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No. 08-01

IN THE FOREIGN INTELLIGENCE SURVEILLANCE
COURT OF REVIEW

IN RE DIRECTIVES TO YAHOO! INC. PURSUANT TO SECTION 105B OF
THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

On Appeal from the Foreign Intelligence Surveillance Court

REPLY BRIEF OF APPELLANT YAHOO!

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INTRODUCTION

The core question in this case is whether the surveillance allowed by the PAA and authorized under the directives served upon Yahoo! comports with the Fourth Amendment to the United States Constitution. After acknowledging the Court's jurisdiction to hear this appeal, the Government argues, without reference to any specific set of factors, that the decision of the FISC should be upheld because the surveillance at issue is "reasonable." Its argument is based not on the requirements of the PAA, but on what it has currently committed to do in its certifications to protect United States persons.[1] Several months ago, before the government "inexplicably modified and added to those certifications,"[2] its plans to

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[1] Its argument is also based, at least in part, on the historical tradition of Presidential wiretaps for foreign intelligence purposes "since at least 1940." Appellee's Resp. at 5. The history of *relevant* warrantless electronic surveillance is, however, much shorter. Electronic surveillance, without regard to its purpose, was not held to violate the Fourth Amendment until "[a]fter the Supreme Court decided *Katz* [*v. United States*, 389 U.S. 347 (1967)] in 1967, and held the Fourth Amendment applicable to electronic surveillance." *United States v. Ehrlichman*, 546 F.2d 910, 936 n.7 (D.C. Cir. 1977). But the memoranda from President's Roosevelt, Truman and Johnson pre-dated *Katz* and authorized surveillance even in the United States. *See United States v. United States District Court,* 444 F.2d 651, 669-671 (6th Cir. 1971). Congress passed FISA in 1978, in part in response to an investigation that revealed abuse of this claimed inherent power in the years following *Katz*. Thus, the relevant historical period of unconstrained authority is really an 11 year period between 1967 and 1978.

[2] J.A. 121.

protect United States persons were different.[3] Furthermore, the government has the discretion to change its protections in any new certification it files.

This type of unfettered executive discretion, combined with the PAA's lack of judicial review, is precisely what makes the surveillance under the PAA unreasonable. The filings containing the government's plans will not again be subject to judicial review unless a provider brings a challenge like the instant one. Such a challenge is quite unlikely, either under the PAA or under any future legislation passed by Congress, because once this Court speaks, its opinion will not only guide the government's conduct but will also influence providers' actions and future legislation.[4] Thus, when this Court rules on the analysis to be employed when evaluating the Fourth Amendment's applicability to warrantless surveillance conducted in the U.S. and involving communications of U.S. persons, it will set the legal standard for warrantless surveillance for foreign intelligence purposes for years to come.[5]

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[3] The pages of the FISC opinion explaining the differences between the certifications have been redacted such that Yahoo! is not aware of the magnitude of the changes. *See* J.A. 154-157.

[4] The Government has successfully unsealed the lower court ruling to share with Congress and other providers. *See* J.A. at 9-10, Dkt. Nos. 65, 72, 74, 78.

[5] To the extent that any of the protections contained in the government's certifications are essential to the reasonableness determination, this Court should say so, because the PAA itself does not, and the government may, in future

The Government would have this Court's momentous words merely be an affirmation of the reasonableness of the surveillance without any reference to the legal standard used by the FISC. In fact, nowhere in the government's 56-page brief does it specifically defend the four-factor test employed by the FISC. Instead, the government argues that none of the factors omitted by the FISC are essential elements of the Fourth Amendment analysis. And it offers no guidelines for this Court's constitutional analysis. However, any determination of reasonableness must be measured against *some* benchmark.

In its prior decision, this Court set forth a list of factors drawn from the Warrant Clause of the Constitution that should be considered in assessing reasonableness. *In re Sealed Case*, 310 F.3d 717, 737-742 (Foreign Intel. Surv. Ct. 2002). Even if all of these factors do not apply to *every* case, these factors certainly should apply to *this* case because the question being asked here is similar—when acquiring the private communications of United States persons without a warrant, what safeguards must be in place for the surveillance to be consistent with the Fourth Amendment. This Court used the correct analytical framework in 2002 when it found that, even if a warrant is not required,

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certifications, omit protections that are not deemed to be constitutionally-mandated.

reasonableness should be measured against the types of protections included in the Warrant Clause of the Constitution. The Government's rejection of the Warrant Clause as a useful yardstick of reasonableness is especially hollow because it offers nothing in its place, other than something akin to the famous Potter Stewart analysis that "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) But the Fourth Amendment is not an abstract concept or an ephemeral idea. It is a specific series of protections that our founders guaranteed to every United States person.

Even to the extent the Court determines that the Warrant Clause does not apply verbatim to the surveillance at issue here, it still must consider the types of protections set forth in the Fourth Amendment when examining the surveillance at issue, otherwise the protections of the Fourth Amendment would evaporate. Instead, it would reduce "the assurance against unreasonable federal searches and seizures [to] 'a form of words', valueless and undeserving of mention in a perpetual charter of inestimable human liberties . . . and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom 'implicit in "the concept of ordered liberty."'" *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

ARGUMENT

I. The Government's Test for Reasonableness Fails to Provide Objective Standards.

The Government applies a "totality of the circumstances," test and relies on *United States v. Knights*, 534 U.S. 112, 118 (2001), to "'balanc[e the individual's] Fourth Amendment interests against [the search's] promotion of legitimate governmental interests." Appellee's Resp. at 34. In doing so, the Government invokes its compelling interest in national security to simplify the analysis to the point where any procedures could satisfy the Fourth Amendment.[6]

The balancing test, however, cannot be the means to an end the Government makes it out to be. As the Supreme Court has stated, the balancing test is relevant to "[a] determination of the *standard of reasonableness* applicable to a particular class of searches . . .." *O'Connor v. Ortega*, 480 U.S. 709, 720 (1987) (*quoting United States v. Place*, 462 U.S. 696, 703 (1983)) (emphasis added). In *Chimel v. California*, the Supreme Court informed the "totality of the circumstances" test by holding that "those facts and circumstances must be viewed in light of established

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[6] The Government claims that Yahoo! has conceded that the vast majority of the Government's collection under the directives involves communications between non-U.S. persons outside of the United States. Appellee's Resp. at 33 n.11. But it did not. Yahoo! *only* conceded that the Fourth Amendment does not apply to non-U.S. persons located outside the U.S. *See* J.A. 38, n.7.

Fourth Amendment principles." 395 U.S. 752, 764 (1969). Likewise in *Ker v. California*, the Supreme Court held that "the reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the 'fundamental criteria' laid down by the Fourth Amendment and in opinions of this Court applying that Amendment." 374 U.S. 23, 33 (1963) (emphasis added). The reference to Fourth Amendment principles is a key component of the analysis this Court should perform. *United States v. Sink*, 586 F.2d 1041, 1047 (5th Cir. 1978) ("In determining the reasonableness of warrantless searches, the central requirement is to examine the totality of the circumstances in light of established fourth amendment principles to determine if the rights which those principles embody have been violated.")

Before balancing the government's compelling interest against the privacy intrusion, the court must first determine which standards rooted in Fourth Amendment principles should form the basis of the reasonableness determination. In *Chimel*, the Supreme Court rejected a subjective analysis that failed to judge the reasonableness of a search in light of established Fourth Amendment principles.[7]

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[7] *See also United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297, 315 n.16 (1972) ("*Keith*").

395 U.S. at 764. In that case, the Government argued that it was "'reasonable' to search a man's house when he is arrested in it." *Id.* The Court, however, held that determining reasonableness without reference to Fourth Amendment principles is an argument "founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on consideration relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point." *Id.* at 764-65.

> To say that the search must be reasonable is to require some criterion of reason. It is no guide at all . . . to say that an 'unreasonable search' is forbidden—that the search must be reasonable. What is the test of reason which makes a search reasonable? The test is the reason underlying and expressed by the Fourth Amendment: the history and experience which it embodies and the safeguards afforded by it against the evils to which it was a response.

Id. at 765 (*quoting United States v. Rabinowitz*, 339 U.S. 56, 83 (1950) (dissenting opinion).

The Government's analysis of the totality of the circumstances fails to identify any "test of reason" "expressed by the Fourth Amendment." *Id.* Instead of comparing the safeguards in place in this case to some reasonableness standard, the Government argues that the "multiple safeguards" it has designed to "ensure that surveillance is appropriately targeted" provide more protection than was present in certain special needs cases where courts have held upheld warrantless

searches. Appellee's Resp. at 36 & n.12. But those cases involve searches of an entirely different character, *see* Section II *infra*, and the Government fails to apply the criteria those cases examined in determining that the special needs searches were reasonable.[8] Instead, it attacks each missing Fourth Amendment protection individually, without providing any relevant factors against which the surveillance should be judged. *See e.g.* Appellee's Resp. at 37, 39, 41.

A. This Court Should Refer to the Warrant Clause In Analyzing the Reasonableness of the Search

In this case, the Warrant Clause provides the appropriate Fourth Amendment benchmark against which to assess reasonableness. Referring to the requirements of the Warrant Clause when assessing the reasonableness of a search does not create a "back door warrant requirement,"[9] but instead is a proper consideration of Fourth Amendment principles. While citing *In re Sealed Case* for a number of points, the Government ignores that *In re Sealed Case* analyzed the reasonableness

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[8] *See e.g. Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 621-22 (1989) (Analyzing the reasonableness in light of the "essential purpose" of the "warrant requirement . . . to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents."); *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) ("The search ... satisfies the Fourth Amendment's reasonableness requirement under well-established principles."); *New Jersey v. T.L.O.*, 469 U.S. 325, 340-43 (1985) (examining level of suspicion required for a search in reference to the probable cause standard under the Fourth Amendment).

[9] *See* Appellee's Resp. at 43.

of FISA orders by asking whether FISA "provide[s] a mechanism that at least approaches a classic warrant and which therefore supports the government's contention that FISA searches are constitutionally reasonable." 310 F.3d at 742. By examining reasonableness with regard to how closely the relevant procedures approximated the requirements for a warrant under Title III, this Court grounded its analysis in objective Fourth Amendment standards. *Id.* at 737 ("obviously, the closer those FISA procedures are to Title III procedures, the lesser are [the] constitutional concerns"). There is no reason to depart from that analysis here where the same type of surveillance, performed under different procedures, is at issue. In both cases the Warrant Clause provides the proper framework for determining the reasonableness of the surveillance at issue.

In re Sealed Case is not an outlier. Other cases addressing the reasonableness of warrantless searches have also based their reasonableness analysis on the Warrant Clause, because, as the Supreme Court has stated, it is the "very heart of the Fourth Amendment directive." *Gerstein v. Pugh*, 420 U.S. 103, 113 n. 12 (1975). "The fundamental command of the Fourth Amendment is that searches and seizures be reasonable," and thus "'both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search,'" even though "'in certain limited circumstances neither is required.'" *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (quoting *Almeida-Sanchez v. United States*, 413

U.S. 266, 277 (1973) (Powell, J. concurring)) (emphasis added). In another analogous context—electronic surveillance for domestic security reasons—the Supreme Court held that "Though the Fourth Amendment speaks broadly of 'unreasonable searches and seizures,' the definition of 'reasonableness' turns, at least in part, on the more specific commands of the warrant clause." *Keith*, 407 U.S. at 309-10.[10]

Tethering reasonableness to the Warrant Clause as this Court did in *In re Sealed Case*, has the effect of grounding the analysis in Fourth Amendment principles and takes into account all of the factors as they relate to each other. When the right factors are examined collectively, rather than individually, the surveillance authorized by the PAA and the directives fails.

B. The Directives Compel an Unreasonable Search

Most of the key protections that derive from the Fourth Amendment are absent from the surveillance at issue here. In *In re Sealed Case* this Court found that "the procedures and government showings required under FISA, if they do not

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[10] Other courts have followed suit when analyzing the reasonableness of foreign intelligence surveillance. *See also Zweibon v. Mitchell*, 516 F.2d 594, 628 & n.89 (D.C. Cir. 1975); *Halkin v. Helms*, 690 F.2d 977, 1000 (D.C. Cir. 1982) (agreeing with *Keith*); *United States v. Diggs*, 544 F.2d 116, 150 (3d Cir. 1976) (same); *United States v. Cavanagh*, 807 F.2d 787, 790 (1987) (following *Keith*'s definition of reasonableness when interpreting FISA orders).

meet the minimum Fourth Amendment warrant standards, certainly come close." *In re Sealed Case*, 310 F.3d at 746. Applying the analysis of that case to this surveillance leads to a very different conclusion. The factors this Court gleaned from the Fourth Amendment analysis in *In re Sealed Case* are: prior judicial scrutiny, probable cause that the target is a foreign power or an agent of a foreign power, a certification by the Attorney General that the information is foreign intelligence information, probable cause to believe that each of the facilities for which surveillance is sought is being used or is about to be used by the target, necessity of the surveillance as opposed to normal investigative procedures, and minimization of what is acquired, retained and disseminated. *Id.* at 738-41. The Government argues repeatedly that no one of these factors is determinative as to the reasonableness of the search. While it is true that no one factor is "talismanic," the Government ignores the fact that all of the factors are certainly *relevant* to the reasonableness determination. When all six factors are given their due and reviewed as this Court directed in *In re Sealed Case*, PAA-authorized surveillance is unreasonable.[11]

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[11] This Court has already explained that the presence or absence of one factor could affect the analysis of other factors. In *In re Sealed Case*, it held that FISA's particularity requirements are reasonable in part because during judicial review "the court may require the government to submit any further information it deems

As Appellant argued in its opening brief, the PAA likely meets just two of the factors. Appellant's Br. 48-49. The PAA provides for minimization of the surveillance and for a certification by the Attorney General designating the type of foreign intelligence information sought and that the information sought is foreign intelligence information and does not constitute electronic surveillance.[12] It does not provide for: prior judicial review, review of whether the facilities are being used or are about to be used by a foreign power or an agent of a foreign power, and no showing that the surveillance is "necessary," or the least intrusive means. In addition, none of the findings under the PAA are made pursuant to the probable cause standard, and the limited judicial review under the PAA is only a one-time review of the general procedures for identifying the location of a future target. While no single factor may be solely determinative of the reasonableness question,

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necessary to determine whether or not the certification is clearly erroneous." 310 F.3d at 739.

[12] While the government might have technical procedures to identify a target's re-entry into the U.S, when the interception would constitute electronic surveillance, that re-entry will likely not be apparent immediately. [REDACTED]

Even if the government has sophisticated mechanisms and excellent intelligence on the location of the target, it is possible that numerous communications sent while in the United States could be intercepted before that intelligence confirms that the target has moved to a location where the PAA no longer authorizes surveillance.

all of them, taken as a whole demonstrate that PAA-authorized surveillance is the type of discretionary search the Supreme Court has rejected. *Berger v. New York*, 388 U.S. 41, 59 (1967) (A statute authorizing electronic eavesdropping is unreasonable if it "requires the naming of 'the person or persons whose communications, conversations or discussions are to be overheard or recorded" but at the same time "does no more than identify the person whose constitutionally protected area is to be invaded rather than 'particularly describing' the communications, conversations, or discussions to be seized," because that "leaves too much to the discretion of the officer executing the order.").

The Government's attempt to eliminate prior judicial review entirely as a factor to be considered is without merit. Its argument misreads *Griffin v. Wisconsin*, to hold that any prior judicial review must be based solely on a probable cause standard.[13] Instead, *Griffin* suggests that probable cause review is only necessary if "a search warrant [is] constitutionally required ...." 483 U.S. at 878 (quoting *Frank v. Maryland*, 359 U.S. 360, 373 (1959)). *Griffin* thus leaves open the question whether a court may conduct prior judicial review under a lower standard where an exception applies. In *O'Connor v. Ortega*, the Supreme Court

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[13] Similarly, footnote 16 of the Government's brief is wrong. This Court, in *In re Sealed Case*, focused on the importance of prior judicial review even in circumstances where a warrant was not held to be required.

addressed that issue, holding that "'[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.'" 480 U.S. at 722-23 (quoting *New Jersey v. T.L.O.*, 469 U.S. at 341). Thus, prior judicial review can be invoked to provide protection for U.S. persons even if a different standard of reasonableness is used.

While the lack of any one factor taken by itself–particularity, lack of judicial review, and necessity–might be acceptable, the combination of the three is fatal because of the excessive discretion afforded to the government. As this Court recognized in *In re Sealed Case*, the limited particularity required by FISA, which is still more stringent than under the PAA, was bolstered by the availability of prior judicial review. 310 F.3d at 739. Thus, when examined in light of the Warrant Clause and this Court's analysis in *In re Sealed Case* the PAA-authorized surveillance violates the Fourth Amendment because without prior judicial review, particularity or necessity, it leaves too much discretion to the Executive Branch.

II. A Broad Foreign Intelligence Exception is Inconsistent with Special Needs Caselaw.

If there is a foreign intelligence exception to the Warrant Clause, it cannot be justified by existing special needs case law. The Government argues that the special needs doctrine is applicable because "the Government's 'programmatic

purpose' in obtaining foreign intelligence information is 'to protect the nation against terrorists and espionage threats directed by foreign powers'—a 'special need' that is fundamentally different from crime control.'" Appellee's Resp. 24-25. But even setting aside the question of whether a "significant purpose" test is sufficient to invoke the special needs doctrine,[14] that doctrine cannot support the broad, lengthy, intrusive surveillance conducted (without notice to the target) by the PAA. Although the surveillance at issue may be for a reason other than traditional crime control, its breadth and intrusiveness places it well beyond any type of search traditionally upheld in special needs cases.

The Government's reliance on *Cassidy v. Chertoff*, 471 F.3d 67, 82 (2d Cir. 2006) and *MacWade v. Kelly*, 460 F.3d 260, 271 (2d Cir. 2006) is misplaced. *Cassidy* and *MacWade* found that "the prevention of terrorist attacks" constitutes a special need, but did so for searches that are quite distinguishable from the surveillance at issue here. *MacWade* addressed searches at daily inspection checkpoints in New York subway facilities. *MacWade*, 460 F.3d at 264. At the checkpoints officers searched the bags of a portion of subway riders entering the station. All passengers received notice of the search, NYPD officers informed

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[14] *See* Appellants' Brief at 37-39 (arguing that the FISC erred in applying the foreign intelligence exception where foreign intelligence collection is not certified to be the primary purpose of the surveillance).

them that the searches were voluntary, and a person could avoid the search by choosing not to ride the subway. *Id.* at 264-65. Officers had virtually no discretion in whom to search, and the scope of the brief search was limited to bags large enough to carry explosives. *Id.* at 265.

Similarly, *Cassidy* involved searches of passengers on ferries. Passengers using ferries were given notice that they would be subject to "random screening of persons, cargo, vehicles, or carry-on baggage." 471 F.3d at 72. Under the program, "Foot and bicycle passengers [were] asked to open their carry-on items and present them for visual inspection. Car passengers [were] asked to open their trunks or tailgates so that the attendant may visually inspect the car's interior; attendants do not appear to search containers in either their trunks or interiors of vehicles. On occasion, attendants will ask the driver to open the car's windows to permit a visual scan of the interior." *Id.* at 73. As with the subway searches in *MacWade*, passengers could avoid search by choosing not to ride the ferries. *Id.*

Both of those programs involved a less significant privacy intrusion than the surveillance at issue here. As the Second Circuit stated in *Cassidy*, a court "must examine the screening at issue and determine whether searches ... are minimally or substantially intrusive." *Id.* at 79. In doing so, the *Cassidy* court considered the duration of the search, the manner in which the government determines which individuals to search, the notice given to individuals, and the opportunity to avoid

the search. *Id.*; *see also MacWade*, 460 F.3d at 273. The subway and ferry searches were short in duration, limited in scope, involved little discretion, and those searched had prior notice of the search and were aware of the search as it is being performed. *Cassidy* held that "[o]n the basis of these factors, it is clear that the searches in this case are, by any measure, minimally intrusive." *Id.* at 79; *see also MacWade*, 460 F.3d at 273.

Surveillance under the PAA, on the other hand, is substantially intrusive in a way that the searches in *MacWade* and *Cassidy* were not. The surveillance at issue here is of a long duration, lasting for up to one year, rather than "a matter of seconds" while boarding the subway or a ferry. *MacWade*, 460 F.3d at 273. It involves the government's seizure of an individual's most private communications.[15] The manner in which the government determines on whom to conduct surveillance is not random and provides for a great deal of discretion. [REDACTED]

[REDACTED] Finally, there is no notice to those subject to surveillance under the PAA, and unlike subway and ferry

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[15] The government has conceded that at least some of the communications at issue "implicate a reasonable expectation of privacy of at least some U.S. persons." Appellee's Resp. at 22, n.6.

riders, they have no opportunity to avoid the search. As such, neither *Cassidy* nor *MacWade* compels a finding of a special needs exception in this case, even though the interest behind the search, preventing terrorist attacks, is similar.

The other cases the Government cites in support of a special needs exception involve searches similar in character to those at issue in *Cassidy* and *MacWade*. Several involve drug testing of students or employees.[16] Appellee's Resp. Br. at 24 n.7; *Board of Educ. v. Earls*, 536 U.S. 822, 829-38 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 822, 829-38 (1995); *Nat'l Treas. Employee's Union v. Von Raab*, 489 U.S. 656, 679 (1989); *Skinner*, 489 U.S. at 620. As the Second Circuit observed in *Lifshitz*, "The unifying characteristics of permissible testing include a reduced expectation of privacy on the part of the testing subject, random or otherwise non-discretionary implementation of the testing program, narrowness of the scope of testing, and important governmental interest that testing effectively furthers." 369 F.3d at 183. The searches at issue in *City of Indianapolis v. Edmond*, 531 U.S. 32, 37-40, 48 (2001), *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), and *New Jersey v. T.L.O.*, 469 U.S. at 340 had similar qualities. Warrantless stops at roadblocks and searches in public schools are not surreptitious

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[16] This is not surprising as the drug testing context is where the special needs doctrine has been most thoroughly developed. *United States v. Lifshitz*, 369 F.3d 173, 183 (2d Cir. 2004).

and are of limited scope and duration, much like the drug testing cases. PAA-authorized surveillance is broader, more intrusive, of longer scope, and is done surreptitiously with no notice of the surveillance. Thus these cases do not support applying a special needs exception to the warrant requirement.

Furthermore, the Government's claim that a special needs exception is necessary because a FISA order is impracticable is strained. The Government has not explained how using FISA's procedure would be impractical when it allows for 72 hours of warrantless surveillance prior to approval—a period designed to be sufficient to satisfy the immediate need for surveillance in the interest of national defense.[17] Furthermore, if the Government is, as it claims, implementing extensive (but entirely secret) procedures to make the determination that a facility is being used by a particular target, it presumably has files and records to support those determinations. Appellee's Resp. at 46-47. It is not clear why the Government cannot submit those determinations to the FISC for review while emergency surveillance is ongoing. Fourth Amendment rights are "not mere second-class

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[17] The government's citation to *United States v. Truong Dinh Hung*, 629 F.2d 908, 913 (4th Cir. 1980) to support its need for "utmost stealth, speed and secrecy" is unpersuasive because it proves too much. Appellee's Resp. at 25. Under the reasoning of *Truong*, the procedural hurdles of FISA itself would place a "disabling burden" on the government's ability to conduct foreign intelligence wiretaps directed at U.S. persons in the U.S.

rights but belong in the catalog of indispensable freedoms." *Brinegar v. United* States, 338 U.S. 160, 180 (1949) (Jackson, J. dissenting). The added burden and cost of, perhaps, additional staff to process these applications is simply not enough to ignore Fourth Amendment rights.[18]

III. Yahoo! Has Standing to Assert the Fourth Amendment as a Defense to a Motion to Compel

A. Yahoo! Has Article III Standing

The FISC was correct in finding that Yahoo! has Article III standing to challenge the constitutionality under the Fourth Amendment of a directive issued to it. In order to establish Article III standing, a party need only establish a "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Yahoo! satisfies these elements of (a) direct injury, (b) traceability, and (c) redressability. First, Yahoo! has been injured because it is being compelled—under threat of contempt—to devote substantial time and effort, including by redirecting engineering resources away from business operations, to comply with

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[18] While the government is correct in that the FISC would receive more requests for surveillance if judicial review were required, this number would still be less than the number of warrant requests a typical federal district court receives in a year. For instance, in 2004, the Federal District Courts issued over 90,000 *arrest* warrants alone. Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2004 at 21 (*available at* www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0401.pdf)

the government's demands.[19] Second, this injury is directly traceable to the Government's issuance of the directives with which Yahoo has been compelled to comply. Finally, the FISC has the power to set aside, modify, or decline to enforce such a directive, motion to compel, or motion for contempt. *See Craig v. Boren*, 429 U.S. 190, 194 (1976) (holding that a business which was required to either follow a statute and suffer economic injury or disobey the statute and suffer sanctions had established "the threshold requirements of a 'case or controversy' mandated by Art. III").[20]

Recognizing that Article III standing was not at issue here, the FISC correctly held that a defendant may raise the Fourth Amendment rights of others defensively, J.A. 161-62. *See also Warth v. Seldin*, 422 U.S. 490, 500 n. 12 (1975) (a litigant's attempt to assert the rights of third parties defensively, as a bar to judgment against him, does not raise any Article III standing problem). The Government's continued reliance on *Alderman v. United States*, 394 U.S. 165,

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[19] In addition to these harms, the disclosure of private communications of its users directly threatens Yahoo!'s business interests and ability to maintain its user base, in a manner previously found to be significant. *See, e.g., Gonzales v. Google, Inc.*, 234 F.R.D. 674, 683-84 (N.D. Cal. 2006) (loss of user trust resulting from forced disclosure of user communications to DOJ was a potential burden on Google).

[20] In *Boren*, the legal duties created by the challenged statute were addressed directly to the vendors, just as the obligation to participate in the surveillance covered by the PAA and the directives is addressed to providers. *See* 429 U.S. at 194.

171-72 (1969) is entirely misplaced. The *Alderman* doctrine is not rooted in traditional concepts of standing but is a description of the contours of the Fourth Amendment's exclusionary rule, namely, "whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant *who seeks to exclude the evidence obtained during it.*" *Rakas v. Illinois*, 439 U.S. 128, 140 (1978) (emphasis supplied).[21] In other words, the doctrine concerns the limits of the exclusionary rule, not any constitutional standing requirements.[22]

B. There Are No Prudential Limitations on Standing That Preclude This Court From Hearing This Case.

The FISC correctly held that prudential limitations on standing do not prevent a provider from raising the Fourth Amendment rights of its customers in this context.[23] This was correct for two reasons: (1) even in the absence of

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[21] As the Supreme Court recognized in *Rakas*, the term "standing" in that context is a misnomer. *Id. at 140* ("the analysis belongs more properly under the heading of substantive Fourth Amendment doctrine than under the heading of standing").

[22] *See Heartland Acad. Cmty. Church v. Waddle*, 427 F.3d 525, 532 (8th Cir. 2005) (concluding that *Alderman*'s statement that Fourth Amendment rights may not be vicariously asserted applies only in the context of the exclusionary rule.). In *Heartland,* the court noted the limited applicability of *Alderman* and found that a school had associational standing to litigate the Fourth Amendment rights of its students in a civil context.

[23] The Government has not cross-appealed the aspect of the decision dealing with prudential standing. There is a circuit split over whether prudential standing issues may be waived. *See Pharm. Res. & Mfrs. of Am. v. Concannon*, 249 F.3d 66 (1st Cir. 2001) (collecting cases). If this Court follows the rule that prudential

Congressional action prudential limitations on standing would be inappropriate here; and (2) Congress specifically gave providers a right to challenge whether a directive was "otherwise lawful," without placing any limitations on the nature and substance of the challenge.

As to the first issue, the Supreme Court has recognized that such prudential limitations are often inappropriate, particularly where the rights of the third parties in question might not otherwise be vindicated. *See, e.g.*, *Barrows v. Jackson*, 346 U.S. 249, 257 (1953) (allowing white respondent to challenge racially restrictive covenant);[24] *Griswold v. Connecticut*, 381 U.S 479, 481 (1965) (allowing doctor to assert privacy rights of patients in defending against criminal prosecution). In *Craig v. Boren*, the Supreme Court allowed a seller of alcohol to assert the Equal

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limitations may be waived, the Government may not advance prudential standing arguments on appeal because it has not filed a cross-appeal. "Without a cross-appeal, an appellee may 'urge in support of a decree any matter appearing in the record,'" but may not "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary." *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924); *see also Becker v. Poling Transp. Corp.*, 356 F.3d 381 (2d Cir. 2004) (in absence of cross-appeal, court may affirm on alternative grounds but may not enlarge judgment). If the Government is successful on its prudential standing argument, Yahoo!'s rights will be lessened and the Government's enlarged because rather than merely affirming the district court's decision holding the directives lawful, Yahoo! also loses the right to challenge directives on Fourth Amendment grounds.

[24] In *Barrows*, as here, a respondent in a civil case was raising the constitutional concerns of third parties.

Protection rights of its customers in challenging a state statute regulating the sale of beer. The Court noted that "vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." *Boren*, 429 U.S. at 195. That is precisely the situation here. A provider challenging a directive asserts the rights of its customers in a situation where it is unlikely—or impossible—that its customers will be able to assert that right on their own behalf.[25]

As to the second issue, Congress made an express grant of the right to challenge a directive to providers who receive one. When faced with such a challenge, the Congress instructed the FISC to grant such a petition if it "finds that the directive does not meet the requirements of the section or *is otherwise unlawful.*" 50 USC § 1805(b)(h)(2) (emphasis added). Similarly, when faced with a motion to compel brought by the government, the FISC must issue an order requiring the person to comply if "it finds that the directive was issued in accordance with subsection (2) and is *otherwise lawful.*" 50 U.S.C. § 1805b(g)

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[25] Only a provider has the right to challenge a directive under the PAA. Individuals subject to surveillance can only bring a challenge in the unlikely event that the fruits of the foreign intelligence surveillance are used against them in a criminal case in the U.S.

(emphasis added). Both tests require the court to consider whether the directives violate the Fourth Amendment rights of any person, regardless of whose Fourth Amendment rights are violated, whether or not the provider raises the issue directly. That is, the express language of the statute requires the FISC to consider the lawfulness of the directive, even had Yahoo! not directly raised the Fourth Amendment issue at all.[26]

The Government's argument that the FISC erred by construing "is otherwise lawful" to include consideration of Fourth Amendment issues is without merit. Prudential standing doctrines can clearly be preempted by Congressional enactment. "Where, however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff." *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972). Although "Congress legislates against the background of . . . [the] prudential standing doctrine," *Bennett v. Spear*, 520 U.S. 154, 163 (1997), when it

[26] The FISC recognized correctly that in the "context of a statute that authorizes the government to acquire the contents of communications to and from United States persons, without their knowledge and consent, the protections provided by the Fourth Amendment are critically important." J.A. at 163.

specifically grants the right to challenge an action, it overrides that backdrop. For example, in *Bennett* itself, the Court found that by passing language allowing that "any person may file a civil suit," Congress created "an authorization of remarkable breadth." *Id.* at 164.

Here, by explicitly directing the court to determine the lawfulness of a directive when challenged, Congress demonstrated its intent that the FISC review directives for <u>any</u> legal infirmities, not just those legal infirmities for which a provider could bring its own damages action. For example, if the directive required the provider to intercept communications only from African-American users, disabled users, and users over the age of 40, that directive would not be "otherwise lawful," even if the provider itself could not demonstrate that it was within any of the protected classes. Moreover, it was quite clear that Fourth Amendment rights were the main concerns being discussed by Congress when it enacted the PAA.[27] Accordingly, any suggestion that the mandatory review for

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[27] *See* Statement of Representative Tierney, 153 Cong. Rec. H. 9955 (2007) (expressing concern that PAA would do "violence to the Fourth Amendment and violence to our civil liberties"); Statement of Representative Hirono, *Id.* at 9964 (expressing concern that the PAA "codifies violating the Fourth Amendment"); Statement of Senator Feingold, 153 Cong. Rec. S. 10866 (2007) (expressing concern with "giving free rein to the Government to wiretap anyone, including U.S. citizens who lives overseas"); Statement of Senator Leahy, *Id.* at 10867 ("It is also essential to preserve the critical role of the FISA Court in protecting the civil liberties of Americans.").

"lawfulness" Congress provided in the PAA was meant to *exclude* Fourth Amendment issues is untenable. Thus, any prudential limitations that would otherwise limit the scope of the court's review have been overridden by statute.[28] *See Warth*, 422 U.S. at 501 ("persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others"); *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) ("Congress' decision to grant a particular plaintiff the right to challenge an Act's constitutionality . . . eliminates any prudential standing limitations").

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[28] *Ellwest Stereo Theatres, Inc. v. Wenner*, 681 F.2d 1243 (9th Cir. 1982) does not compel a contrary conclusion. In *dicta*, the court in *Wenner* suggested that an adult-theatre owner could not assert his patron's theoretical Fourth Amendment rights. *Id.* at 1248. That case is distinguishable in that (a) the Ninth Circuit based its holding primarily on the prematurity of the claim, and (b) the Ninth Circuit was not considering a statute explicitly providing a right to challenge the ordinance in question. *Id.* at 1248. Similarly, in *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974), the Court's one-sentence observation that the banks in the case might not be able to vicariously assert their customer's Fourth Amendment claims was entirely *dicta,* as it was offered with no analysis, and there had been no assertion of such rights by the banks. *Id.* at 69.

CONCLUSION

For the foregoing reasons, Yahoo! requests that this Court reverse the FISC's judgment and find that the surveillance authorized by the directives is not "otherwise lawful" and grant such other relief as the Court deems appropriate.

Respectfully submitted,

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Surveillance Court of Review

CERTIFICATE OF SERVICE

I hereby certify that on this 9th Day of June 2008, I provided four true and correct copies of **Yahoo! Inc.'s Reply Brief** to [redacted] an Alternate Court Security Officer, who has informed me that he will deliver four copies of the Reply Brief to the Court for filing, and a copy to the:

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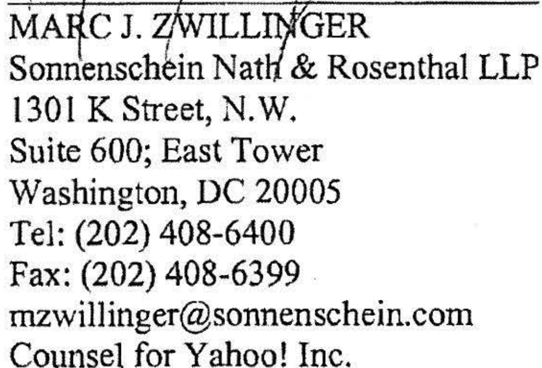

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