No. 11-1025

In The

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER AUTHORITIES

INTEREST OF AMIC US CURIAE [1]

Amicus National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL i s the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL files numerous amicus briefs each year in this Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. Because the surveillance challenged in this action poses a direct, concrete threat to the confidentiality that is critical to an

[1] Under Sup. Ct. R. 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court under Rule 37.3(a).

effective defense in criminal cases, NACDL has decided to present its views for the Court's consideration.

SUMMARY OF ARGUMENT

Confidentiality is essential to the work of criminal defense lawyers. Under the standards of professional responsibility that guide the work of defense counsel, including both the relevant rules of professional conduct and the American Bar Association Standards for Criminal Justice, counsel must preserve the confidentiality of information relating to the representation of a client.

In light of this duty of confidentiality, petitioners are wrong to contend that respondents McKay and Royce--both criminal defense lawyers --have alleged merely "speculative" and "self-inflicted" injuries from potential surveillance under the FISA Amendments Act, 50 U.S.C. § 1881a ("FAA"). That surveillance may target regions, persons, and subjects heavily implicated by the matters in which McKay and Royce serve as criminal defense counsel. As the court of appeals recognized, they have good reason to believe that their communications in particular will be intercepted in the course of surveillance under the FAA. Pet. App. 37a-38a. They thus must choose between foregoing international communications about sensitive matters or incurring the expense and burden of traveling overseas for in-person communication. The substantial, specific burdens that the FAA

outcome of the controversy and guarantee the "concrete adverseness" necessary for standing. Massachusetts v. EPA, 549 U.S. 497, 517 (2007) (quotation omitted). Their challenge to the constitutionality of the FAA should be permitted to proceed to decision on the merits.

ARGUMENT

1. Keeping a client's information confidential is among a lawyer's most fundamental duties. The principle of confidentiality manifests itself in the attorney-client privilege, "one of the oldest recognized privileges for confidential communications." Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998). It finds expression in the work-product doctrine, recognized by this Court sixty-five years ago in Hickman v. Taylor, 329 U.S. 495 (1947). And the American Bar Association Model Rules of Professional Conduct, on which lawyers' ethics codes in most states are based,

unnecessary intrusion by opposing parties and their counsel. Proper preparation of a cl( )

establish a relationship of trust and confidence with the accused," and it adds: "Defense counsel should explain the necessity of full disclosure of all facts known to the client for an effective defense, and defense counsel should explain the extent to which counsel's obligation of confidentiality makes privileged the accused's disclosures." American Bar Association, Standards for Criminal Justice, Defense Function, Standard 4 -3.1(a) (3d ed. 1993) ("ABA Standards") . The Commentary explains that "[n]oth - ing is more fundamental to the lawyer -client relationship than the establishment of trust and confidence. Without it, the client may withhold essential information from the lawyer. Thus, important evidence may not be obtained, valu able defenses neglected, and, perhaps most significant, defense counsel may not be forewarned of evidence that may be presented by the prosecution." ABA Standard 4 -3.1, Commentary.

The Standards address a circumstance analogous to the surveillance at iss ue here. Standard 4

. a ed. 4.

client relationship, may compel time-consuming and expensive travel by the lawyer to assure confidentiality, or even prevent legitimate grievances from being brought to light." Id., Commentary (emphasis added).

The ABA Standards confirm, in the criminal defense context, that Professor Gillers' opinion is correct; lawyers have a duty to "safeguard confidential information." Pet. App. 380a. Professor Gillers is correct as well, with respect to criminal defense lawyers, that "[i]f an attorney has reason to believe that sensitive and confidential information related to the representation of a client and transmitted by telephone, fax, or e-mail is reasonably likely to be intercepted by others, he or she may not use that means of communication in exchanging or collecting the information. He or she must find a safer mode of communication, if one is available, which may require communication in person." Pet. App. 381a. The Standards contemplate a similar course; if attorney-client mail is intercepted by government officials, defense counsel may be compelled to undertake "time-consuming and expensive travel . . . to assure confidentiality." ABA Standard 4-3.1, Commentary; see Pet App. 371a-372a (Declaration of Scott McKay) (given likelihood of surveillance, "[w]henever possible, I . . . collect information in person rather than by telephone or email. . . . Collecting information in person sometimes requires travel that is both time-consuming and expensive.").

4. In light of the obligations imposed under the relevant professional responsibility rules, plaintiffs McKay and Royce--both criminal defense lawyers--allege concrete, specific injuries from potential surveillance under the FAA

approval, to intercept any electronic communi cation to or from any person associated with any bank, brokerage, or other financial institution in Manhatt an. The statute require s no individualized probable cause showing. Although the statute requires minimization, it (like the FAA) permits the government to retain evidence of crimes that have been committed. As with the FAA, the government administers th e surveillance program entirely in secret.

Now suppose that a District of Columbia criminal de 439-4(afl Tg)-2(e,)-e rpresntie a Manhatin

ade

imposes on McKay and Royce--except that for them in person communication requires international travel, rather than a day trip up the eastern seaboard and back. The criminal defense attorney in this hypothetical example suffers "concrete and particularized" injury from the statute, even though it does not target her directly, and she plainly has standing to challenge its constitution ality . Lujan v. Defenders of Wild life , 504 U.S. 555, 560-61 (1992). McKay and Royce even more clearly have standing

CONCLUSION

For these reasons, the Court should find that respondents have Article III standing and affirm the court of appeals' judgment.

Respectfully submitted,

JOHN D. CLINE
Counsel of Record
LAW OFFICE OF
JOHN D. CLINE
235 Montgomery St.
Suite 1070
San Francisco, CA 94104
(415) 322-8319

JOSHUA L. DRATEL
CO-CHAIR, AMICUS