No.

In the Supreme Court of the United States

IN RE: SEALED CASE OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW NO. 02-001

AMERICAN CIVIL LIBERTIES UNION, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, *and* ARAB COMMUNITY CENTER FOR ECONOMIC AND SOCIAL SERVICES, *Petitioners.*

ON PETITION FOR LEAVE TO INTERVENE AND PETITION FOR A WRIT OF CERTIORARI TO THE FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW

PETITION FOR LEAVE TO INTERVENE AND PETITION FOR A WRIT OF CERTIORARI

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Petitioners are the American Civil Liberties Union, the National Association of Criminal Defense Lawyers, American-Arab Anti-Discrimination Committee, and the Arab Community Center for Economic and Social Services. Respondent is the United States.

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, petitioners confirm that none of the petitioners have parent companies nor do any publicly held companies own ten percent or more of their stock.

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PETITION FOR LEAVE TO INTERVENE

Table of Contents

Table of Contents……iv

Table of Authorities……v

Introduction……1

Interest of Proposed Intervenors/Petitioners……4

Argument……5

I. Longstanding Principles Of Civil Procedure Support Intervention in this Court……5

A. Petitioners Satisfy the Requirements for Intervention as of Right……6

1. Timeliness……7

2. Cognizable Interest……7

a. ADC and ACCESS……7

b. ACLU……12

c. NACDL……13

3. Impairment……13

4. Lack of Adequate Representation……15

B. In the Alternative, This Court Should Recognize Petitioners as Permissive Intervenors……16

II. Petitioners Satisfy Article III Standing Requirements……16

A. Petitioners ACLU, ADC, and ACCESS Have Associational Standing to Represent the Interests of Their Members……16

B. Petitioner NACDL Has Standing to Represent the Interests of Criminal Defendants……19

Conclusion……20

Table of Authorities

Cases

Banks v. Chicago Grain Trimmers, 390 U.S. 459 (1968)......3
Bowsher v. Synar, 478 U.S. 714 (1986)..............................17
Bryant v. Yellen, 447 U.S. 352 (1980)..................................3
Caplin & Drysdale, Chartered v. United States,
491 U.S. 617 (1989)..19, 20
Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386
U.S. 129 (1967)..7
International Union, Automobile Workers, Local 283 v.
Scofield, 382 U.S. 205 (1965)..5
Cronin v. Fed. Aviation Agency, 73 F.3d 1126 (D.C. Cir.
1996)...17
Deaver v. Seymour, 822 F.2d 766 (D.C. Cir. 1987)..............6
Department of Labor v. Triplett, 494 U.S. 715 (1990)..17, 19
Doe v. Bolton, 410 U.S. 179 (1973)...................................19
Donaldson v. United States, 400 U.S. 517 (1971).................7
Donnelly v. Glockman, 159 F.3d 405 (9th Cir. 1998).............6
Grutter v. Bollinger, 188 F.3d 394 (6th Cir. 1999)..............12
Hartford Associates v. United States, 792 F. Supp. 358
(D.N.J. 1992)..6
Hunt v. Washington State Apple Advertising Commission,
432 U.S. 333 (1977)..16, 18
Hunter v. Ohio ex rel. Miller, 396 U.S. 879 (1969)...............3
Idaho v Freeman, 625 F.2d 886 (9th Cir. 1980)...................13
Jordan v. Michigan Conference of Teamsters Welfare, 207
F.3d 854 (6th Cir. 2000)..6
Kootenai Tribe of Idaho v. Veneman, 2002 WL 31770408
(9th Cir. 2002)...16

Laird v. Tatum, 408 U.S. 1
(1972)……………………………………17

Massachusetts School of Law at Andover v. United States,
118 F.3d 776 (D.C. Cir. 1997)..5
Mullaney v. Anderson, 342 U.S. 415 (1952).........................3
NAACP v. New York, 413 U.S. 345 (1973)...........................7
New York State NOW v. Terry, 704 F. Supp. 1247 (S.D.N.Y.
1989)...17
North v. Walsh, 656 F.Supp. 414 (D.D.C. 1987)...................6

Olagues v. Russoniello, 797 F.2d 1511 (9th Cir. 1986)..11
Pennell v. City of San Jose, 485 U.S. 1 (1988)..17
Reporters Committee for Freedom of the Press v. American Telephone & Telegraph Co., 593 F.2d 1030 (D.C. Cir. 1978) 6
Rogers v. Paul, 382 U.S. 198 (1965) 3
Rose v. Operation Rescue, 919 F.2d 857 (3d Cir. 1990) 17
Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1982) 12
SEC v. U.S. Realty & Improvement Co., 310 U.S. 434 (1940) 16
Sierra Club v. United States EPA, 995 F.2d 1478 (9th Cir. 1993) 7
Singleton v. Wolff, 428 U.S. 106 (1976).............................19
Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) 5
Steffel v. Thompson, 415 U.S. 452 (1974)...........................18
Trbovich v. United Mine Workers, 404 U.S. 528 (1972) 15
United States v. Nicholson, 955 F.Supp. 588 (E.D.Va. 1997) 14
United States v. Verdugo-Urquidez, 494 U.S. 259 (1990)...14
United States v. United States District Court ("Keith"), 407 U.S. 297 (1972)……………………………………..………………10, 11
Valley Forge Christian Coll. v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) 17
Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383 (1988) 18
Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd., 840 F.2d 72 (D.C. Cir. 1988)....................................6
Wounded Knee Legal Defense/Offense Comm. v. FBI, 507 F.2d 1281 (8th Cir. 1974)...19

Statutes

18 U.S.C. § 2518(8)(d)...14
18 U.S.C. § 2520..14
50 U.S.C. § 1806(c) 14
50 U.S.C. § 1803(a) 2

50 U.S.C. § 1803(b) 2
50 U.S.C. § 1806(c) 6
50 U.S.C. § 1806(e) 6
50 U.S.C. § 1806(f)..14

Constitutional Provisions

First Amendment……………………………………………..……
passim

Fourth Amendment ....*passim*

Other Authorities

7C Wright, Miller & Kane, Federal Practice and Procedure § 1911, 357- 63 (2d ed. 1986) 16

David Johnston and Don Van Natta, Jr., *Iraqis in U.S. being monitored: Tracking operation aims to root out terror risks*, New York Times (Nov. 17, 2002) 8

Eric Lichtblau, *F.B.I. Tells Offices to Count Local Muslims and Mosques*, New York Times (January 28, 2003)…………...9

Eric Schmitt & Philip Shenon, *General Sees Scant Evidence of Threat Near in U.S.*, New York Times (Dec. 13, 2002).….8

Michael Moss and Ford Fessenden, *New Tools for Domestic Spying, and Qualms*, New York Times (December 10, 2002)…………………………………………………………
………..………..9

Susan Schmidt & Dan Eggen, *FBI Given More Latitude: New Surveillance Rules Remove Evidence Hurdle*, Washington Post (May 30, 2002)……………………………………..9

Transcript, *Department of Justice Press Conference Re: Foreign Intelligence Surveillance Court of Review* (November 18, 2002) 3

INTRODUCTION

Proposed Intervenors/Petitioners ("petitioners") move to intervene in order to seek this Court's review of the first decision ever issued by the Foreign Intelligence Surveillance Court of Review ("Court of Review"). The Court of Review's far-reaching decision upheld a provision of the USA Patriot Act authorizing surveillance under less stringent foreign-intelligence standards even where the government's primary purpose is criminal investigation. As described fully in the accompanying petition for *certiorari*, the decision conflicts with rulings of this Court and a number of lower courts, and seriously compromises the First and Fourth Amendment rights of United States citizens and permanent residents. The Court of Review effectively overturned an earlier, unanimous decision of the Foreign Intelligence Surveillance Court ("FISA Court") that had rejected the Attorney General's bid for broader surveillance powers without reaching the constitutional questions. Because the Attorney General was the only party to the proceedings below, the Court of Review's decision will stand unchallenged unless petitioners are permitted to intervene.

The unique circumstances of this case strongly support intervention. Ordinarily, the FISA Court's role is limited to hearing applications for individual surveillance warrants, a task that does not require it to engage in statutory construction or address difficult questions of constitutional law. At issue in this case, however, is a ruling that will govern *all* future FISA surveillance and that raises significant statutory and constitutional questions. These fundamental issues should not be finally adjudicated by courts that sit in secret, do not ordinarily publish their decisions, and allow only the government to appear before them. While the government could petition for *certiorari*, it is unlikely to do so, because the Court of Review accepted virtually all of its arguments. The target of the ongoing sealed surveillance order that gave rise to the decision is obviously unaware that his interests are adversely affected, and therefore cannot petition for *certiorari*.

When Congress crafted FISA, it plainly did not anticipate that the Court of Review would have the final say on the statutory and constitutional construction of the statute. It authorized the FISA Court to "hear applications for and grant orders approving electronic surveillance . . . under the procedures set forth in this chapter." 50 U.S.C. § 1803(a). It authorized the Court of Review to "review the denial of any application made under this chapter." *Id.* § 1803(b). Nothing in the statutory scheme suggests that Congress assumed or even expected that the foreign intelligence courts would be called upon, as they were in this case, to reach difficult statutory and constitutional questions – let alone to determine the constitutionality of FISA itself. As a result, the FISA Court's ordinary procedures – closed courts, unpublished decisions, *ex parte* proceedings – are wholly inadequate to the task.

Indeed, both lower courts effectively acknowledged as much. The FISA Court, whose judges ordinarily sit individually, heard the case *en banc* and ultimately published its decision, notwithstanding that the FISA Court had "never before . . . issued an unclassified opinion and order." *See* Letter of Hon. Colleen Kollar-Kotelly to Hon. Patrick Leahy *et. al.* (August 20, 2002). The Court of Review noted that this case presented the "first appeal from the [FISA Court] to the Court of Review since the passage of the [FISA] in 1978," and that the case "raise[d] important questions of

statutory interpretation[] and constitutionality." App. 2a. Noting that "[t]he government is the only party to FISA proceedings," the Court of Review accepted *amicus* briefs from the American Civil Liberties Union ("ACLU"), the National Association of Criminal Defense Lawyers ("NACDL"), and others.

Intervention is also warranted at this juncture because the FBI has already made sweeping changes in response to the Court of Review's decision, including doubling the number of National Security Law Unit attorneys responsible for filing FISA applications and creating a FISA unit within the FBI General Counsel's office. *See* Transcript, *Department of Justice Press Conference Re: Foreign Intelligence Surveillance Court of Review* (November 18, 2002).[1] It is clear that the FBI is interpreting the Court of Review's decision broadly and already expanding the use of FISA to investigate criminal activity as opposed to gathering foreign intelligence. The Attorney General himself has characterized the new powers as "revolution[ary]." *Id.*

Petitioners urge this Court to allow them to intervene to protect the privacy and free speech rights of their members and clients, including Americans who are Muslim or of Arab or South Asian descent and who believe they are or will soon be the targets of unconstitutional FISA surveillance. While direct intervention in the Supreme Court is unusual, it is far from unprecedented. *See Bryant v. Yellen*, 447 U.S. 352, 366 (1980) (affirming lower court's decision to grant motion to intervene for purpose of filing petition for *certiorari*); *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969) (granting motion to intervene but denying petition for *certiorari*); *Banks v. Chicago Grain Trimmers*, 390 U.S. 459 (1968) (granting motion to intervene and petition for *certiorari*); *Rogers v. Paul*, 382 U.S. 198, 199 (1965) (granting motion to add petitioners to avoid mootness issue and granting petition for *certiorari*); *Mullaney v. Anderson*, 342 U.S. 415 (1952) (granting motion to add petitioners to avoid standing issue and granting petition for *certiorari*); R. Stern, E. Gressman, S. Shapiro & K. Geller, Supreme Court Practice 386 (8th ed. 2002). Given the broad impact of the Court of Review's decision on the privacy of persons living in the United States, the secrecy of the lower court proceedings, and the absence of any other party that could seek this Court's review, petitioners' intervention here is wholly appropriate.

INTEREST OF PROPOSED INTERVENORS/PETITIONERS

The ACLU is a nationwide, non-profit, non-partisan organization with more than 300,000 members dedicated to the constitutional principles of liberty and equality. The ACLU's activities include analyzing the likely impact of federal anti-terrorism legislation on individual rights, including First and Fourth Amendment rights. The ACLU has been at the forefront of numerous cases involving individual rights and national security.

The NACDL is a District of Columbia non-profit organization whose membership is comprised of over 10,000 lawyers and 28,000 affiliate members representing every state. The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice;

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[1] The transcript is available at <http://www.uspolicy.be/issues/terrorism/ashcroft.1111902.htm>.

and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. The NACDL has long been concerned with the threat that the FISA poses to the Fourth Amendment protection against unreasonable searches and seizures and with the secret, *ex parte* manner in which FISA issues are routinely decided. NACDL is a full member in the American Bar Association's House of Delegates.

The American-Arab Anti-Discrimination Committee ("ADC") is a civil rights organization committed to defending the rights of people of Arab descent and promoting their rich cultural heritage. ADC, which is non-sectarian and non-partisan, is the largest Arab-American grassroots organization in the United States. It was founded in 1980 by former U.S. Senator James Abourezk and has chapters nationwide.

The Arab Community Center for Economic and Social Services ("ACCESS") is a Detroit-based human-services organization committed to the development of the Arab-American community in all aspects of its economic and cultural life. Its staff and volunteers have joined forces to meet the needs of low income families, to help newly arrived immigrants adapt to life in America, and to foster among Americans a greater understanding of Arab culture as it exists both here and in the Arab world. To achieve these goals, ACCESS provides a wide range of social, mental health, educational, artistic, employment, legal and medical services. ACCESS has more than 2500 members and approximately 150 full-time staff.

ARGUMENT

I. LONGSTANDING PRINCIPLES OF CIVIL PROCEDURE SUPPORT INTERVENTION IN THIS COURT

In the absence of any procedural rule directly governing intervention for the first time in this Court, petitioners find guidance in Rule 24 of the Federal Rules of Civil Procedure, which governs intervention in the district courts. *Cf. International Union, Automobile Workers, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965) (directing the Courts of Appeals to address intervention motions by reference to "the policies underlying intervention in the trial courts"); *Smuck v. Hobson*, 408 F.2d 175, 176-82 (D.C. Cir. 1969) (applying Rule 24 to intervention sought for the purpose of appeal); *Massachusetts School of Law at Andover v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997) ("intervention in the court of appeals is governed by the same standards as in the district court").[2]

[2] Cases dismissing collateral civil challenges to criminal proceedings are inapposite. *See, e.g.*, *Deaver v. Seymour*, 822 F.2d 766 (D.C. Cir. 1987); *Reporters Committee for Freedom of the Press v. American Telephone & Telegraph Co.*, 593 F.2d 1030, 1069 (D.C. Cir. 1978); *Hartford Associates v. United States*, 792 F. Supp. 358, 364 (D.N.J. 1992); *North v. Walsh*, 656 F. Supp. 414 (D.D.C. 1987). First, the rule against such challenges has always been rationalized by reference to the availability of alternative avenues for vindicating the complained-of constitutional infringements. *See Deaver v. Seymour*, 822 F.2d at 337; *id*. at 339; *Hartford Associates v. United States,* 792 F.Supp. at 364; *North v. Walsh*, 656 F.Supp. at 421; *Reporters Committee for Freedom of the Press v. American Telephone & Telegraph Co.*, 593 F.2d 1030, 1069 (D.C. Cir. 1978). Here, such remedies are unavailable or extremely limited. FISA targets who are never prosecuted, *including those whose surveillance is unconstitutional*, will never know that their privacy has been compromised. *See* p. 14, *infra*. Even FISA targets who are ultimately prosecuted by the FBI are

A. Petitioners Satisfy the Requirements for Intervention as of Right

Under Rule 24, "[t]he grounds for intervention of right may be stated as: (1) timeliness, (2) cognizable interest, (3) impairment, and (4) lack of adequate representation." *Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*, 840 F.2d 72, 75 (D.C. Cir. 1988); *see also Jordan v. Michigan Conference of Teamsters Welfare*, 207 F.3d 854, 862 (6th Cir. 2000); *Donnelly v. Glockman*, 159 F.3d 405, 409 (9th Cir. 1998). Petitioners satisfy each of these requirements here.

1. Timeliness

Petitioners file this motion within 90 days after the entry of the Court of Review's judgment. Consequently, petitioners file this motion within the time period ordinarily applicable to *certiorari* petitions. *See* Sup. Ct. R. 13.1 ("[A] petition for a writ of *certiorari* to review a judgment in any case, civil or criminal, entered by . . . a United States court of appeals . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment."). Given that petitioners seek to intervene for the sole purpose of filing a petition for *certiorari*, it is the 90-day period that should determine the timeliness of their motion. *See NAACP v. New York*, 413 U.S. 345, 366 (1973) ("Timeliness is to be determined from all the circumstances.").

2. Cognizable Interest

Under Rule 24, intervention as of right is available only to those who can fairly assert a "significant protectable interest" in the matter in question. *Donaldson v. United States*, 400 U.S. 517, 531 (1971). A prospective intervenor need not, however, show a specific legal or equitable interest. *See, e.g., Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 132-36 (1967). Rather, "it is generally enough that the interest [asserted] is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *Sierra Club v. United States EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993).

Each of the petitioners in this case asserts a significant protectable interest within the meaning of Rule 24.

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severely constrained in their ability to challenge the legality of the surveillance or the introduction of FISA evidence. *See* 50 U.S.C. § 1806(c) and (e); see p. 14, *infra*. In addition, the judicial policy against collateral civil challenges has never been extended to contexts in which First Amendment rights are at stake. *See Deaver v. Seymour*, 882 F.2d at 69; *id.* at 70 n. 8; *Hartford Associates v. United States*, 792 F.Supp. at 364. As discussed at length below, *see* p. 10-11, *infra*, the prospect of unconstitutional surveillance has already had a profound effect on petitioners' members' and constituents' willingness to voice their political views and otherwise exercise their First Amendment rights.

a. ADC and ACCESS

Petitioners ADC and ACCESS seek to intervene in order to protect their members' and constituents' Fourth Amendment right to be free from unconstitutional surveillance. Because standards for obtaining FISA orders are significantly less stringent than the Fourth Amendment normally requires, and because the Court of Review has now approved the use of FISA warrants in searches whose primary purpose is criminal investigation, the Fourth Amendment rights of petitioners' members and constituents are directly threatened.

The government's own public statements and actions strongly imply that at least some of petitioners' members are currently being surveilled. *First*, many of petitioners' members emigrated to the United States from countries the Administration has accused of sponsoring terrorism, such as Syria and Iraq. Petitioners believe that the FBI is monitoring their members' communications based on their countries of national origin. FBI Director Robert Mueller has stated publicly that a "substantial" number of persons are under constant surveillance, particularly in communities like New York and Detroit, where petitioners have thousands of Arab-American members.[3] The Attorney General has also confirmed a "previously undisclosed intelligence program involv[ing] tracking thousands of Iraqi citizens and Iraqi-Americans with dual citizenship."[4] *Second*, many of petitioners' members are Muslim. Due to government statements that it is targeting mosques in its antiterrorism efforts, petitioners fear that the FBI is monitoring their members' communications based on their religious beliefs or affiliations. For example, the FBI has ordered each of its field offices to "establish a yardstick for the number of terrorism investigations and intelligence warrants" by counting the number of Muslims and mosques in its district.[5]

Third, some of petitioners' members have been in contact with people whom the INS detained, and the FBI interrogated, after September 11. Petitioners believe that the FBI is monitoring their members' communications on the basis of their relationships with INS/FBI detainees.[6] *Fourth*, some of petitioners' members have publicly expressed opposition to the possibility of war in Iraq, to United States support for Israeli policies,

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[3] Eric Schmitt & Philip Shenon, *General Sees Scant Evidence of Threat Near in U.S.*, New York Times (Dec. 13, 2002).

[4] David Johnston and Don Van Natta, Jr., *Iraqis in U.S. being monitored: Tracking operation aims to root out terror risks*, New York Times (Nov. 17, 2002).

[5] Eric Lichtblau, *F.B.I. Tells Offices to Count Local Muslims and Mosques*, New York Times (January 28, 2003); *see also* Michael Moss and Ford Fessenden, *New Tools for Domestic Spying, and Qualms*, New York Times (December 10, 2002) (reporting that the former deputy director of the CIA, David Cohen, testified in an affidavit, "In the last decade, we have seen how the mosque and Islamic institutes have been used to shield the work of terrorists from law enforcement scrutiny by taking advantage of restrictions on the investigation of First Amendment activity."); Susan Schmidt & Dan Eggen, *FBI Given More Latitude: New Surveillance Rules Remove Evidence Hurdle*, Washington Post (May 30, 2002) (reporting that new DOJ guidelines remove barriers that previously prevented FBI from infiltrating and monitoring religious institutions unless agents were "following a lead").

[6] The FBI routinely interrogated INS detainees, asking questions not only about the detainees' own immigration status, political views, religious beliefs, and foreign connections but also about the political views, religious beliefs, and foreign connections of the detainees' U.S.-citizen friends and family members.

and to other aspects of United States foreign policy. Petitioner's members are concerned that the FBI is monitoring their members' communications on the basis of their publicly expressed political beliefs, particularly if those members are originally from countries accused of sponsoring terrorism. *Fifth*, some of petitioners' members have publicly defended charities that were later accused of providing material support to Foreign Terrorist Organizations. Again, petitioners believe that the FBI is monitoring their members' communications based at least in part on their publicly expressed political views. *Sixth*, some of petitioners' members contributed financially to charities that were later accused of providing material support to Foreign Terrorist Organizations. The FBI may be monitoring their members' communications because they engaged in these transactions. *Seventh*, the government has already targeted petitioners' members in various ways. For example, many of petitioners' members were asked to participate in the Justice Department's "voluntary interview" program; interviewees were asked about their religious and political beliefs and their connections to foreign countries. *Finally*, the FBI has, at least in one case, sought information about petitioners' members from petitioners themselves.[7] That the FBI has sought information in these ways leads petitioners reasonably to believe that it may also be monitoring their members in other, less public, ways.

Petitioners also seek to intervene in order to protect their members' First Amendment rights. Traditionally, the warrant and probable cause requirements have served as important safeguards of First Amendment interests by preventing the government from intruding into an individual's protected sphere merely because of that individual's exercise of First Amendment rights. Thus, in rejecting a domestic-intelligence exception to the warrant requirement, this Court wrote in *Keith*:

> National security cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime. . . . History abundantly documents the tendency of Government – however benevolent and benign its motives – to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs.

United States v. United States District Court ("Keith"), 407 U.S. 297, 313-14 (1972); *see also id*. at 314 ("The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.").

Keith's discussion of the relationship between Fourth and First Amendment rights has particular force here, because a large number of petitioners' members and constituents are new to the United States. Although many of petitioners' members and constituents are U.S. citizens, a substantial number come from countries in which dissent was suppressed, often violently, and in which surveillance was the principal means by which

[7] For example, the FBI approached ACCESS immediately after September 11 to inquire about two individuals who had sought job training from ACCESS.

the government discouraged and unearthed dissent. As a consequence, petitioners' members "are understandably insecure in exercising their recently acquired rights as citizens, and easily intimidated by government action." *Olagues v. Russoniello*, 797 F.2d 1511, 1516 (9th Cir. 1986) (en banc), *vacated as moot*, 484 U.S. 806 (1987).

The threat of unconstitutional FBI surveillance has already affected petitioners' members' First Amendment rights in diverse ways. Some have become reluctant to express their political views publicly for fear that doing so will provoke FBI surveillance. Some have become reluctant to express their views *privately* for fear that the FBI is already intercepting their communications and will somehow use their privately-expressed political views against them. Some of petitioners' members have become reluctant to attend religious services because they believe that the FBI may have infiltrated the services and may be intercepting the communications of those who attend. Some of petitioners' non-member clients have become hesitant to become members for fear that identifying themselves with the Arab and Arab-American communities will provoke FBI surveillance.

b. ACLU

Petitioner ACLU seeks to intervene in order to protect its staff's and its members' First and Fourth Amendment rights. As a consequence of the Court of Review's decision, the ACLU reasonably fears that some of its staff and members are or may imminently become subject to FISA surveillance, especially given the ACLU's significant outreach efforts and the legal representation that the ACLU has provided to the Arab-American, South-Asian-American, and Muslim-American communities. The ACLU also fears that the threat of unlawful surveillance may chill some members' willingness to exercise their First Amendment rights. The ACLU is particularly concerned about the First Amendment rights of its members who are new American citizens.

The ACLU also seeks to intervene in order to protect the public's interest in meaningful Fourth Amendment protections against unwarranted government surveillance and in First Amendment rights that encourage uninhibited debate about matters of public concern. As this Court is aware, the ACLU has long been a leading defender of First and Fourth Amendment rights. The ACLU is well-situated to defend those rights here. *Cf. Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999) (non-profit organizations dedicated to preserving higher educational opportunities for minorities had requisite interest in action to challenge university's admissions policy); *Sagebrush Rebellion, Inc. v. Watt,* 713 F.2d 525 (9th Cir. 1982) (wildlife protection group had requisite interest to intervene as of right in suit concerning environmental regulations promulgated by Secretary of Interior); *Idaho v Freeman*, 625 F.2d 886 (9th Cir. 1980) (women's rights organization had requisite interest to intervene as of right in action by states challenging procedures relating to proposed equal rights amendment).

c. NACDL

Petitioner NACDL asserts an interest in protecting its clients' rights to be free from illegal surveillance that may later be used against them in criminal proceedings. NACDL members currently represent criminal defendants in cases against whom FISA obtained evidence is used, and expect to represent additional defendants in future cases. Because

the Court of Review's decision now authorizes the use of FISA primarily for criminal investigation, NACDL believes a growing number of its member lawyers will be unable to adequately represent their clients when FISA evidence is used against them in criminal cases. *See also* pp. 18-19, *infra*.

3. Impairment

Disallowing intervention in the present case would substantially impair petitioners' ability to protect their interests. As explained in the attached petition for *certiorari*, petitioners believe that the Court of Review's decision, permits the FBI to engage in unconstitutional surveillance. Yet the decision, which the Court of Review acknowledged "raises important questions of statutory interpretation[] and constitutionality," App. 29, was issued by a court that had never convened before, held its hearing in secret, and allowed only the government to appear before it.[8] The difficult questions at issue in this case have never been the subject of an adversarial hearing. Unless petitioners are permitted to intervene, the Court of Review's decision will stand.

Petitioners cannot adequately protect their interests through any avenue other than intervention in the present litigation. Petitioners and other citizens who are victims of unlawful foreign-intelligence surveillance cannot challenge it when it occurs because there is no way for them to learn that it is taking place, or that it has taken place in the past. The differences between FISA and Title III are significant in this context. A target of Title III surveillance must eventually be notified of the surveillance – even if the government never seeks to introduce evidence obtained from the surveillance in a criminal proceeding. *See* 18 U.S.C. § 2518(8)(d). The notice requirement ensures that victims of government excesses are afforded an opportunity to challenge the legality of surveillance by, for example, contesting the introduction of evidence or by filing an action for monetary damages, *see id.* § 2520. Targets of FISA surveillance, by contrast, are never told that their privacy has been compromised unless the FBI uses the evidence against them in a judicial proceeding. *See* 50 U.S.C. § 1806(c). The only FISA targets who are afforded an opportunity to challenge unlawful FISA surveillance are those whom the FBI decides to prosecute. Even here, the opportunity is extremely limited because criminal defendants are routinely denied access to the FISA surveillance application and the evidence obtained through it. *See id.* § 1806(f); *United States v. Nicholson*, 955 F.Supp. 588, 592 (E.D. Va. 1997). In any event, to hold that petitioners cannot complain of unlawful surveillance unless the fruits of that surveillance are used against them in criminal proceedings would be to miscast the constitutional proscription against unlawful searches as a mere trial right, and to provide no protection to wholly innocent persons. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (Fourth Amendment "prohibits unreasonable searches and seizures whether or not the evidence is sought to be used in a criminal trial, and a violation of the Amendment is fully accomplished at the time of an unreasonable governmental intrusion" (internal quotation marks omitted)).

For these reasons, petitioners' have no adequate means of protecting their interests other than to intervene in this litigation.

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[8] The ACLU, the NACDL and others were permitted to file briefs *amicus curiae*.

4. Lack of Adequate Representation

Under Rule 24, the burden of showing that representation would be inadequate is "minimal." *See Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972) (quoting 3B J. Moore, Federal Practice 24.09--1 (4) (1969)). Petitioners easily carry that burden here. Were the Court to disallow intervention, petitioners' interests would be wholly unrepresented. The government could seek this Court's review, but it has no interest in doing so because it prevailed in the court below. While FISA does not expressly foreclose a party other than the government from petitioning for *certiorari*, the only other party in this case is the surveillance target, who cannot petition for *certiorari* because he or she does not know that his or her interests are at stake. Thus, unless petitioners are permitted to intervene here, the Court of Review's decision will stand and petitioners' interests will be unrepresented.

Petitioners are aware, of course, that a court's decision to grant a warrant application is not ordinarily appealable, even outside the foreign intelligence context. The decision below is extraordinary, however, for at least two reasons. First, the Court of Review did not simply grant the FBI's application for a particular surveillance warrant but rather approved procedures that will govern all FISA surveillance warrants in the future. Second, in order to determine the acceptability of the proposed procedures, the Court of Review found it necessary to reach the constitutionality of certain aspects of the Patriot Act. Disallowing petitioners from intervening here would effectively render the Court of Review's decision unreviewable.

B. In the Alternative, This Court Should Recognize Petitioners as Permissive Intervenors

Under Rule 24(b), "anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common." Rule 24(b), unlike Rule 24(a), does not require the prospective intervenor to show a "significant protectable interest." *Kootenai Tribe of Idaho v. Veneman*, 2002 WL 31770408, at *5 (9th Cir. 2002). Further, Rule 24(b) "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation." *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 459 (1940). Indeed, "the intervenor-by-permission does not even have to be a person who would have been a proper party at the beginning of the suit." 7C Wright, Miller & Kane, Federal Practice and Procedure § 1911, 357- 63 (2d ed. 1986).

For the reasons explained above, petitioners urge the Court to allow them to intervene here.

II. PETITIONERS SATISFY ARTICLE III STANDING REQUIREMENTS

A. Petitioners ACLU, ADC, and ACCESS Have Associational Standing to Represent the Interests of Their Members

An association has standing to bring suit on behalf of its members where: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the

lawsuit." *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). Petitioners satisfy each of these requirements.[9]

Petitioners' members would have standing to sue in their own right. They allege that they have personally suffered actual or threatened injury from unconstitutional surveillance under FISA.[10] *See Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982). As discussed in detail above, the government's own statements and actions, as well as a number of other factors, support petitioners' allegation that the government is subjecting them to FISA surveillance or that it will do so in the foreseeable future. *See, e.g., Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Cronin v. Fed. Aviation Agency*, 73 F.3d 1126 (D.C. Cir. 1996). Of course, as a consequence of FBI secrecy, petitioners do not know for certain whether any of their members are currently subject to FISA surveillance. The government cannot, however, use its own secrecy to defeat standing. *See, e.g., Rose v. Operation Rescue*, 919 F.2d 857, 866 n.5 (3d Cir. 1990); *New York State NOW v. Terry*, 704 F.Supp. 1247, 1256 n.6 (S.D.N.Y. 1989) ("Defendants cannot use the uncertainty, created entirely by themselves, to their advantage to argue that no particular individual could in advance point to a certain threatened injury. The threat of injury was sufficiently concrete to confer standing on plaintiffs."). Indeed, the secrecy surrounding FISA surveillance has itself caused a profound chilling effect on petitioners' members' willingness to exercise their First Amendment rights; this chilling effect constitutes an independent injury and provides another clear basis for standing.[11]

Petitioners' members would also meet the other requirements of Article III standing, were they to bring suit themselves. Their injury is clearly traceable to government activity – namely, FBI surveillance conducted in conformity with the Court of Review's decision. The injury would be remedied if this Court were to overturn the decision of the Court of Review.

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[9] The Court need only find that one of the petitioners has standing. *Department of Labor v. Triplett*, 494 U.S. 715, 720 (1990) ("since the committee has standing, we need not inquire whether the Department does as well") (citing *Bowsher v. Synar*, 478 U.S. 714, 721 (1986)).

[10] *Laird v. Tatum*, 408 U.S. 1 (1972) (holding that petitioners lacked standing to challenge government data-gathering program), is wholly inapposite. In that case, the petitioners complained not of highly-intrusive wiretaps and physical searches effected in violation of the Fourth Amendment. Rather, they challenged, solely on First Amendment grounds, a government program to collect information that was already publicly available. *See id.* at 6 ("The information itself was collected by a variety of means, but it is significant that the principal sources of information were the news media and publications in general circulation."). The *Laird* petitioners alleged that the program caused a chilling effect due to possible government misuse of the data in the future. *Id.* at 9-10. In contrast, petitioners in the present case allege that the government is *currently* using FISA to violate their Fourth and First Amendment rights, and that FISA is facially invalid as construed by the Court of Review.

[11] Standing rules are relaxed in the First Amendment context to address precisely the kind of injury that petitioners point to here – namely, government action, short of prosecution, that results in self-censorship. *See, e.g., Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (in First Amendment context, "threatened injury" requirement is met where prospective intervenor shows "actual and well-founded fear that the law will be enforced against [it]"); *id.* at 393 (rationale for relaxed standing rule is danger of "of self-censorship; a harm that can be realized even without an actual prosecution"); *Steffel v. Thompson*, 415 U.S. 452 (1974).

Finally, petitioners meet the other prongs of the *Hunt* test. The interests petitioners assert are germane to their organizational missions. Further, the resolution of the questions identified in the accompanying petition for *certiorari* would not require the participation of individual members in the lawsuit, because no question of fact is at issue.

For these reasons, petitioners ACLU, ADC, and ACCESS have associational standing to represent the interests of their members.

B. Petitioner NACDL Has Standing to Represent the Interests of Criminal Defendants

Petitioner NACDL has third-party standing to advance the constitutional rights of its clients. NACDL members currently represent criminal defendants against whom the government has introduced FISA evidence. NACDL members also expect to represent additional defendants in future criminal cases involving FISA evidence. This Court has held that lawyers have standing to advance the constitutional rights of their clients. *See Department of Labor v. Triplett*, 494 U.S. 715 (1990) (lawyer had third-party standing to challenge attorneys fees restrictions based on due process rights of client to obtain legal representation); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 n.3 (1989) (same); *Wounded Knee Legal Defense/Offense Comm. v. FBI*, 507 F.2d 1281, 1284 (8th Cir. 1974) (stating that a lawyer has the "standing to challenge any act which interferes with his professional obligation to his client and thereby, through the lawyer, invades the client's constitutional right to counsel."). *Cf. Singleton v. Wolff*, 428 U.S. 106, 117 (1976) (allowing "a physician to assert the rights of women patients as against the government interference with the abortion decision"); *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (holding that doctors have standing to challenge abortion laws that interfere with their ability to use their best professional judgment in treating their patients).

Here, petitioner NACDL's members have suffered an injury-in-fact because FISA procedures severely limit their ability to effectively represent the constitutional rights of their clients against whom FISA evidence is used. *See Wounded Knee*, 507 F.2d at 1284; *Caplin & Drysdale, Chartered*, 491 U.S. at 624 n.3. NACDL also satisfies prudential standing requirements, because the relationship between lawyer and client is of "special consequence," *Caplin & Drysdale, Chartered*, 491 U.S. at 624 n.3, and because the secrecy of the FISA process makes it difficult or impossible for affected third parties – the targets of unlawful surveillance – to assert their own constitutional rights, *see id*.

CONCLUSION

For the reasons stated above, this Court should grant the Petition to Intervene.

Respectfully submitted.

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