No. 11-1025

In The
Supreme Court of the United States

JAMES R. CLAPPER, JR., DIRECTOR OF NATIONAL INTELLIGENCE, ET AL.,
Petitioners,

v.

AMNESTY INTERNATIONAL USA, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF AMICUS CURIAE OF CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF RESPONDENTS

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INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents—including lawyers, journalists, and human rights researchers—filed a lawsuit seeking to strike down as unconstitutional the Foreign Intelligence Surveillance Act Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 ("FAA" or "Act"), a statute that they assert invested the government with sweeping new authority to collect Americans' international communications from telecommunications facilities inside the United States. Respondents argue that "[t]he Act permits the government to collect these communications *en masse*—without having to demonstrate or even assert to any court that any party to any of the communications is a terrorist, an agent of a foreign power, or a suspected criminal." Br. for Resp. at 1. The U.S. Court of

IIIÕs judicial power as a vital check on unlawful actions of the legislature, which is precisely what Respondents claim in this case. Fearing legislative overreach, the ConstitutionÕs Framers considered a variety of safeguards, from a judicial veto on proposed legislation to the enduring, robust judicial review ultimately written into Article III. The records of the Constitutional Convention demonstrate that the Framers were deeply concœrned that the national legislature would enact laws contravening the Constitution and individual liberty . The Framers unanimously agreed that the authority of the judiciary to intervene was needed to ensure the constitutionality of national laws.

While the government suggests that the separation-of-powers concerns reflected in standing doctrine support blocking access to the courts in this case, GovÕt Br. at 23, 35, history shows that allowing the judiciary to check legislative infringements on individual rights is essential to our constitutional system. Indeed, it was the assurance of robust judicial review of legislative action that encouraged the supporters of the Bill of Rights. Concerned that an enumeration of fundamental rights could end up as merely a parchment barrier to tyranny, the supporters of the Bill of Rights counted on the availability of meaningful judicial review to protect the rights and liberties set forth in th6.84 inch6.84 nd

judiciary to resolve, and Court precedent implements this concern by ensuring that only individuals with a redressable Ò

ARGUMENT

I. The Text and History of Article III of the Constitution Support Standing In This Case.

Article III empowers the judiciary to determine the constitutionality of laws enacted by the federal legislature. Its words provide in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their AuthorityÉ.

U.S. CONST., art. III, ¤ 2. Article III goes on to list certain categories of ÒControversiesÓ over which the federal judicial power shall extend. Id.

In the 18th Century, the word ÒcasesÓ was understood to encompass both civil and criminal matters, while ÒcontroversiesÓ referred only to civil disputes. Cass R. Sunstein, WhatÕs Standing After Lujan? Of Citizen Suits, ÒInjuries,Ó and Article III, 91 MICH. L. REV. 163, 168 (1992) (citing Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 431-32 (1793)). Perhaps most important, the word ÒallÓ in Article III Òmeant just what it said: Federal courts had to be the last word in ÔallÕ toptier cases,Ó including claims derived from the Constitution and federal statutes. AKHIL REED AMAR, AMERICAÕS CONSTITUTION: A BIOGRAPHY 228 (2005). It was crucial to the Framers of the Constitution that the federal courts serve as Òthe last wordÓ in cases

arising under the Constitution, as RespondentsÕ claims here do.

A. The Framers Considered Judicial Review Essential To Protecting Liberty and Preventing Abuse of Government Power.

The Framers crafted Article IIIÕs judicial power as a vital check on alleged ly unlawful actions of the legislature. The records of the Constitutional Convention demonstrate that the Framers were deeply concerned that the national legislature would enact laws contravening the Consti tution or infringing on individual liberty . They unanimously agreed that the authority of the judiciary to intervene was needed to ensure the constitutionality of national laws. After debating different possible judicial mechanisms, the Framers chose judicial review as the exclusive method for the judiciary to protect the rights of the people.

On May 29, 1787, Governor Edmund Randolph of Virginia put forth an opening proposal for the form of the national government. His plan included judicial tribunals , consisting of one or more supreme tribunals as well as inferior tribunals, that would answer Òquestions which may involve the national peace and harmony.Ó 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22 (Max Farrand ed. 1911). In addition, Randolph p roposed a Òcouncil of revision,Ó consisting of Òthe Executive and a convenient n umber of the National Judiciary . . . with authority to examine every act of the National Legislature before it shall operate.Ó Id . at

21. RandolphÕs suggestion for a council of revision would have established a judicial veto power over federal legislation .

On June 4, 1787, the proposal for a council of revision came up for a vote, but the Framers chose to postpone its consideration. Id . at 94. Elbridge Gerry of Massachusetts o ffered an alternative proposition that only the executive would have veto power over national laws, subject to an override by two-thirds of each branch of the national legislature. Id .

James Madison, a supporter of the council of revision, emphasized the importance of the judicial branch operating as a check on the power of the national legislature. Judicial intervention was needed to provide Òfor the safety of a minority in Danger of oppression from an unjust and interested majority.Ó 1 RECORDS OF THE F

the scope of the federal judicial power. The founding generation carefully selected the words of Article III to ensure that the judicial branch would have the authority to resolve disputes involving the constitutionality of federal statutes.

Madison observed on July 18, 1787, that Ò[s]everal criticisms ha[d] been made on the definitionÓ of the jurisdiction of the national judiciary. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 46 (Max Farrand ed. 1911). In response to these criticisms, Madison recommended making explicit in the constitutional text Òtha t the jurisdiction shall extend to all cases arising under the Natl. laws.Ó Id. The Framers voted unanimously to adopt MadisonÕs proposed language. Then, on August 27, William Samuel Johnson of Connecticut urged that the text of Article III reference Òth is Constitution,Ó immediately before the word Òlaws.Ó Id. at 430. His proposal was enacted without opposition.

After JohnsonÕs suggestion to reference the Constitution directly in Article IIIÕs text, Madison Òdoubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a judiciary nature.Ó Id. No specific text was proposed to address this concern, but the Framers Ògenerally supposed that the jurisdiction given was constructively l imited to cases of a Judiciary N ature.Ó Id. MadisonÕs understanding of federal jurisdiction has been identified as consonant with this CourtÕs standing jurisprudence. ÒThe CourtÕs recognition that injury

in fact is a requirement of Article III ensures that the courts

interpretat ion Òis not to be collected from any particular provisions in the Constitution.Ó Id. To the contrary, the text of the Constitution provides that it is the Òproper and peculiar province of the courtsÓ to uphold the Const itution as Òfundamental law.ÓId.

Hamilton emphasized the special role judges have in enforcing Òspecific exceptions to the legislative authority.Ó In HamiltonÕs words:

> The complete independence of the courts of justice is peculiarly essential in a limit ed Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for

in checking acts by the national legislature that infringe the rights of the people .

C. The Framers of the Bill of Rights Relied Upon the Availability of Article III Judic ial Review.

The special role of the judiciary in reviewing congressional legislation that infringed the rights of the people was also essential to the passage of the Bill of Rights.

When Madison wrote to Thomas Jefferson on October 17, 1788, listing re asons both in fav or of and against a Bill of Rights, h e worried that Ò[t]he restrictions however strongly marked on paper will never be regarded when opposed to the decided sense of the public, and after repeated violations in extraordinary cases they will lose even their ordinary efficacy.Ó 11 THE P

means of enforcing these guarantees. His letter and its reasoning regarding the role of the courts Òhad a profound influence on Madison.Ó LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 33 (1999).

When Madison proposed the Bill of Rights in Congress on June 8, 1789, he eloquently espoused the position suggested by Jefferson: that adoption of a Bill of Rights would enable the judiciary to protect the people from legislative tyranny. He also echoed HamiltonÕs argument in the Federalist Papers about the unique role of courts in enforcing Òspecified exceptions to the legislative authority.Ó He stated:

> If the [Bill of Rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.

Annals of Congress, 1st Cong., 1st Sess. 457 (1789). Madison steered the Bill of Rights to passage in order Òto foster a consensus among Americans about the fundamental rights that defined their society and to institutionalize the judiciary as the guardian of those rights.Ó Jones, 27 JOURNAL OF LAW AND POLITICS at 550.

The Framers expected the judicial branch to vigorously uphold the rights reserved to the people

in the Bill of Rights. Judicial review was the key to transforming rights from mere marks on paper to an effective shield guarding the people from a tyrannical government.

D. Court

> Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful d uty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to i nquire the decree of its necessi ty, would be to pass the line which circumscribes the judicial department , and to tread on legislative ground.

Review of the constitutionality of federal laws by this Court increased following the Civil W ar. See Otis H. Stephens, Jr., Marbury v. Madison: 200 Years of Jr2 (d) ( ) -248.2 (r) 0.l73 (of 0.2 (ev) -0r) 0.2 vi2 (a) -02 (s) 0.73 (of) i2 (s) 0.

Flores, 495 U.S. 385, 391 (1990) (emphasizing that Òthis Court has the duty to review the constitutionality of congressional enactmentsÓ). Just last Term, this Court cited Marbury as authority for the well-established principle that Òwhen an Act of Congress is alleged to conflict with the Constitution, Ô[i]t is emphatically the province and duty of the judicial department to say what the law is.ÕÓ Zivotofsky ex rel. Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427-28 (2012) (quoting Marbury, 5 U.S. at 177).

Just as in these earlier cases, RespondentsÕ challenge to the constitutionality of the FAA is Òof a Judiciary nature.Ó Roberts, 42 DUKE L.J. at 1232. This Court observed in the Founding Era that resolving conflicts between federal statutes and the Constitution Òis of the very essence of judicial duty.Ó Marbury, 5 U.S. (1 Cranch) at 178. Chief Justice John Marshall explained: ÒCertainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.Ó Id. at 177. As shown above, the Founding generation in America did indeed expect that unconstitutional laws would be invalidated by the federal courts. Judicial review of the FAA comports with the text and history of Article III.

II.

amend. I. The government fundamentally misunderstands the First AmendmentÕs text and history as well as this CourtÕs precedents when it insists that Respondents show that they will certainly be surveilled under the law in order to challenge it. As Justice Alito recently explained, it is blackletter standing doctrine that Òthe injury required for standing need not be actualized. A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct.Ó Davis v. FEC, 554 U.S. 724, 734 (2008). As the CourtÕs standing cases repeatedly have recognized, First Amendment rights are vulnerable, largely due to potential chilling effects, and thus the mere existence of an infringing law can cause harm. Because Òeven minor punishments can chill protected speech,Ó this Court Òpermit[s] facial challenges to statutes that burden expression.Ó Ashcroft v. Free Speech Coal., 535 U.S. 234, 244 (2002). In the instant case, for example, attorneys credibly fear professional sanctions for unethical behavior if they engage in communications with their clients that are predictably likely to be subjected to warrantless surveillance by the federal government. E.g., Br. of Resp. at 32-36. The governmentÕs accusations that RespondentsÕ alleged harms are purely speculative are therefore particularly misplaced with respect to judicial review under the First Amendment.

Finally, the injury demonstrated by Respondents is plainly redressable. As this Court has explained: ÒAn unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in

legal contemplation , as inoperative as though it had never been passed.Ó Norton v. Shelby County ,

CONCLUSION

The decision of the U.S. Court of Appeals for the Second Circuit should be affirmed .