UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMNESTY INTERNATIONAL USA; GLOBAL FUND FOR WOMEN; GLOBAL RIGHTS; HUMAN RIGHTS WATCH; INTERNATIONAL CRIMINAL DEFENCE ATTORNEYS ASSOCIATION; THE NATION MAGAZINE; PEN AMERICAN CENTER; SERVICE EMPLOYEES INTERNATIONAL UNION; WASHINGTON OFFICE ON LATIN AMERICA; DANIEL N. ARSHACK; DAVID NEVIN; SCOTT MCKAY; and SYLVIA ROYCE, Plaintiffs, v. JOHN M. MCCONNELL, in his official capacity as Director of National Intelligence; LT. GEN. KEITH B. ALEXANDER, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service; and MICHAEL B. MUKASEY, in his official capacity as Attorney General of the United States, Defendants.	Case No. 08-cv-6259 (JGK) ECF CASE

BRIEF AMICUS CURIAE OF THE NEW YORK CITY BAR ASSOCIATION IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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I. STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Founded in 1870, the New York City Bar Association (the "Association"), is a professional organization of more than 22,000 attorneys. Through its many standing committees, such as its Committee on Civil Rights, the Association educates the Bar and the public about legal issues relating to civil rights, including the right of access to the courts, the right to counsel and the right to remain free from unreasonable searches and seizures. The Association also seeks to promote effective assistance of counsel for everyone, including those suspected or accused of criminal wrongdoing, and is especially concerned with protecting the confidentiality of attorney-client communications as essential to such representation.

Over the past several years, the Association has attempted to demonstrate by various means—including through the filings of amicus curiae briefs—that individual liberties need not be subverted by governmental power during times of war and that national security can be achieved without prejudice to the constitutional rights that are at the heart of our democracy.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

The Association joins Plaintiffs' challenge to the constitutionality of recent amendments to the Foreign Intelligence Surveillance Act ("FISA"), which the President signed into law as the FISA Amendments Act of 2008, Pub. L. No. 110-261 (2008) (the "FAA" or the "Act"), and which, as Plaintiffs persuasively argue, allows for the dragnet acquisition of Americans' communications without adequate constitutional safeguards.

The Association submits this brief to highlight the chilling impact that the FAA is likely to have on the relationship between lawyers and overseas clients, and on the ability of lawyers to communicate with witnesses, experts and others abroad who are likely to become

[1] The parties have consented to this filing.

targets under the sweeping reach of the FAA. As set forth below, the FAA's express authorization of the government to acquire the constitutionally protected communications of Americans—without individualized warrants, without meaningful judicial oversight and without meaningful limitations on the dissemination of acquired information—chills a broad spectrum of constitutionally protected speech, including communications between attorneys and their clients. The FAA therefore undermines the right and need for effective assistance of counsel that is fundamental to the rule of law. Because FISA, prior to its recent amendment, provided a reasonable and comprehensive framework for the Executive Branch to protect the Nation's security, the Association is concerned that fundamental rights, including the right to counsel, are being impermissibly and unnecessarily undermined.

III. RELEVANT BACKGROUND

A. The President's Warrantless Surveillance Program

In the wake of a December 2005 New York Times article, President Bush informed the Nation that, since 2001, he had authorized the National Security Agency ("NSA") to engage in a program of warrantless electronic surveillance of American citizens (the "Program"). See J. Risen & E. Lichtblau, Bush Lets U.S. Spy on Callers Without Courts, N.Y. Times, Dec. 16, 2005, at A1. The President reauthorized the Program repeatedly between 2001 and 2007.

According to public statements made by senior government officials, the Program involved the interception of emails and telephone calls that originated or terminated inside the United States. The interceptions were not predicated on judicial warrants or any other form of judicial authorization; nor were they predicated on any determination of criminal or foreign-intelligence probable cause. Instead, then-Attorney General Alberto Gonzales explained that the NSA would wiretap conversations once it had "a reasonable basis to conclude that one party to

the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda". Press Briefing by Attorney General Alberto Gonzales & General Michael Hayden, Principal Deputy Director for National Intelligence, Dec. 19, 2005 ("Gonzales Press Briefing"), available at http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html. The Attorney General testified before Congress that, "like the police officer on the beat", NSA personnel unilaterally decide "what is reasonable" before proceeding with the wiretaps. Hearings Before the Sen. Comm. on the Judiciary (Feb. 7, 2006), transcript available at http://www.washingtonpost.com/wp-dyn/content/article/2006/02/06/AR2006020600931.html.

Later revelations by the Department of Justice left no doubt that the NSA's warrantless wiretaps reached communications between lawyers and their clients. Indeed, the Justice Department affirmatively stated that "[a]lthough the Program does not specifically target the communications of attorneys . . . calls involving such persons would not be categorically excluded from interception if they met [the Program's] criteria". Dep't of Justice Responses to Joint Questions from House Judiciary Comm. Minority Members ¶ 45, available at http://rawprint.com/pdfs/HJCrawstory2.pdf ("DOJ Responses"); see also Privileged Conversations Said Not Excluded From Spying, N.Y.Times, Mar. 25, 2006, at A10.

In January 2007, the Foreign Intelligence Surveillance Court ("FISC"), which is empowered under FISA to grant or deny surveillance orders in foreign intelligence investigations, reportedly issued a classified order narrowing the ability of the Executive Branch to conduct foreign surveillance outside the confines of FISA. The Executive Branch then appealed to Congress for an amendment to FISA.

B. The Protect America Act

In the final hours of the 2007 summer congressional session, Congress responded by passing the Protect America Act, a stop-gap legislative measure with a "sunset" of February 2008. The Act expanded the Executive's surveillance authority and provided legislative sanction for surveillance that the President had previously been conducting under the Program. Among other measures, the law required telecommunications companies to make their facilities available for government wiretaps, and granted them immunity from lawsuits for complying. The law also allowed executive-branch agencies to conduct oversight-free surveillance of all international calls and emails, including those with Americans on the line, with the sole requirement that the intelligence-gathering be "directed at a person reasonably believed to be located outside the United States". See Pub. L. No. 110-55 (2007).

C. The FISA Amendments Act of 2008

Shortly after the expiration of the Protect America Act, President Bush signed the FISA Amendments Act (the "FAA") into law on July 10, 2008. Like the Protect America Act, the FAA allows for the mass acquisition by the Executive Branch of Americans' international telephone and email communications without particularized warrants or meaningful judicial oversight. Although there is no need to provide here a detailed description of the Act's provisions (see Pls.' Compl. ¶¶ 34-43), we list below several of the provisions most relevant to the interests of the Association:

- The Attorney General may obtain a mass acquisition order from the FISC without even identifying its surveillance targets, much less demonstrating that such targets are foreign agents, engaged in criminal activity, or at all connected to terrorism.

- The Act permits the acquisition of purely domestic communications as long as there is uncertainty about the location of one party to the communications.

- The Act does not prescribe any specific minimization procedures, does not give the FISC any authority to oversee the implementation of minimization procedures and specifically allows the government to retain and disseminate information—including information relating to U.S. citizens—if the government concludes that it is "foreign intelligence information".

IV. THE FAA IMPEDES ATTORNEY-CLIENT COMMUNICATIONS.

The FAA threatens to undermine a fundamental principle of a just legal system: that persons suspected by the government of wrongdoing have access to legal advice conducted in confidence, uninhibited by fears that government agents are listening in. For lawyers who advise overseas clients, or who rely on witnesses or other sources of information located abroad, the Act undermines this core legal principle, chilling speech protected by the First Amendment, impeding the ability of lawyers to provide adequate assistance to clients, and impairing the constitutional right to the effective assistance of counsel.

A. Preserving the Confidentiality of Lawyer-Client Communications is Essential to the Effective Assistance of Counsel.

The principle that lawyer-client communications are entitled to confidentiality is deeply rooted in our legal system. The courts of this country long have recognized that disclosures made by clients to their attorneys to facilitate the rendering of legal advice are protected with a "seal of secrecy". See, e.g., Hunt v. Blackburn, 128 U.S. 464, 470 (1888) ("The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."). Thus, "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law". Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (citations omitted).

The purpose of such confidentiality "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice". Upjohn, 449 U.S. at 389; see also Fisher v. United States, 425 U.S. 391, 403 (1976) ("[I]f the client knows that damaging information could . . . be obtained from the attorney following disclosure . . . the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."). As the Supreme Court has noted, the attorney-client privilege shields communications between lawyers and clients relating to legal advice in recognition of the basic principle "that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client". Upjohn, 449 U.S. at 389.

These principles are consistent with the widespread international recognition of the right to confidential communication between attorney and client. The right is protected, for example, under the International Covenant on Civil and Political Rights (the "Covenant"), a major treaty ratified by the United States designed to guarantee "those civil and political rights with which the United States and the western liberal democratic tradition have always been associated". Letter from Warren Christopher, Dep't of State, to the President (Dec. 17, 1977), available at 1966 U.S.T. LEXIS 521, at *22. Article 14(3) of the Covenant protects a criminal defendant's right to counsel and, as explained by the comments to that provision, "requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications". Human Rights Committee, General Comment 13, Article 14, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 21st Sess., at 14, U.N. Doc. HRI/GEN/Rev.1 f 9 (1994), available at http://www1.umn.edu/humanrts/gencomm/hrcom13.htm.

The importance of preserving the confidential nature of communications between lawyers and their clients has also been recognized by foreign legislatures. For instance, Britain's Covert Surveillance Code of Practice, pursuant to Section 71 of the Regulation of Investigatory Powers Act of 2000, provides in relevant part that "privilege is not lost if a professional legal adviser is properly advising a person who is suspected of having committed a criminal offence". Id. § 3.4. In addition, wiretaps that "may lead to such information [i.e., privileged information] being acquired [are] subject to additional safeguards under [the] code", id. § 3.5, for instance that the "application for surveillance which is likely to result in the acquisition of legally privileged information . . . only be made in exceptional and compelling circumstances", id. § 3.6. Similarly, German criminal procedure generally prohibits the surveillance and recording of confidential communications between lawyers and their clients. As soon as it becomes apparent that the surveillance is targeting such communications, the surveillance and recording have to be terminated, all recordings of such communications have to be destroyed without undue delay and the information obtained from such surveillance may not be used for prosecutorial purposes or admitted as evidence. See German Criminal Procedural Code (Strafprozessordnung) § 100c(V)-(VI).

Foreign courts examining the importance of preserving the confidential nature of communications between lawyers and their clients have also concluded that such confidentiality should be preserved. In S. v. Switzerland, (1991) 14 EHRR 670, the European Court of Human Rights held that "an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society . . . " Id. ¶ 48. Similarly, in Niemetz v. Germany, (1992) 16 EHRR 97, the European Court of Human Rights held that the search of a lawyer's office, including his client files, violated the lawyer's right to

privacy, emphasizing that "where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by" the European Convention for the Protection of Human Rights and Fundamental Freedoms. Id. at ¶ 37. Similarly, the German Federal Constitutional Court has emphasized recently that confidential communications between a criminal defendant and his counsel enjoy absolute protection under the German Constitution. Bundesverfassungsgericht [BVerfG] March 3, 2004, 1 BvR 2378/98 and 1 BvR 1084/99.

B. The Monitoring and Wiretapping of Communications Between Lawyers and Their Clients Chills Communications Protected by the First Amendment.

The wiretapping of communications between lawyers and clients allowed under the FAA—without individualized warrants or minimization procedures—will chill constitutionally protected speech in violation of the First Amendment. Before FISA was enacted, in United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297 (1972) ("Keith"), the Supreme Court noted the degree to which warrantless surveillance is inconsistent with the guarantees of the First Amendment:

> History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. . . . The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect "domestic security." Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.

Id. at 314.

Keith also underscored the inherent danger of permitting the acts of the Executive to go unchecked by judicial oversight:

> The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks.

> The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech. . . . [T]he Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised.

Id. at 317.[2]

FISA was enacted in 1978 after Senator Frank Church's congressional committee uncovered widespread warrantless surveillance of U.S. citizens. The legislative history of FISA demonstrates that Congress shared the Keith Court's view that warrantless searches by an unchecked Executive raised the specter of abuse[3]—especially given the documented history of abuse in this area[4]—and chilled protected speech:

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[2] See also Scott v. United States, 436 U.S. 128, 137 (1978) ("The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.") (quoting Terry v. Ohio, 392 U.S. 1, 21-22 (1968)).

[3] Indeed, the disclosures of the FBI's misuse of National Security Letters provide another dramatic example that executive officers cannot be trusted to safeguard privacy and protected speech in the exercise of their law enforcement duties. National Security Letters allow the FBI to demand customer records from credit bureaus, banks, phone companies, Internet service providers, and other organizations without judicial oversight simply upon a finding by the FBI that the information sought is "relevant to an authorized investigation" of international terrorism or foreign intelligence. Not surprisingly—and just as the Court in Keith anticipated—the Letters have been grossly misused. See U.S. Dep't Justice Office of the Inspector General, A Review of the Federal Bureau of Investigation's Use of National Security Letters, March 2007, available at http://www.usdoj.gov/oig/special/s0703b/final.pdf.

4 Following its investigation of past practices of the Executive Branch, Congress was informed that the "vague and elastic standards for wiretapping and bugging" the Executive Branch had been applying resulted in "electronic surveillances which, by any objective measure, were improper and seriously infringed the Fourth Amendment rights of both the targets and those with whom the targets communicated". Legislative History at 8. For instance, Congress was informed that past subjects of surveillance "ha[d] included a United States Congressman, congressional staff member, journalists and newsmen, and numerous individuals and groups who engaged in no criminal activity and who posed no genuine threat to the national security, such as two White House domestic affairs advisers and an anti-Vietnam war protest group". Id. Furthermore, claims of national security had sometimes been used to justify warrantless wiretapping of members of the Democratic Party, ostensibly because the Executive Branch had boundlessly defined the term "dissident group". United States v. Falvey, 540 F. Supp. 1306, 1309 (E.D.N.Y. 1982).

> Also formidable—although incalculable—is the "chilling effect" which warrantless electronic surveillance may have on the Constitutional rights of those who were not targets of the surveillance, but who perceived themselves, whether reasonably or unreasonably, as potential targets. Our Bill of Rights is concerned not only with direct infringements on Constitutional rights, but also with government activities which effectively inhibit the exercise of these rights. The exercise of political freedom depends in large measure on citizens' understanding that they will be able to be publicly active and dissent from official policy, within lawful limits, without having to sacrifice the expectation of privacy that they rightfully hold. Arbitrary or uncontrolled use of warrantless electronic surveillance can violate that understanding and impair that public confidence so necessary to an uninhibited political life.

S. Rep. No. 95-604, at 8 (1978), as reprinted in 1978 U.S.C.C.A.N. 3904, 3909.

As one pre-FISA Court of Appeals described the chilling effect of warrantless foreign intelligence gathering: "To allow the Executive Branch to make its own determinations as to such matters invites abuse, and public knowledge that such abuse is possible can exert a deathly pall over vigorous First Amendment debate on issues of foreign policy". Zweibon v. Mitchell, 516 F.2d 594, 635-36 (D.C. Cir. 1975).

The chilling effects of FISA Amendments Act are most troubling in the context of the relationship between attorneys and their clients. The right of meaningful access to the courts is one aspect of the First Amendment right to petition the government, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972),[5] and the right to assistance of counsel—which includes the right to confidential attorney-client communication—is an integral part of that right. See, e.g., Goodwin v. Oswald, 462 F.2d 1237, 1241 (2d Cir. 1972) (prison inmates, who have fewer First Amendment rights than non-incarcerated persons, possess the rights to access the courts, to have assistance of counsel, and to have "the opportunity for confidential communication between attorney and client"). The Act's authorization of massive

[5] "The right of access to the courts is indeed but one aspect of the right of petition." California Motor, 404 U.S. at 510.

surveillance of U.S. citizens' and residents' international telephone and email communications makes in-person communication virtually the only means by which attorneys and clients reasonably can be assured that their dialogue with overseas clients, witnesses and experts will remain confidential. As a practical reality, however, such in-person meetings between an attorney and a client abroad may become so burdensome, costly and ineffective that the Act might very well chill all effective communications, thus undermining the First Amendment right completely.

The Supreme Court has also held that, for groups that are forced to resort to the courts to redress disparate treatment at the hands of the government, the right to pursue litigation is protected by the First Amendment. NAACP v. Button, 371 U.S. 415, 428-30 (1963). The attorneys who represent these groups and thereby challenge what they believe to be unlawful government policies similarly engage in a form of protected political expression. Id.; see also In re Primus, 436 U.S. 412, 431-32 (1978) ("The First and Fourteenth Amendments require a measure of protection for 'advocating lawful means of vindicating legal rights,' including 'advising another that his legal rights have been infringed'") (internal citations omitted); Westchester Legal Servs., Inc. v. County of Westchester, 607 F. Supp. 1379, 1382 (S.D.N.Y. 1985) ("The First Amendment 'protects the right of associations to engage in advocacy on behalf of their members.'") (quoting Smith v. Arkansas State Highway Empls., 441 U.S. 463, 464 (1979)).

Under the new FAA, the government—without a particularized warrant and with little judicial oversight—would be free, for example, to intercept all communications between American lawyers and overseas clients accused by the United States of somehow having ties to terrorism, or even communications between American and European attorneys working on

behalf of prisoners held at Guantánamo Bay. Many of these potential "targets" are vigorously litigating their innocence against the Government. But "the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants". Primus, 436 U.S. at 431. The dragnet surveillance authorized by the FAA seriously inhibits the ability of these accused persons effectively to petition the courts because it necessarily chills communications with their attorneys, as well as communications between their attorneys and witnesses and others who reside outside the United States. Moreover, the inability of the attorneys to litigate effectively against what they believe to be unlawful government conduct chills the speech and expression of those attorneys as well. See Button, 371 U.S. at 428-30 (White, J., concurring in part and dissenting in part) (finding constitutionally protected the activities of NAACP staff lawyers in, among other things, "advising Negroes of their constitutional rights"); see also Primus, 436 U.S. at 431-32.

C. Wiretapping Communications Between Lawyers and Their Clients Inhibits the Effective Assistance of Counsel Guaranteed by the Sixth Amendment.

The privacy of lawyer-client communication is also recognized as critical to the effective assistance of counsel guaranteed by the Sixth Amendment.[6] See United States v. Chavez, 902 F.2d 259, 266 (4th Cir. 1990) ("[A] critical component of the Sixth Amendment's guarantee of effective assistance is the ability of counsel to maintain uninhibited communication with his client and to build a 'relationship characterized by trust and confidence'." (quoting Morris v. Slappy, 461 U.S. 1, 21 (1983))); Bittaker v. Woodford, 331 F.3d 715, 723 n.7 (9th Cir. 2003) ("[T]he essence of the Sixth Amendment right is, indeed, privacy of communication with counsel." (citations and internal quotations omitted)).

[6] "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

Thus, when the Government intrudes into that privacy, the intrusion often renders counsel's assistance ineffective and thereby violates the Sixth Amendment rights of the criminal defendant. See, e.g., Weatherford v. Bursey, 429 U.S. 545, 558 (1977) (government intrusion into attorney-client relationship violates the Sixth Amendment if the defendant is prejudiced by the intrusion); United States v. Gartner, 518 F.2d 633, 637 (2d Cir. 1975) ("When conduct of a Government agent touches upon the relationship between a criminal defendant and his attorney, such conduct exposes the Government to the risk of fatal intrusion and must accordingly be carefully scrutinized.").

It is clear that the FAA is fundamentally at odds with the Sixth Amendment's deep respect for attorney-client confidentiality.

Under the Act, the Attorney General and the Director of National Intelligence can authorize jointly "the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information." FAA § 702(a). Such surveillance activities authorized by the Act threaten the sanctity of the attorney-client relationship,[7] by chilling all communications between those who "perceive themselves, whether reasonably or unreasonably, as potential targets"[8] of surveillance and their attorneys. A client who worries that any communications with counsel could be subject to surveillance will understandably be "reluctant to confide in his lawyer", Fisher, 425 U.S. at 403, and will thus be unable to obtain fully informed advice.

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[7] "The sanctity of the constitutional right of an accused privately to consult with counsel is generally recognized and zealously enforced by state as well as federal courts." Coplon v. United States, 191 F.2d 749, 758 (D.C. Cir. 1951). In stark contrast to the FAA, the unamended FISA procedures showed considerable respect for the attorney-client relationship. See supra for a discussion of FISA's minimization procedures.

[8] Legislative History at 8.

The Act does not require the government to demonstrate to the FISC that its surveillance targets are foreign agents, engaged in criminal activity, or connected even remotely with terrorism. The only requirement set forth by the Act is that the target be "reasonably believed to be located outside the United States." FAA § 702(a). This open-ended, amorphous standard effectively exposes all lawyer communications with overseas clients to government intrusion and therefore subverts of the right to counsel guaranteed by the Sixth Amendment.

D. Warrantless Surveillance Creates a Serious Ethical Dilemma for Lawyers.

The FAA creates a serious ethical dilemma for lawyers—especially for those needing to communicate with clients, witnesses, experts and others abroad who, because of their geographic location, their affiliation or the nature of their communications, are potential targets under the broad sweep of the FAA.

The Model Rules of Professional Conduct ("Model Rules") promulgated by the American Bar Association require an attorney to provide competent representation to clients, including the "thoroughness and preparation reasonably necessary for the representation". ABA Model Rule 1.1. Under Model Rule 1.4, an attorney also owes her client a duty of communication, pursuant to which she must "reasonably consult with the client about the means by which the client's objectives are to be accomplished". The Comment to Model Rule 1.4 emphasizes the importance of this communication to the lawyer-client relationship, explaining that "[r]easonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation".

The same standards of professional responsibility also require an attorney to maintain as confidential information that relates to the representation of a client. See Model Rule 1.6. This ethical obligation is expansive and is substantially broader than the attorney-client privilege. See id. cmt. ¶ 3 ("The confidentiality rule . . . applies not only to matters

communicated in confidence by the client but also to all information relating to the representation, whatever its source."). The lawyer's fundamental duty of confidentiality "contributes to the trust that is the hallmark of the client-lawyer relationship" and encourages clients "to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter". Id. ¶ 2. The duty is therefore central to the functioning of the attorney-client relationship and to effective representation.

Given that the Act authorizes massive surveillance of Americans' international communications, and in some cases purely domestic communications, lawyers who engage in sensitive and privileged communications by telephone and email with individuals outside of the United States (including clients, their families, witnesses, journalists, human rights organizations, experts, investigators, and foreign government officials) now confront a difficult and troubling ethical dilemma: either discontinue their telephonic and electronic communications with these clients and risk violating their obligations of competence and candor, or continue communicating with these clients at the risk of violating their professional obligation to take all reasonable steps to protect client confidences. Of course, an attorney may be able to avoid this conflict through in-person communications with clients and witnesses. Such an approach, however, may not always be possible, especially where clients and witnesses are located abroad. And, even when possible, it will burden the representation with inefficiencies, substantially increased costs, and significant logistical difficulties. In short, the FAA may cause attorneys to cease all electronic and telephonic communications relating to the representation that they have reason to believe will be intercepted, and to resort to alternative means for gathering information that, at best, may work clumsily and inefficiently and, at worst, may not work at all.

V. CONCLUSION

For the foregoing reasons, the Association respectfully requests that this Court grant Plaintiffs' motion for summary judgment.

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Respectfully submitted,

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