatching. Friends of the Earth, 528 U.S. at 181-82. The Court found that the  
11 plaintiffs’ decision to curtail those activities was “enough for injury in fact,” and found  
12 that the plaintiffs’ reactions were reasonable responses to the threat of exposure to  
13 pollution. Id. at 183-85.<sup>25</sup>

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<sup>25</sup> For other examples of cases finding standing in plaintiffs who were not directly regulated by the statutes they challenged and who asserted indirect injuries, see Massachusetts v. EPA, 549 U.S. at 521-26 (granting State of Massachusetts standing to challenge EPA’s refusal to regulate greenhouse gas emissions because those emissions contribute to global warming, which contributes to a rise in sea level, which causes more frequent and severe flooding, which damages coastal infrastructure); Duke Power, 438 U.S. at 73-78 (granting organizations and individuals standing to challenge statute that capped liability for nuclear reactor accidents, because statute created incentives for defendant to build and operate nearby nuclear reactor that would release small quantities of radiation that would potentially have aesthetic, environmental, and health affects); SCRAP, 412 U.S. at 678, 683-90 (granting environmental group standing to challenge increase in railroad rate because it would decrease use of recycled products, which would adversely affect environment near plaintiffs and would impair plaintiffs’ use of nearby



1           These cases establish that a plaintiff has standing to challenge a statute that does not  
2 regulate him if he can show that the statute reasonably caused him to alter or cease certain  
3 conduct. In the instant case, the key to determining whether the plaintiffs have standing  
4 based on the indirect injuries they suffer is determining whether someone who wants to  
5 protect the privacy of his communications would reasonably take the measures these  
6 plaintiffs took not to be overheard.

7           B. Application

8           First, it is reasonable for the plaintiffs to take measures to avoid being overheard.  
9 The plaintiffs have established that, because of their legitimate needs to communicate with  
10 persons who will likely be subject to government surveillance under the FAA, they are  
11 likely to be monitored. Moreover, the various groups of plaintiffs – attorneys, journalists,  
12 and human rights, labor, legal, and media organizations – have established that they have  
13 legitimate interests in not being monitored. Since the plaintiffs allege that the FAA is  
14 unconstitutional, if the plaintiffs’ legal theory is correct, any search authorized by the FAA  
15 would be an illegal search that the plaintiffs would reasonably try to avoid.<sup>26</sup>

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forests, streams, mountains); Baur, 352 F.3d at 632-36 (granting individual standing to challenge FDA regulations of meat producers and processors based on alleged increased risk of contracting a food-borne illness).

<sup>26</sup> We emphasize again that we express no view with respect to the ultimate correctness of the plaintiffs’ argument that the FAA violates the Constitution. The only issue here is whether the plaintiffs have standing to present their argument to a court. That question requires us to ask whether the statute, if it is unconstitutional, would inflict any injury on the plaintiffs.

1           Moreover, each of the plaintiffs has alleged that the risk of being monitored causes  
2 additional injuries beyond the mere fact of being subjected to a putatively unconstitutional  
3 invasion of privacy. The risk of being monitored by the government threatens the safety  
4 of their sources and clients, impedes their ability to do their jobs, and implicates the  
5 attorneys' ethical obligations. Journalists Klein and Hedges, for example, assert that if  
6 their communications with their sources were overheard, those sources' identities, political  
7 activities, and other sensitive information would be disclosed, which would expose them  
to violence and r.ties, and oto violence 59vtiyo do tnnt threatens theensnon-sstiancal ensitiv12 U.S. 37.

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<sup>27</sup> Both the attorneys and the non-attorneys have reason to fear being monitored under the challenged statute, so both categories of plaintiffs are justified in taking measures to avoid this injury. The attorneys argue that their ethical duty obligates them to incur these expenses. That is true, but it does not entitle the attorneys to special treatment in this standing inquiry. The attorneys' ethical duty is triggered only when the risk of surveillance reaches a certain threshold of likeliness. But when that threshold is met, as it has been here, the non-attorney plaintiffs also have reason to fear being monitored, and they are equally justified in taking measures to avoid what they contend is an illegal search. The fact that an ethical obligation compels the attorneys to take avoidance measures does not mean that their taking those measures, in itself, is any more reasonable than the other plaintiffs taking similar measures for reasons other than ethical concerns.

1           In sum, the FAA has put the plaintiffs in a lose-lose situation: either they can  
2 continue to communicate sensitive information electronically and bear a substantial risk of  
3 being monitored under a statute they allege to be unconstitutional, or they can incur  
4 financial and professional costs to avoid being monitored. Either way, the FAA directly  
5 affects them.<sup>28</sup>

6           The Supreme Court has said that “the gist of the question of standing” is whether  
7 “the appellants alleged such a personal stake in the outcome of the controversy as to assure  
8 that concrete adverseness which sharpens the presentation of issues upon which the court  
9 so largely depends for illumination of difficult constitutional questions.” Baker, 369 U.S.  
10 at 204. The instant plaintiffs are not merely random citizens, indistinguishable from any  
11 other members of the public, who want to test in court the abstract theory that the FAA is  
12 inconsistent with the Constitution; rather, these plaintiffs have shown that, regardless of  
13 which course of action they elect, the FAA affects them. We therefore conclude that they  
14 have a sufficient “personal stake” to challenge the FAA. That does not mean that their  
15 challenge will succeed; it means only that the plaintiffs are entitled to have a federal court  
16 reach the merits of their challenge. We need not “decide whether appellants’ allegations

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<sup>28</sup> See Meese, 481 U.S. at 475 (approving the district court’s analysis that the plaintiffs have met the standing requirement, in part, because the challenged statute “puts the plaintiff to the Hobson’s choice of foregoing the use of the three Canadian films for the exposition of his own views or suffering an injury to his reputation.” (internal quotation marks and citation omitted)).

1 . . . will, ultimately, entitle them to any relief, in order to hold that they have standing to  
2 seek it.” Baker, 369 U.S. at 208.

### 3 **V. Laird v. Tatum**

4 The government’s principal arguments against the above analysis rest on a single  
5 case, Laird v. Tatum, 408 U.S. 1 (1972). Laird is unquestionably relevant to this case, as it  
6 is the only case in which the Supreme Court specifically addressed standing to challenge a  
7 government surveillance program. Because Laird significantly differs from the present  
8 case, however, we disagree with the government’s contention that Laird controls the  
9 instant case, and that Laird created different and stricter standing requirements for  
10 surveillance cases than for other types of cases.

11 In Laird, the plaintiffs challenged a surveillance program that authorized the Army  
12 to collect, analyze, and disseminate information about public activities that had potential to  
13 create civil disorder. The Army collected its data from a number of sources, but most of it  
14 came from “the news media and publications in general circulation” or from “agents who  
15 attended meetings that were open to the public and who wrote field reports describing the  
16 meetings.” Laird, 408 U.S. at 6. The Court noted that the court of appeals had  
17 characterized the information gathered as “nothing more than a good newspaper reporter  
18 would be able to gather by attendance at public meetings and the clipping of articles from  
19 publications available on any newsstand.” Id. at 9 (internal quotation marks omitted).



1 sector,” or the plaintiffs’ “less generalized yet speculative apprehensiveness that the Army  
2 may at some future date misuse the information in some way that would cause direct harm  
3 to respondents.” *Id.* at 13. Moreover, the Court noted that the plaintiffs had cast  
4 “considerable doubt” on whether the surveillance program had actually chilled them, *id.* at  
5 13 n.7, and the plaintiffs did not identify any concrete harm inflicted by the program.

6 The Court therefore considered:

7 whether the jurisdiction of a federal court may be invoked by a  
8 complainant who alleges that the exercise of his First  
9 Amendment rights is being chilled by the mere existence,  
10 *without more*, of a governmental investigative and data-  
11 gathering activity that is alleged to be broader in scope than is  
12 reasonably necessary for the accomplishment of a valid  
13 governmental purpose.

14  
15 408 U.S. at 10 (emphasis supplied).

16 The Court denied plaintiffs standing. It held that the plaintiffs’ complaints about  
17 “the very existence of the Army’s data-gathering system” and their “[a]llegations of a  
18 subjective ‘chill’ are not an adequate substitute for a claim of specific present objective  
19 harm or a threat of specific future harm.” *Id.* at 13-14. The Court noted that although  
20 previous cases have found governmental regulations unconstitutional based on their  
21 “chilling” effect,

22 [i]n none of these cases, however, did the chilling effect arise  
23 merely from the individual’s knowledge that a governmental  
24 agency was engaged in certain activities or from the  
25 individual’s concomitant fear that, armed with the fruits of  
26 those activities, the agency might in the future take some other

1 and additional action detrimental to that individual. Rather, in  
2 each of these cases, the challenged exercise of governmental  
3 power was regulatory, proscriptive, or compulsory in nature,  
4 and the complainant was either presently or prospectively  
5 subject to the regulations, proscriptions, or compulsions that he  
6 was challenging.

7  
8 Id. at 11.

9 The government argues that “[t]his case is directly governed by Laird,” because the  
10 only specific present harms the plaintiffs allege flow from a subjective chill. Laird,  
11 however, differs dramatically from this case.

12 In Laird, the plaintiffs did not clearly allege any injuries whatsoever. They did not  
13 claim that the government surveillance they sought to challenge, which relied principally  
14 on monitoring through publicly available sources activities conducted entirely in public,  
15 harmed them. They did not claim that they, or anyone with whom they regularly  
16 interacted, would be subject to any illegal or unconstitutional intrusion if the program they  
17 challenged was allowed to continue. Rather, they claimed only that they *might* be injured  
18 *if* the information lawfully collected by the military were misused in some unspecified way  
19 at some unspecified point in the future, and they alleged that the surveillance scheme had a  
20 chilling effect, while essentially admitting that they themselves had not been chilled, and  
21 that the program had not altered their behavior in any way.

22 By contrast, the instant plaintiffs clearly have alleged specific and concrete injuries.  
23 Unlike the Laird plaintiffs, they do not challenge a program of information gathering that



1 they concede is lawful, on the theory that the information gathered may be misused in the  
2 future by government agents acting illegally and without authorization; rather, they  
3 challenge a specific statute that expressly authorizes surveillance that they contend is in  
4 itself unconstitutional. They do not vaguely allege that they might be subject to  
5 surveillance under the program; rather, they set forth specific, concrete reasons to believe  
they are likely to be overheard, because their72 Ou.0002 Socialist horimployeoplidentified ; friz chaarg

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<sup>29</sup> See Socialist Workers Party, 419 U.S. at 1319 (Marshall, *Circuit Justice*) (holding that, as distinguishable from Laird, the plaintiffs' allegations were specific enough to satisfy the "threshold jurisdictional question" of standing because "the allegations are much more specific: the applicants have complained that the challenged investigative activity will have the concrete effects of dissuading some [Young Socialist Alliance] delegates from participating actively in the convention and leading to possible loss of employment for those who are identified as being in attendance.").

1 direct or indirect, Laird has little or nothing to say about the critical issue in this case: the  
2 reasonableness of the plaintiffs’ fear of future injury from the FAA, and the causal relation  
3 of the challenged statute to the tangible costs the plaintiffs claim they have incurred.

4 The government next argues, however, that even if Laird does not directly govern  
5 this case, it created special standing rules for surveillance cases that are stricter than those  
6 that apply to other types of cases, and that those special rules preclude standing in this  
7 case. We disagree.

8 First, the government argues that under Laird a plaintiff may challenge a  
9 surveillance statute only if he is “subject to” that statute, meaning that he belongs to a  
10 narrow class of individuals the statute, on its face, identifies as targets. In support of this  
11 claim, the government relies on Laird’s comment that some previous plaintiffs who  
12 obtained standing to challenge a regulation that did not explicitly target them were able to  
13 do so because they were or would soon be “subject to the regulations, proscriptions, or  
14 compulsions” they challenged. Id. at 11. The government thus argues that the instant  
15 plaintiffs cannot obtain standing to challenge the FAA, because the FAA “does not direct  
16 intelligence gathering activities against the plaintiffs. Nor does it authorize plaintiffs to be  
17 targeted.”<sup>30</sup>

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<sup>30</sup> The government points out that certain of our sister circuits have read Laird to have created such a requirement in surveillance cases. See ACLU v. NSA, 493 F.3d at 661 (Batchelder, *J.*, lead opinion) (“[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

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chill.”); Id. at 688 (Gibbons, *J.*, concurring) (noting that “the plaintiffs have failed to

1 of the ‘subjective chill’ that the Supreme Court found insufficient to establish standing in  
2 Laird.”

3 We are not persuaded that Laird created either of these special standing rules for  
4 surveillance cases. Since Laird is the only Supreme Court precedent in which a plaintiff  
5 who had not been surveilled claimed standing to challenge a surveillance scheme, it is  
6 natural to look to it for guidance. However, the government reads far more into Laird than  
7 either its facts or its language permit. In doing so, it loses sight of the general principles of  
8 standing.

9 First, the Laird plaintiffs so obviously lacked standing that the Court did not need to  
10 create stricter standing rules in the surveillance context in order to deny plaintiffs standing.  
11 The Laird plaintiffs identified no injury that they had suffered or would likely suffer. In  
12 the absence of any clear alleged injury, the Court could not find that the plaintiffs had  
13 satisfied the normal standing requirements, and it therefore did not need to invent new  
14 rules to reach that outcome. As we have demonstrated at length above, the facts of Laird  
15 are simply not comparable to those presented in the instant case. That the Laird plaintiffs  
16 were held to lack standing does not imply that the instant plaintiffs similarly have failed to  
17 allege injury. Any statement in Laird of a general rule applicable to all surveillance cases  
18 could only be dictum.

19 Second, Laird in fact contains no such purported special rules for surveillance  
20 cases. Nothing in Laird supports the conclusion that the Court intended to change the

1 standing rules, nor does it explain any need to create standing rules for surveillance cases  
2 distinct from the rules applicable in other contexts. To the contrary, Laird's final sentence  
3 makes clear that the result in that case was dictated by the well-established general  
4 principles of standing:

5 [T]here is nothing in our Nation's history or in this Court's  
6 decided cases, including our holding today, that can properly  
7 be seen as giving any indication that actual or threatened injury  
8 by reason of unlawful activities of the military would go  
9 unnoticed or unremedied.

10  
11 Laird, 408 U.S. at 16. The language quoted by the government – that some previous  
12 plaintiffs who obtained standing to challenge a regulation were or would soon be “subject  
13 to the regulations, proscriptions, or compulsions” they challenged, id. at 11 – does not  
14 purport to establish a fixed requirement for standing in the surveillance context or in any  
15 other; it merely contrasts the situation of the Laird plaintiffs with those of other plaintiffs  
16 who were found to have standing.

17 Third, while the government relies heavily on ACLU v. NSA and United  
Presbyterian to support its interpretation of Laird

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<sup>32</sup> In ACLU v. NSA, the plaintiffs challenged a narrow surveillance program that monitored particular individuals the government suspected were associated with al Qaeda. 493 F.2d at 647 (Batchelder, *J.*, lead opinion). The FAA, by contrast, authorizes a considerably broader surveillance program. This fact increases the likelihood that the instant plaintiffs will be harmed in the future, which is a key consideration in determining whether the plaintiffs should have standing to challenge the underlying statute. In United Presbyterian, the plaintiffs challenged an executive order that, inter alia, established



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<sup>33</sup> We are not alone in so reading Laird. See Socialist Workers Party, 419 U.S. at 1318 (Marshall, *Circuit Justice*) (“The Government has contended that under Laird, a chilling effect will not give rise to a justiciable controversy unless the challenged exercise of governmental power is regulatory, proscriptive, or compulsory in nature, and the complainant is either presently or prospectively subject to the regulations, proscriptions, or compulsions that he is challenging. In my view, the Government reads Laird too broadly. In the passage relied upon by the Government, the Court was merely distinguishing earlier cases, not setting out a rule for determining whether an action is justiciable or not.” (internal quotation marks and citations omitted)); see also Meese, 481 U.S. at 472-74 (Laird’s prohibition of standing based on “subjective chill” does not preclude standing for plaintiff who alleged that his showing of films was chilled by a statute that required certain films to be labeled “political propaganda.”); Presbyterian Church (U.S.A.) v. United States