No. 11-1025

In the Supreme Court of the United States

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

v.

AMNESTY INTERNATIONAL USA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

STUART F. DELERY
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

ANTHONY A. YANG
Assistant to the Solicitor General

DOUGLAS N. LETTER
THOMAS M. BONDY
DANIEL J. LENERZ
HENRY C. WHITAKER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

ROBERT S. LITT
General Counsel

TRICIA S. WELLMAN
Deputy General Counsel

BRADLEY A. BROOKER
Associate General Counsel
Office of the Director of National Intelligence
Washington, D.C. 20511

RAJESH DE
General Counsel

ARIANE E. CERLENKO
Associate General Counsel
National Security Agency
Ft. Meade, Md. 20755

QUESTION PRESENTED

Section 702 of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1881a (Supp. II 2008)—referred to here as Section 1881a—allows the Attorney General and Director of National Intelligence to authorize jointly the "targeting of [non-United States] persons reasonably believed to be located outside the United States" to acquire "foreign intelligence information," normally with the Foreign Intelligence Surveillance Court's prior approval of targeting and other procedures. 50 U.S.C. 1881a(a), (b), (g)(2) and (i)(3); cf. 50 U.S.C. 1881a(c)(2). Respondents are United States persons who may not be targeted for surveillance under Section 1881a. Respondents filed this action on the day that Section 1881a was enacted, seeking both a declaration that Section 1881a is unconstitutional and an injunction permanently enjoining any foreign-intelligence surveillance from being conducted under Section 1881a. The question presented is:

Whether respondents lack Article III standing to seek prospective relief because they proffered no evidence that the United States would imminently acquire their international communications using Section 1881a-authorized surveillance and did not show that an injunction prohibiting Section 1881a-authorized surveillance would likely redress their purported injuries.

PARTIES TO THE PROCEEDING

Petitioners are James R. Clapper, Jr., in his official capacity as Director of National Intelligence; General Keith B. Alexander, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service; and Eric H. Holder, Jr., in his official capacity as Attorney General of the United States.

Respondents are 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.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-61a) is reported at 638 F.3d 118. The order of the court of appeals denying rehearing en banc (Pet. App. 114a-115a), and opinions regarding the denial of rehearing (Pet. App. 116a-196a), are reported at 667 F.3d 163. The opinion of the district court (Pet. App. 62a-113a) is reported at 646 F. Supp. 2d 633.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 2011. A petition for rehearing was denied on September 21, 2011 (Pet. App. 114a-115a). On December 9, 2011, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and in-

cluding January 19, 2012. On January 10, 2012, Justice Ginsburg further extended the time to February 18, 2012, and the petition was filed on February 17, 2012. The petition for a writ of certiorari was granted on May 21, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, 92 Stat. 1783 (50 U.S.C. 1801 *et seq.* (2006 & Supp. II 2008)), are set out in the appendix to the petition (Pet. App. 415a-468a).[1]

STATEMENT

1. Congress enacted FISA in 1978 to regulate, *inter alia*, the government's use of certain types of communications surveillance for foreign-intelligence purposes. In doing so, Congress limited the definition of the "electronic surveillance" governed by FISA to four discrete types of domestically focused foreign-intelligence activities. See 50 U.S.C. 1801(f). Specifically, Congress defined "electronic surveillance" in FISA to mean (1) the acquisition of the contents of a wire or radio communication obtained by "intentionally targeting" a "particular, known United States person who is in the United States" in certain circumstances; (2) the acquisition of the contents of a wire communication to or from a "person in the United States" when the "acquisition occurs in the United States"; (3) the intentional acquisition of the contents of certain radio communications when "the

[1] All citations to FISA in this brief are to the 2006 edition of the United States Code as supplemented, where relevant, by the Code's 2008 Supplement.

sender and all intended recipients are located within the United States"; and (4) the installation or use of a surveillance device "in the United States" for monitoring or to acquire information other than from a wire or radio communication in certain circumstances. *Ibid.*; cf. 50 U.S.C. 1801(i) (defining "United States person").

Before the United States may conduct such "electronic surveillance" to obtain foreign-intelligence information, FISA generally requires the government to obtain an order from a judge on the Foreign Intelligence Surveillance Court (FISC). 50 U.S.C. 1805, 1809(a)(1); see 50 U.S.C. 1803(a), 1804(a). To obtain such an order, the government must establish, *inter alia*, probable cause to believe that the "target of the electronic surveillance" is a foreign power or an agent thereof and that "each of the facilities or places" at which the surveillance is directed (inside or outside the United States) is being used, or is about to be used, by a foreign power or its agent. 50 U.S.C. 1805(a)(2). The government must also establish that the "minimization procedures" that it will employ are reasonably designed to minimize the acquisition and retention, and prohibit the dissemination, of nonpublic information concerning "United States persons," consistent with the government's need to obtain, produce, and disseminate foreign-intelligence information. 50 U.S.C. 1801(h), 1805(a)(3) and (c)(2)(A).[2]

Because of FISA's definition of "electronic surveillance," FISA as originally enacted did not apply to the vast majority of surveillance the government conducted

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[2] Congress has separately authorized other types of domestic surveillance activities. For example, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, regulates the interception of wire, oral, or electronic communications for law-enforcement purposes.

outside the United States, even if that surveillance might specifically target United States citizens abroad or incidentally acquire (while targeting third parties abroad) communications to or from citizens in the United States. See S. Rep. No. 701, 95th Cong., 2d Sess. 7 & n.2, 34-35 & n.16 (1978). Instead, Executive Order No. 12,333, as amended, addresses the government's "human and technical collection techniques * * * undertaken abroad." Exec. Order No. 12,333, § 2.2, 3 C.F.R. 210 (1981 Comp.), reprinted as amended in 50 U.S.C. 401 note (Supp. II 2008). That Executive Order governs the intelligence community, *inter alia*, in collecting "foreign intelligence and counterintelligence" abroad, collecting "signals intelligence information and data" abroad, and utilizing intelligence relationships with "intelligence or security services of foreign governments" that independently collect intelligence information. *Id.* §§ 1.3(b)(4), 1.7(a)(1), (5) and (c)(1).[3]

2. This case involves a constitutional challenge to Section 702 of FISA, 50 U.S.C. 1881a, which was enacted in 2008 as part of the FISA Amendments Act of 2008 (FAA), Pub. L. No. 110-261, sec. 101(a)(2), § 702, 122 Stat. 2438. That provision—referred to here as Section 1881a—establishes new, supplemental procedures for authorizing certain types of surveillance targeting non-United States persons located outside the United States when the acquisition involves obtaining foreign-

[3] Congress has separately authorized certain intelligence activities abroad for purposes other than for obtaining foreign intelligence. The intelligence community has statutory authority to "collect information outside the United States about individuals who are not United States persons" for "purposes of a law enforcement investigation," when requested by a United States law-enforcement agency. 50 U.S.C. 403-5a(a).

intelligence information from or with the assistance of an electronic communication service provider.[4]

Section 1881a provides that, "upon the issuance" of an order from the FISC, the Attorney General and Director of National Intelligence may jointly authorize the "targeting of persons reasonably believed to be located outside the United States" for a period of up to one year to acquire "foreign intelligence information." 50 U.S.C. 1881a(a).[5] Section 1881a specifies that the authorized acquisition may not intentionally "target a United States person"—whether that person is known to be in the United States or is reasonably believed to be outside the United States, 50 U.S.C. 1881a(b)(1) and (3)—and may not target a person outside the United States "if the

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[4] The FAA enacted other amendments to FISA, including provisions not at issue in this case that govern the targeting of United States persons abroad. See 50 U.S.C. 1881b, 1881c. Section 1881c provides new privacy protections for United States persons abroad by generally requiring the government to obtain an order from the FISC and to follow minimization procedures when intentionally targeting such a person for foreign-intelligence information, if the person has a reasonable expectation of privacy and a court warrant would be required if the acquisition were conducted inside the United States for law-enforcement purposes. 50 U.S.C. 1881c(a)(2) and (c). Other procedures apply when the acquisition constitutes electronic surveillance or the acquisition of stored electronic communications or data that requires a FISA order and the acquisition is conducted within the United States. 50 U.S.C. 1881b(a)(1) and (c).

[5] The Attorney General and Director may authorize targeting to commence under Section 1881a before the FISC issues its order if they determine that certain "exigent circumstances" exist. 50 U.S.C. 1881a(a) and (c)(2). If that determination is made, the Attorney General and Director must, as soon as practicable (and within seven days), submit for FISC review their Section 1881a certification, including the targeting and minimization procedures used in the acquisition. 50 U.S.C. 1881a(g)(1)(B); see 50 U.S.C. 1881a(d), (e) and (g)(2)(B).

purpose * * * is to target a particular, known person reasonably believed to be in the United States," 50 U.S.C. 1881a(b)(2). Section 1881a further requires that the acquisition be "conducted in a manner consistent with the [F]ourth [A]mendment." 50 U.S.C. 1881a(b)(5).

Section 1881a does not require an individualized court order addressing each non-United States person to be targeted under its provisions. Section 1881a instead permits the FISC to approve certifications by the Attorney General and Director of National Intelligence that identify categories of foreign intelligence targets. Specifically, Section 1881a requires the government to obtain the FISC's approval of (1) the government's certification regarding the proposed surveillance, and (2) the targeting and minimization procedures to be used in the acquisition. 50 U.S.C. 1881a(a), (c)(1) and (i)(2) and (3); see 50 U.S.C. 1881a(d), (e) and (g)(2)(B). The certification must be made by the Attorney General and Director of National Intelligence and must attest that, *inter alia*, (1) the acquisition does not violate the Fourth Amendment and complies with the aforementioned limitations prohibiting the targeting of United States persons; (2) the acquisition involves obtaining "foreign intelligence information from or with the assistance of an electronic communication service provider"; (3) the targeting procedures in place are reasonably designed to ensure that any acquisition targets only persons reasonably believed to be outside the United States; and (4) the minimization procedures appropriately restrict the acquisition, retention, and dissemination of nonpublic information about United States persons. 50 U.S.C. 1881a(g)(2)(A)(i), (ii), (vi) and (vii); see 50 U.S.C. 1801(h), 1881a(b); cf. 50 U.S.C. 1801(e), 1881(a) (defining "foreign intelligence information").

The FISC must review the certification, targeting and minimization procedures, and any amendments thereto. 50 U.S.C. 1881a(i)(1) and (2). If the FISC determines that the certification contains all the required elements and that the procedures are "consistent with" the Act and "the [F]ourth [A]mendment," the FISC will issue an order approving the certification and the use of the targeting and minimization procedures. 50 U.S.C. 1881a(i)(3)(A).

Section 1881a addresses the possibility that surveillance targeting non-United States persons abroad, to whom the Fourth Amendment does not apply, see *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), might incidentally acquire the communications of certain United States persons who communicate with the foreign surveillance targets. Specifically, the government may conduct Section 1881a-authorized surveillance only in accordance with specific targeting and minimization procedures that are subject to judicial review by the FISC. 50 U.S.C. 1881a(c)(1)(A), (d), (e) and (i)(3)(A). Not only must the targeting procedures be reasonably designed to restrict acquisitions to the targeting of persons reasonably believed to be abroad and applied using compliance guidelines to ensure that the acquisition does not intentionally target a United States person, 50 U.S.C. 1881a(b), (d)(1) and (f)(1)(A), the minimization procedures must be reasonably designed to minimize any "acquisition" of nonpublicly available information about unconsenting United States persons, and to minimize the "retention" and prohibit the dissemination of any such information that might still be acquired, consistent with the need to obtain, produce, and disseminate foreign-intelligence information, 50 U.S.C. 1801(h)(1), 1821(4)(A); see 50 U.S.C. 1881a(e)(1). The FISC, in

turn, must review the targeting and minimization procedures to ensure that they satisfy the statutory criteria and are consistent with the Fourth Amendment. 50 U.S.C. 1881a(i)(2)(B), (C) and (3)(A).

Section 1881a further requires that the Attorney General and Director of National Intelligence periodically assess the government's compliance with both the targeting and minimization procedures and with relevant compliance guidelines, and that they submit those assessments both to the FISC and to congressional oversight committees. 50 U.S.C. 1881a(*l*). The Attorney General must also keep the relevant oversight committees "fully inform[ed]" concerning the implementation of Section 1881a. 50 U.S.C. 1881f(a) and (b)(1).

If the government intends to use or disclose any information obtained or derived from its acquisition of a person's communications under Section 1881a in judicial or administrative proceedings against that person, it must provide advance notice of its intent to the tribunal and the person, whether or not the person was targeted for surveillance under Section 1881a. 50 U.S.C. 1881e(a); see 50 U.S.C. 1801(k), 1806(c). That person may then challenge the use of that information in district court by challenging the lawfulness of the Section 1881a acquisition. 50 U.S.C. 1806(e) and (f), 1881e(a). Separately, any electronic service provider the government directs to assist in Section 1881a surveillance may challenge the lawfulness of that directive in the FISC. 50 U.S.C. 1881a(h)(4) and (6); cf. Pet. App. 144a-145a.[6]

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[6] Cf. also, *e.g.*, *In re Directives*, 551 F.3d 1004 (FISC Rev. 2008) (adjudicating Fourth Amendment challenge brought by electronic service provider to directive issued under Section 1881a's predecessor provisions in the Protect America Act of 2007, Pub. L. No. 110-55, secs. 2-3, §§ 105A-105C, 121 Stat. 552-555 (50 U.S.C. 1805a-1805c (Supp. I 2007)

3. On the day Section 1881a was enacted (July 10, 2008), respondents—four individual attorneys and nine organizations in the United States—filed this action challenging the provision's constitutionality. Pet. App. 197a, 200a-203a, 240a-241a. Respondents seek a declaration that Section 1881a is facially unconstitutional and an injunction permanently enjoining the government from "conducting surveillance pursuant to the authority granted by section [1881a]." *Id.* at 241a.[7]

At summary judgment, three attorney respondents and three organizational respondents submitted evidence supporting their assertion of Article III standing.[8] Respondents do not claim that they will, or ever could be, targeted for surveillance under Section 1881a. They instead assert that they "reasonably believe" that their communications will be incidentally acquired under Sec-

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(repealed 2008)); *United States* v. *Duggan*, 743 F.2d 59 (2d Cir. 1984) (addressing constitutional challenge to FISA by individual against whom evidence collected under FISA was introduced).

[7] Title VII of FISA, which includes Section 1881a, is scheduled to sunset on December 31, 2012. See FAA § 403(b)(1), 122 Stat. 2474. The extension of Title VII's authority is the "top legislative priority" of the intelligence community. See Letter from Director of National Intelligence James R. Clapper to Speaker John Boehner et al. 1 (Mar. 26, 2012), http://www.dni.gov/electronic_reading_room/dni%20letter%20with%20fisa%20amendments.pdf.

[8] See Pet. App. 349a-353a (respondent Sylvia Royce's declaration); *id.* at 368a-375a (respondent Scott McKay's declaration for himself and respondent David Nevin); *id.* at 334a-339a, 363a-367a (Naomi Klein's and Christopher Hedges's declarations for respondent Nation Magazine); *id.* at 340a-347a (Joanne Marnier's declaration for respondent Human Rights Watch); *id.* at 354a-362a (John Walsh's declaration for respondent Washington Office on Latin America). The seven other respondents submitted no evidence to support their asserted standing. Gov't C.A. Br. 19 n.7.

tion 1881a, because they communicate with people abroad whom they believe the "U.S. government is likely to target" for surveillance under Section 1881a. Pet. App. 214a; see *id.* at 337a, 343a-344a, 350a-352a, 356a-357a, 366a, 370a-371a. Respondents state that their work requires them to engage in telephone and email communications with non-United States persons located outside the United States who, respondents contend, are alleged to be associated with terrorists or terrorist organizations; are foreign government officials; are political activists opposing governments supported by the United States; or are located in geographic areas that are a special focus of the government's counterterrorism or diplomatic efforts. *Ibid.*; *id.* at 214a. Respondents believe that some of the information they exchange with those individuals involves "foreign intelligence information" as defined by 50 U.S.C. 1801(e) and 1881(a). Pet. App. 215a. Based on their asserted fear that their communications may be incidentally intercepted by Section 1881a surveillance targeting others abroad, respondents contend that they "will have to take burdensome and costly measures to minimize the chance" of such an interception by, for instance, "travel[ing] long distances to collect information that could otherwise have been gathered by telephone or email." *Ibid.*; see *id.* at 338a, 345a, 352a, 367a, 372a-373a.

4. The district court dismissed respondents' claims at summary judgment for want of Article III standing. Pet. App. 62a-113a.

The district court first determined that respondents' "abstract fear that their communications will be monitored under the FAA" in the future (Pet. App. 84a-85a) does not constitute an Article III injury in fact. *Id.* at 82a-100a. The court explained that courts of appeals

had previously rejected similar standing assertions based on plaintiffs' "fear of surveillance," and that respondents' "alleged injury * * * [was] even more speculative" than those previously held insufficient. *Id.* at 86a-87a, 100a. Section 1881a, the court explained, "does not authorize the surveillance of [respondents'] communications" because Section 1881a-authorized surveillance cannot "target [respondents]." *Id.* at 85a. The court further observed that respondents "make no claim that their communications have yet been monitored" and "make no allegation or showing that the surveillance of their communications has been authorized or that the Government has sought approval for such surveillance." *Id.* at 63a. Whether the government would ultimately seek a Section 1881a "order * * * that affects [respondents'] rights" and "whether such [a request] would be granted by the FISC," the court concluded, was "completely speculative." *Id.* at 85a; see *id.* at 96a-97a.

The district court likewise held that respondents could not establish Article III standing based on the cost of measures they purportedly take to protect the confidentiality of their communications. Pet. App. 100a-112a. The court explained that this second, cost-based theory was not a "truly independent" one, because "the costs incurred by [respondents] flow directly from [their] fear of surveillance." *Id.* at 101a. Respondents, the court held, "cannot manufacture a sufficient basis for standing from an insufficient one" by electing to expend their own funds or alter their actions. *Ibid.*

5. A panel of the court of appeals reversed. Pet. App. 1a-61a. The court held that respondents established Article III standing based on (1) their fear that the government would cause them a "future injury" by intercepting their communications under Section 1881a,

and (2) their claim that their own "expenditure of funds" is a "present injury" caused by Section 1881a, *id.* at 25a-27a. See *id.* at 25a-50a.

a. Taking the second theory first, the court of appeals concluded that respondents' "expenditure of funds" qualified as "the most mundane [type] of injuries in fact." Pet. App. 26a. In the court's view, those injuries were "caused by the challenged statute" because "it was not unreasonable for [respondents] to incur costs out of fear that the government will intercept their communications under [Section 1881a]." *Id.* at 27a. The court stated that a "plaintiff's self-inflicted injury" will not be fairly traceable to a statute if it results from an unreasonable decision by the plaintiff; but the court reasoned that, in this case, respondents' asserted injuries were caused by Section 1881a because their "fear of the FAA" was not "fanciful, paranoid, or otherwise unreasonable" and because, in the court's view, the "possibility of interception is [not] remote or fanciful." *Id.* at 27a-28a; see *id.* at 31a-36a. The court recognized that Section 1881a does not authorize surveillance "target-[ing] [respondents] themselves," but it concluded that that fact did not alter the analysis (*id.* at 41a), because it determined that a plaintiff can establish Article III "standing to challenge a statute that does not regulate him if he can show that the statute reasonably caused him to alter or cease certain conduct," *id.* at 46a. See *id.* at 41a-46a.

In this case, the court found it "significant that the injury that [respondents] fear results from conduct that is authorized by statute." Pet. App. 36a. "[T]he fact that the government has authorized the potentially harmful conduct" by enacting Section 1881a, the court reasoned, "means that [respondents] can reasonably as-

sume that government officials will actually engage in that conduct by carrying out the authorized surveillance." *Id.* at 36a-37a. Although the court identified no evidence of the government's actual surveillance activities under Section 1881a (or other legal authority), the court deemed it "extremely likely" that the government would "undertake broad-based surveillance" under the authority of Section 1881a and concluded that respondents had "good reason to believe that their communications" would be intercepted because the government did not dispute respondents' speculation that they communicate with "likely targets of FAA surveillance." *Id.* at 37a. The court rested its conclusion on what it labeled a "reasonable interpretation of [Section 1881a] and a realistic understanding of the world," opining that it was "reasonable to expect that the government will seek surveillance authorization under [Section 1881a]" and that it was "fanciful to suggest" that the government would "more than rarely fail" to convince the FISC to issue an order authorizing such surveillance. *Id.* at 38a-40a. Given that possibility of future surveillance, the court found it "reasonable for [respondents] to take measures to avoid being overheard." *Id.* at 47a-49a.

b. The court of appeals likewise held that respondents could establish Article III standing under their "future-injury theory." Pet. App. 29a. The court stated that "probabilistic [future] injuries constitute injuries in fact only when they reach a certain threshold of likelihood." *Id.* at 26a (citing *City of L.A.* v. *Lyons*, 461 U.S. 95, 107 n.8 (1983)). The court then concluded that the prospect that the government would intercept respondents' communications using FISC-approved surveillance targeting others under Section 1881a was "sufficiently likely to confer standing" because, in its view, the

test for "basing standing on the risk of future harm" simply requires "an objectively reasonable likelihood" of such harm. *Id.* at 29a. For the reasons discussed above, the court concluded that "[Section 1881a] creates an objectively reasonable likelihood that [respondents'] communications are being or will be monitored under the FAA." *Ibid.*

c. The court of appeals found this Court's standing analysis in *Laird* v. *Tatum*, 408 U.S. 1 (1972), to be inapplicable. Pet. App. 50a-60a. Although the court noted that *Laird* held that the plaintiffs had failed to establish Article III standing to "challenge[] a surveillance program" based on their claim that the program's "chilling effect" caused them to cease expressive activities, the court of appeals concluded that respondents had established "specific and concrete injuries" different than those in *Laird*. *Id.* at 50a-54a. The court acknowledged that the D.C. Circuit has read *Laird* as requiring that a plaintiff prove "some concrete harm (past or immediately threatened) *apart from* the 'chill' itself," *id.* at 56a (quoting *United Presbyterian Church* v. *Reagan*, 738 F.2d 1375, 1378 (1984) (Scalia, J.)), and that the Sixth Circuit's decision in *ACLU* v. *NSA*, 493 F.3d 644 (2007), cert. denied, 552 U.S. 1179 (2008), was in accord. Pet. App. 56a & n.31, 59a. But the court of appeals stated that the "interpretations of *Laird*" adopted by those circuits—both of which read "*Laird* essentially the same way [as] the government"—were not "persuasive." *Id.* at 58a-59a.

d. Finally, the court of appeals held that respondents satisfied the redressability prong of the standing analysis. Pet. App. 41a n.24. It reasoned that judicial relief would likely redress respondents' claimed injury, because "[respondents'] injuries stem from their reason-

able fear of being monitored by FAA-authorized government surveillance," and the requested injunction would "prohibit[] the government from conducting surveillance under the FAA." *Ibid.*

6. The court of appeals denied the government's petition for en banc rehearing by an equally divided, six-to-six vote. Pet. App. 114a-115a. Judge Lynch, who authored the panel opinion, authored an opinion concurring in the denial of rehearing, which no other judge joined. *Id.* at 116a-133a. Four other judges authored dissenting opinions. *Id.* at 133a-175a (Raggi, J.), 175a-189a (Livingston, J.), 189a-196a (Jacobs, C.J.), 196a (Hall, J.).

a. Judge Raggi, who authored the principal dissent on behalf of five judges, concluded that the panel's "novel, relaxed standing standard" was "unprecedented," was "wholly at odds with Supreme Court precedent," and "create[d] a split" with the other circuits that have addressed "standing to challenge foreign intelligence surveillance programs." Pet. App. 133a, 135a. She explained that the panel erred in ruling that respondents' "professed *fear* of interception under the statute," and their related choice to "incur[] costs to conduct conversations in person," were "sufficient to support standing because the fear is not 'irrational.'" *Id.* at 133a; see *id.* at 136a.

Judge Raggi found that a central flaw in the panel's analysis was its "reasoning that, in lieu of injury inflicted by the government through actual or imminent FAA interception, [respondents] can establish standing through self-inflicted injury, specifically, costs incurred to meet with foreign contacts rather than risk feared FAA interception." Pet. App. 147a. That error, she explained, enabled the panel to determine that "the likeli-

hood of interception becomes relevant only to causation, *i.e.* were the incurred costs 'fairly traceable' to the FAA?" *Id.* at 147a-148a. Under the panel's reasoning, Judge Raggi observed, "for the price of a plane ticket, [respondents] can transform their standing burden from one requiring a showing of actual or imminent FAA interception to one requiring a showing that their subjective fear of such interception is not 'fanciful,' 'irrational,' or 'clearly unreasonable.'" *Id.* at 148a.

Judge Raggi concluded that the panel's holding conflicts with this Court's precedents, which require plaintiffs who base Article III standing on a "future" injury to show that that injury is "imminent," *i.e.*, "*certainly* impending." Pet. App. 146a-147a (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 564 n.2 (1992)). She explained that respondents' "subjective fear of FAA interception" is "plainly insufficient" to show a cognizable injury, and that respondents' related theory that they incurred costs to minimize the possibility of interception similarly reflected a type of "subjective chilling" insufficient under this Court's jurisprudence. *Id.* at 147a, 149a-151a. Judge Raggi also emphasized that the other courts of appeals that have confronted similar challenges to programs that, like Section 1881a, "authoriz[e], but [do] not direct[], intelligence surveillance" have "uniformly found that plaintiffs lacked standing precisely because they could not demonstrate actual or imminent interception." *Id.* at 162a; see *id.* at 161a-164a (discussing, *inter alia*, the D.C. and Sixth Circuits' decisions in *United Presbyterian Church* and *ACLU* v. *NSA*).

Finally, Judge Raggi concluded that respondents failed to demonstrate that their claimed injuries were redressable. Pet. App. 168a-173a. She noted that an

order "enjoining the FAA [would] merely eliminate one of several means for" monitoring the contacts who respondents believe "are 'likely' to be targeted for FAA surveillance." *Id.* at 169a. Even without the FAA, the United States could monitor such persons abroad with, for instance, "NSA surveillance programs" not covered by FISA or with surveillance under traditional FISA orders. *Id.* at 172a; see *id.* at 171a n.22. Judge Raggi also recognized what she termed the "real possibility" that "other countries" would target the same persons abroad given respondents' description of their contacts. *Id.* at 172a. Judge Raggi accordingly determined that respondents failed to show that their fear-related injuries likely would be redressed by enjoining only that subset of surveillance activities conducted under Section 1881a. *Id.* at 169a, 173a.

b. Judge Livingston's dissenting opinion for five judges (Pet. App. 175a-189a) described the panel's decision as a "truly unprecedented" and "startling" "transformation" of standing law involving "probabilistic harm," *id.* at 175a, 178a-179a. She noted that this Court has "said many times before" that allegations of "possible future injury do not satisfy the requirements of Art[icle] III," *id.* at 175a (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990)) (brackets in original), and recently held that a "*statistical probability* of future harm" is insufficient, *id.* at 176a (discussing *Summers* v. *Earth Island Inst.*, 555 U.S. 488 (2009)). She reasoned that the panel erred in failing to demand that respondents show an "actual or imminently threatened" injury, *ibid.*, and explained that the panel's contrary analysis mistakenly relied on decisions addressing materially different contexts, *id.* at 180a-187a. The panel's mistaken view that "an 'objectively reasonable' threat of

future surveillance [is] sufficient for Article III standing," Judge Livingston ultimately concluded, was a "truly dramatic and unjustified expansion" of standing law that was "contrary to the approaches taken in surveillance cases by our sister circuits" and "not in keeping with the limited role of the judiciary in our constitutional structure." *Id.* at 188a-189a.

SUMMARY OF ARGUMENT

The court of appeals has held that respondents—who cannot be targeted by surveillance conducted under Section 1881a and who have not established that communications involving them have been or ever will be incidentally collected by any Section 1881a-authorized surveillance targeting third parties abroad—have Article III standing to challenge Section 1881a's constitutionality. The court based its ruling on its view that respondents showed (1) a sufficiently threatened "future injury" with an "objectively reasonable likelihood" of being incidentally exposed to such surveillance targeting others, and (2) an ongoing, "present injury" by incurring costs and altering their conduct in an effort to minimize the possibility of the surveillance they fear. That unprecedented holding is inconsistent with this Court's decisions, which require proof of a non-conjectural and imminent—*i.e.*, "certainly impending"—injury in fact where the prospect of future injury is the asserted basis for standing, and reject as insufficient self-imposed injuries stemming from the asserted chilling effect of a plaintiff's fears concerning a defendant's future actions.

1. It is well settled that plaintiffs seeking to establish Article III standing on the basis of a "future" injury must demonstrate that the asserted injury is imminent and not conjectural. Respondents' belief that the gov-

ernment is likely in the future to acquire the content of communications involving them by targeting third parties abroad under Section 1881a falls far short of this standard. Indeed, the court of appeals made no attempt to determine whether respondents established a non-conjectural and imminent injury, holding instead that respondents could establish standing with what in the court's assessment was an "objectively reasonable likelihood" of injury at some future point. Pet. App. 29a. That standard erroneously allows standing to be established with speculative assertions of possible future harm, disregarding this Court's repeated admonition that "threatened injury must be 'certainly impending' to constitute injury in fact" and that "[a]llegations of possible future injury" are insufficient. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (citation omitted).

Respondents' evidentiary submission confirms the court of appeals' error. Respondents proffered declarations showing that they "believe" that it is likely that the government will at some point incidentally acquire communications involving them by targeting others abroad under Section 1881a. But it is wholly speculative, for instance, whether the government will imminently target respondents' (largely unidentified) foreign contacts abroad for foreign-intelligence information; whether the government would seek to use Section 1881a-authorized surveillance rather than the multiple other methods of foreign-intelligence collection; whether the FISC would issue an order permitting targeting in a manner allowing incidental collection of respondents' communications; and whether any resulting foreign-intelligence activity would, in fact, collect communications involving respondents. Respondents have no personal knowledge of any such matters, proffer no specific facts as support,

and leave all such details to conjecture. Respondents' asserted "understanding" that the government will conduct "dragnet" surveillance under Section 1881a to acquire the content of the communications of millions of United States persons (without even an Executive-Branch finding of individualized suspicion to limit surveillance targets) is even more speculative.

Respondents' conjecture highlights the extent to which the court of appeals' decision departs from fundamental principles of Article III standing. Allowing this case to be litigated on respondents' "beliefs" about possible future acts by the government and the FISC, unsupported by specific facts demonstrating an imminent injury to them, would require the courts to conduct constitutional review of actions of co-equal Branches of Government "in the rarified atmosphere of a debating society" without the "concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)). This Court has made clear that the standing inquiry must be especially rigorous in this context to ensure that constitutional review, consistent with the separation-of-powers principles that animate Article III standing, is limited to suits in which the private parties invoking federal jurisdiction have demonstrated non-conjectural and imminent injuries from government action requiring judicial redress.

2. Respondents also cannot establish Article III standing based on asserted ongoing "present" harms—their own expenditure of money and altered communications practices—that they have elected to sustain in an attempt to avoid the Section 1881a-authorized surveillance they fear.

a. Self-inflicted harms are not cognizable Article III injuries. A federal suit is over once the plaintiff has failed to show a non-conjectural and imminent injury from the defendant's challenged actions. It is irrelevant whether the plaintiff also decides to impose other harms upon himself. Such self-inflicted damage adds nothing to the proper analysis. A plaintiff will have (or lack) standing based on the presence (or absence) of a non-conjectural and imminent injury from the defendant's challenged conduct. There is no basis for treating similarly situated plaintiffs differently on the ground that one has decided to take actions that harm himself but the other has not. Any contrary rule would erroneously allow litigants like respondents to manufacture Article III standing "for the price of a plane ticket." Pet. App. 148a (Raggi, J., dissenting).

Nor does the fact that respondents assert that they have altered their behavior because they genuinely "fear" the possibility that their communications will be incidentally acquired under Section 1881a change the analysis. Respondents' decision to curtail conduct to avoid a feared future injury reflects nothing more than a "subjective chill," which this Court has long held insufficient to establish standing. See *Laird* v. *Tatum*, 408 U.S. 1 (1972). Allegations of self-inflicted harm induced by a plaintiff's own fears simply are "not an adequate substitute for a claim of * * * a threat of specific future harm," *i.e.*, "immediately threatened injury." *Id.* at 14-15.

b. Even if such self-inflicted harms were cognizable injuries in fact, respondents have not shown that it is likely, as opposed to merely speculative, that their injury would be redressed by a favorable decision. Respondents' self-inflicted harms flow from their and their

foreign contacts' fears that the government will monitor their contacts' communications, but respondents do not seek to enjoin all possible government surveillance of their contacts. The government has several alternative means of conducting foreign-intelligence collection targeting non-United States persons abroad and, as respondents describe them, respondents' contacts could be targets for surveillance by other countries. It is thus wholly speculative whether an injunction halting only Section 1881a-authorized surveillance would redress respondents' asserted injuries. That is particularly true here, because respondents' self-imposed injuries appear to depend on the surveillance fears of their contacts, and respondents have failed to carry their heavy burden of demonstrating that stopping only Section 1881a-authorized activity would eliminate those third-party concerns.

ARGUMENT

RESPONDENTS FAILED TO ESTABLISH THEIR ARTICLE III STANDING TO SUE

To establish Article III standing, a plaintiff must demonstrate (1) that he has "suffered an injury in fact * * * which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) a sufficient "causal connection between the injury and the conduct complained of"; and (3) a "likel[ihood]" that "the injury will be redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal quotation marks and citations omitted). The plaintiff must "demonstrate standing separately for each form of relief sought." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006) (citation omitted). And to seek prospective relief, the plaintiff must

establish an ongoing, present injury or an "actual and imminent"—not "conjectural"—threat of future injury. *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 493 (2009). That ongoing or imminent injury must be present "at the commencement of the litigation," *Davis* v. *FEC*, 554 U.S. 724, 732 (2008) (citation omitted), which in this case was the date Section 1881a was enacted. The analysis of those Article III standing requirements, which reflect fundamental separation-of-powers concerns, must be "especially rigorous" when federal courts are asked to conduct constitutional review of the actions of co-equal Branches of Government. *Raines* v. *Byrd*, 521 U.S. 811, 819-820 (1997).

The court of appeals erroneously departed from these settled principles in holding that respondents established Article III standing to seek declaratory relief and an injunction permanently barring any foreign-intelligence surveillance from being conducted under Section 1881a. Respondents are United States persons who may not be targeted by surveillance conducted under Section 1881a, and they have not established that their communications have been or ever will be incidentally collected by any Section 1881a-authorized surveillance targeting foreign third parties abroad. The court of appeals nevertheless found Article III standing based on respondents' own speculative beliefs and fears about possible foreign-intelligence-collection activity targeting others under Section 1881a. The court rested its holding on (1) a purported "future injury"—the incidental interception of respondents' communications under Section 1881a—that is conjectural and not imminent, and (2) respondents' self-inflicted "present injury" resulting from their own and third parties' fear of such surveil-

lance. Neither provides a proper basis for Article III jurisdiction.

A. Respondents' Asserted Future Injuries Are Conjectural And Not Imminent

Respondents assert that they are threatened by Section 1881a-authorized surveillance directed at third parties abroad, because respondents believe that such surveillance could in the future incidentally acquire their own international communications. Respondents' assertion of that "future injury" falls far short of establishing a non-conjectural, imminent injury necessary to support Article III standing.

Plaintiffs who assert a threatened future injury as the basis for their standing must demonstrate that the purported injury in fact is "actual and imminent, not conjectural or hypothetical." *Summers*, 555 U.S. at 493; accord *Defenders of Wildlife*, 504 U.S. at 560, 564 n.2; *id.* at 579 (Kennedy, J., concurring in part and concurring in the judgment) (The "threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'") (citation omitted). Indeed, this Court has long required that a "threatened injury * * * be 'certainly impending' to constitute injury in fact," *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (quoting *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (*Farm Workers*)); see *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) (*Laidlaw*), in order "to ensure that the alleged injury is not too speculative for Article III purposes," *Defenders of Wildlife*, 504 U.S. at 565 n.2. Proof of an imminent and non-conjectural injury is also necessary to provide "the essential dimension of [factual] specificity" to a case, *Schlesinger* v. *Reservists Comm. to Stop the War*,

418 U.S. 208, 221 (1974), and to assure that legal questions "will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action," *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)).

1. The court of appeals failed to apply those well-settled principles. The court made no attempt to determine whether respondents established a non-conjectural and "imminent" future injury to them that would result from a Section 1881a-authorized acquisition of communications obtained by targeting a non-United States person abroad, let alone conclude that such an acquisition was "certainly impending" on the day Section 1881a became law and respondents filed this suit. It instead held that respondents could establish standing by showing that "[Section 1881a] creates an objectively reasonable likelihood that [their] communications are being or will be monitored under the FAA." Pet. App. 29a. That novel standard of "likelihood" of injury at some undetermined future point disregards this Court's repeated admonition that a "threatened injury *must be 'certainly impending'* to constitute injury in fact." *Whitmore*, 495 U.S. at 158 (quoting *Farm Workers*, 442 U.S. at 298) (emphasis added). The Court has "said many times" that such "[a]llegations of possible future injury do not satisfy the requirements of Art[icle] III." *Ibid.*

The Court in *Summers*, for instance, required proof of an "imminent future injury" by plaintiffs seeking an injunction to halt the Forest Service's reliance on regulations authorizing it to take certain land-management actions without public notice or an opportunity for comment or appeal. 555 U.S. at 492-495. The plaintiffs in

Summers (like respondents here) attempted to challenge the regulations as an unlawful grant of authority, but the Court held that they failed to establish their standing because they could not identify an actual "application of the [challenged] regulations that threatens imminent and concrete harm." *Id.* at 494-495. The Court reasoned that it would "fly in the face of Article III's injury-in-fact requirement" to permit such an untethered challenge to a "regulation in the abstract." *Id.* at 494. The Court also concluded that the requisite injury in fact could not be established by a "statistical probability" of a future injury, *id.* at 497-499, and determined that a "*realistic* threat" of future harm does not satisfy "the requirement of 'imminent' harm," *id.* at 499-500. The court of appeals disregarded *Summers*' teachings: It allowed respondents to challenge Section 1881a's constitutionality "in the abstract," without any showing of an "imminent" and "concrete application" (*id.* at 494), because it found what it regarded as an "objectively reasonable likelihood" that the government would sometime in the future acquire communications involving respondents using authority conferred by Section 1881a. Pet. App. 29a.

The court of appeals concluded that *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983), supported its contrary position because, in the court's view, *Lyons* "articulated the principle that a plaintiff may obtain standing by showing a sufficient likelihood of future injury." Pet. App. 33a; see *id.* at 31a-33a. But as *Summers* explained, *Lyons* is an "opinion that did *not* find standing, so the seeming expansiveness of the test made not a bit of difference"; it does not support a standing test satisfied by what a court may believe is a "realistic threat" of injury instead of proof of an actual, imminent future harm.

Summers, 555 U.S. at 499-500 (rejecting dissenters' view that *Lyons* suggested that standing might be shown with a "*realistic likelihood*" that proven, past conduct would recur in the "reasonably near future," *id.* at 505 (Breyer, J., dissenting) (citation omitted)).

Nor is the court of appeals' formulation supported by its suggestion that a "'realistic danger' of 'direct injury'" is sufficient to challenge "prospective government action." Pet. App. 30a (quoting *Farm Workers*, 442 U.S. at 298). In *Farm Workers*, this Court indicated that a "realistic danger of sustaining a direct injury" can support Article III standing; but in the following sentence, it made clear that the "threatened injury" it deemed sufficient was an "injury [that] is certainly impending." 442 U.S. at 298 (citation omitted). The Court then explained that that imminence requirement applies differently when a criminal statute directly prohibits a "course of conduct arguably affected with a constitutional interest" and a plaintiff establishes that he would "engage in [that] course of conduct" but for the statute. *Ibid.* In that context, the Court concluded that a plaintiff may challenge the statute directly regulating his conduct without having to violate the law and risk "'actual arrest or prosecution,'" if he can show a sufficiently "credible threat of prosecution." *Ibid.* (citation omitted).

Farm Workers stands for the proposition that when a plaintiff's own conduct is directly regulated by the statute he wishes to challenge and the plaintiff "claim[s] the right to do" the very thing the statute prohibits, the fact that the plaintiff has not yet violated the law will not destroy standing, because the "plaintiff's own action (or inaction) in failing to violate the law[, which] eliminates the [otherwise] *imminent* threat of prosecution," is "effectively coerced" by the threat. *MedImmune, Inc.* v.

Genentech, Inc., 549 U.S. 118, 129 (2007) (emphasis added); cf. *Lyons*, 461 U.S. at 103 (analyzing standing with the assumption that "[plaintiffs] will conduct their activities within the law and so avoid prosecution") (quoting *O'Shea* v. *Littleton*, 414 U.S. 488, 497 (1974)) (brackets in original). Those principles are inapplicable here. Section 1881a does not directly regulate any private conduct (and certainly does not regulate respondents' conduct), nor does it provide for any sort of enforcement sanctions against respondents that could be claimed to "effectively coerce" them into eliminating an otherwise imminent injury.[9]

2. The court of appeals' reliance on respondents' summary-judgment evidence underscores the degree to which the court's ruling, turning on what it regarded as an "objectively reasonable likelihood" of injury (Pet. App. 29a), strays from this Court's established jurisprudence requiring a non-conjectural, imminent injury.

Respondents (who are the plaintiffs in this case) "bear[] the burden of proof" and therefore were required to proffer at summary judgment admissible evidence of "specific facts" establishing their Article III standing. *Defenders of Wildlife*, 504 U.S. at 561 (citation omitted); see *DaimlerChrysler Corp.*, 547 U.S. at 342 n.3. Declarations submitted to support standing not

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[9] This Court has not limited its understanding of an "imminent" future injury to a particular timeframe for all factual contexts and has noted that "imminence" is a "somewhat elastic concept." *Defenders of Wildlife*, 504 U.S. at 565 n.2. However, the Court has emphasized that a plaintiff must show that his asserted "injury is '*certainly* impending,'" because the purpose of requiring an imminent injury is to "ensure that the alleged injury is not too speculative for Article III purposes" and to protect against the "possibility of deciding a case in which no injury would have occurred at all." *Ibid.* (quoting *Whitmore*, 495 U.S. at 158).

only must set out facts that would be admissible at trial, but also "must be made on personal knowledge" concerning matters about which the declarants are competent to testify. Fed. R. Civ. P. 56(c)(2) and (4). "[C]onclusory allegations" in such declarations do not satisfy respondents' affirmative evidentiary burden of proving Article III standing. *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 888 (1990).

Respondents, however, have rested their standing on conclusory statements of belief based on speculation about how the government might apply Section 1881a to target foreign persons abroad for foreign-intelligence information. See Pet. App. 334a-375a (respondents' declarations). As the dissenting judges below explained, because "[respondents] do not—and indeed cannot—profess personal knowledge" of the government's "targeting priorities and practices" for Section 1881a-authorized acquisitions, their asserted belief that their international communications are likely to be incidentally intercepted by future Section 1881a-authorized surveillance targeting foreigners abroad is impermissibly speculative and insufficient to prove a non-conjectural and imminent injury in fact. See, *e.g.*, Pet. App. 158a-159a (Raggi, J., dissenting from the denial of rehearing en banc).

The court of appeals nevertheless determined that "[Section 1881a] creates an objectively reasonable likelihood that [respondents'] communications are being or will be monitored under the FAA," Pet. App. 29a, based on respondents' speculation. That error is particularly significant in the context of respondents' facial challenge to Section 1881a. Section 1881a does *not* authorize surveillance targeting respondents or any other United States person, 50 U.S.C. 1881a(b)(1)-(3), and respon-

dents have never presented evidence that their international communications have ever been or will be incidentally acquired by Section 1881a-authorized surveillance targeting foreign third parties abroad. Respondents instead rely on two lines of speculation that their communications could be incidentally collected in Section 1881a-authorized surveillance.[10]

a. First, respondents' declarants state that they "*believe* that at least some of [their] international communications are likely to be collected" under Section 1881a's authority, because they state that they communicate with persons abroad who might be targeted for foreign-intelligence collection under Section 1881a. Pet. App. 337a (emphasis added); accord *id.* at 343a-344a, 350a, 356a-357a, 366a, 370a. That belief is speculative and unsupported by specific facts. In fact, respondents' evidence shows that their subjective beliefs reflect speculation piled upon speculation. Respondents, for instance, rely on conjecture that the government will choose to expend its limited resources to target respondents' own (largely unidentified) foreign contacts. Respondents state that they need to communicate with individuals in broadly defined categories located abroad, some of whom (respondents assert) criticize or oppose the interests of the United States. *E.g.*, Pet. App. 337a

[10] Seven respondents—Amnesty International USA, Global Fund for Women, Global Rights, International Criminal Defence Attorneys Association, PEN American Center, Service Employees International Union, and attorney Daniel N. Arshack—failed to present *any* proof of standing at summary judgment. See p. 9 & n.8, *supra*; cf. Pet. App. 215a-221a, 224a-226a, 229a-233a, 236a-238a (complaint alleging injuries to those respondents). The court of appeals clearly erred in reversing the district court's holding that those respondents failed to establish standing. Cf. *Defenders of Wildlife*, 504 U.S. at 561 (plaintiffs must proffer evidence of their standing to survive summary judgment).

("foreign political activists and political groups"), 342a ("victims of human rights abuses, witnesses, experts, scholars, political activists, and foreign governmental officials"), 359a ("Latin American and European government officials and non-governmental experts"). But respondents do not purport to have personal knowledge of how the government exercises its targeting authority under Section 1881a, much less provide any evidence that government officials will actually elect to target particular foreign persons with whom respondents may be in contact to collect foreign-intelligence information.

Even if respondents could have shown that they are at "greater risk than the public at large" of having their international communications intercepted under Section 1881a, that showing would have been insufficient. See *United Presbyterian Church* v. *Reagan*, 738 F.2d 1375, 1380 (1984) (Scalia, J.). Because Section 1881a "does not *direct* intelligence-gathering activities against all persons who could conceivably come within its scope, but merely *authorizes*" the collection of certain information in certain contexts, *ibid.*, respondents must necessarily conjecture about how government officials will make targeting decisions for Section 1881a-authorized acquisitions. An asserted injury cannot be "imminent" where, as here, it is based on "speculati[on] that [government] officials will" take harmful actions. *DaimlerChrysler Corp.*, 547 U.S. at 344-345. Such conjecture gives "no assurance that the asserted injury is * * * 'certainly impending.'" *Ibid.* (quoting *Whitmore*, 495 U.S. at 158).

Respondents' subjective "belief" that third parties with whom they will communicate will likely be targeted under Section 1881a fails for numerous other reasons. Even if the government were to want to obtain the communications of such a person, respondents have prof-

fered nothing to show that the government would imminently acquire respondents' communications using surveillance *authorized by Section 1881a.* As Judge Raggi correctly recognized, there are "several means" for the intelligence community to collect information about non-United States persons outside the United States other than Section 1881a-authorized surveillance. Pet. App. 169a, 172a. The government, for instance, could utilize "electronic surveillance" under FISA when targeting a person abroad if there is probable cause to believe the person is a foreign power or an agent thereof. See p. 3, *supra*; 50 U.S.C. 1801(a)(1) (defining "foreign power").[11] Alternatively, it may utilize technical and other collection techniques abroad that do not fall within the FISA's geographically limited definition of "electronic surveillance," see pp. 2-3, *supra*, which Congress fashioned specifically to avoid regulating certain "international signals intelligence activities" by the NSA and other "electronic surveillance conducted outside the United States." S. Rep. No. 701, 95th Cong., 2d Sess. 71

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[11] Respondent Scott McKay, for instance, "believe[s]" that his international communications with Sami Omar Al-Hussayen will be acquired under Section 1881a because the government previously intercepted Al-Hussayen's communications. Pet. App. 370a-371a. But it is a matter of public record that the government lawfully acquired Al-Hussayen's communications using FISA authority that existed long before Section 1881a. See *Al-Kidd* v. *Gonzales*, No. 05-cv-93, 2008 WL 5123009, at *5-*6 (D. Idaho Dec. 4, 2008) (finding that surveillance lawful). Respondents provide no reason to conclude that any ongoing surveillance targeting Al-Hussayen (if it were to occur) would not continue to operate under that authority. Cf. 50 U.S.C. 1801(f)(2), 1805(a) (authorizing targeting of agents of foreign powers in—or who communicate with persons in—the United States with surveillance directed at facilities used by the target if the acquisition occurs in the United States).

(1978).[12] Such foreign-intelligence collection conducted abroad is governed by Executive Order No. 12,333, not Section 1881a. See p. 4, *supra*. The government may also obtain information from the intelligence services of foreign countries, which are not bound by the United States Constitution or FISA when collecting intelligence about persons abroad or deciding whether to provide that information to the United States.

Furthermore, respondents provide no basis for concluding that the FISC would issue an order that would permit the targeting of respondents' foreign contacts in a manner that would allow the incidental collection of respondents' communications. See Pet. App. 165a-167a (Raggi, J., dissenting). Section 1881a imposes numerous requirements for targeting and minimization procedures (see pp. 6-8, *supra*), and it is a matter of conjecture how the Attorney General and Director would exercise their authority under Section 1881a and how the FISC would actually apply that section's requirements in an order under that provision. Respondents likewise provide no evidence suggesting that the government's targeting of third parties under such an order would ultimately collect respondents' communications.

b. Respondents' second line of speculation is equally insufficient. Respondents have argued in this Court that Section 1881a authorizes what they call "dragnet" surveillance—the acquisition of communications content without even an Executive-Branch finding of individual-

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[12] For example, the targeting of non-United States persons abroad for foreign-intelligence collection involving the acquisition of the contents of international wireless (radio) communications and the contents of international wire communications (conducted outside of the United States) does not qualify as "electronic surveillance." See 50 U.S.C. 1801(f).

ized suspicion to limit surveillance targets—which, respondents have asserted, could include the acquisition of "all communications to and from specific countries" that would capture the communications of "thousands or even millions of U.S. citizens and residents." Br. in Opp. 1, 7, 33. But respondents have proffered no facts supporting that speculation. Their declarants have simply stated that it is their "understanding" that such "dragnet" surveillance would occur under Section 1881a. See, *e.g.*, Pet. App. 336a-337a, 356a, 365a, 370a, 374a.

Respondents' speculation is particularly odd in the context of this facial challenge to Section 1881a's constitutionality. Respondents have argued (Br. in Opp. 9) that the type of unfocused surveillance they "understand" could be conducted would violate the Fourth Amendment. See also Dist. Ct. Doc. 21, at 5, 20 & n.10, 28 (Dec. 15, 2008). But Section 1881a expressly provides that its authorization extends only to surveillance conducted "consistent with the [F]ourth [A]mendment," 50 U.S.C. 1881a(b)(5), and specifically requires the FISC to ensure that the government's targeting and minimization procedures governing foreign-intelligence collection under Section 1881a comply with the Fourth Amendment, 50 U.S.C. 1881a(i)(3)(A).

c. Notwithstanding the lack of evidence about the United States' actual conduct of relevant foreign-intelligence collection, the court of appeals relied on the court's own assessment of what is a "realistic understanding of the world" to determine the likely nature and scope of future foreign-intelligence acquisitions under Section 1881a. Pet. App. 38a. That reliance was doubly flawed. Respondents had the burden of "clearly and specifically set[ting] forth facts sufficient to satisfy [all] Art[icle] III standing requirements," and this Court

has made clear that a federal court is "powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore*, 495 U.S. at 155-156. Moreover, given the "secrecy of our Government's foreign intelligence operations"—a secrecy "'essential to the effective operation of our foreign intelligence service,'" *Haig* v. *Agee*, 453 U.S. 280, 307 (1981) (quoting *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam))—the court of appeals could not reliably determine without evidence what is "realistic" in this context. Such "unadorned speculation [does] not suffice to invoke the federal judicial power." *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976).

4. Respondents' conjecture highlights the extent to which the court of appeals' decision departs from fundamental principles of Article III standing. Allowing this case to proceed based on such "beliefs" about possible future acts by the government—unsupported by specific facts establishing an imminent injury in fact—would wholly disregard this Court's longstanding requirement of a "concrete factual context conducive to a realistic appreciation of the consequences of judicial action," and effectively require federal courts to resolve important legal questions in the abstract and "rarified atmosphere of a debating society." *Valley Forge Christian Coll.*, 454 U.S. at 472.

The consequences of that error are particularly acute in situations like this one, where a federal court must exercise its "most important and delicate" responsibility: constitutional review of the actions of co-equal Branches of Government. *Schlesinger*, 418 U.S. at 221. "[T]he law of Art[icle] III standing is built" on fundamental separation-of-powers principles, *Raines*, 521 U.S. at 820 (quoting *Allen* v. *Wright*, 468 U.S. 737, 752

(1984)), that are "designed to maintain" the Constitution's "'tripartite allocation of power'" by defining "'the proper—and properly limited—role of the courts in a democratic society,'" *DaimlerChrysler Corp.*, 547 U.S. at 341, 353 (quoting *Valley Forge Christian Coll.*, 454 U.S. at 474, and *Allen*, 468 U.S. at 750). This Court therefore has emphasized that the standing inquiry should be "especially rigorous" when resolving the merits would require a federal court "to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines*, 521 U.S. at 819-820. Disregarding that admonition, the court of appeals' ruling would require a federal court to adjudicate the constitutionality of Section 1881a *in the abstract,* without the essential assistance of concrete facts concerning any actual, imminent surveillance affecting the persons challenging the law.

Strict adherence to that especially rigorous standard is all the more necessary when a litigant seeks to have the courts entertain a private suit concerning the actions of the Executive and Congress to protect the national security, which lie at the core of the constitutional responsibilities of the political Branches and require confidentiality for success. See, *e.g.*, *Department of the Navy* v. *Egan*, 484 U.S. 518, 529-530 (1988) (noting the courts' traditional reluctance to "intrude upon the authority of the Executive" in its discharge of its "Art[icle] II duties" involving "foreign policy" and "national security affairs") (citations omitted); *CIA* v. *Sims*, 471 U.S. 159, 172 n.16 (1985) ("Secrecy is inherently a key to successful intelligence operations."); *Agee*, 453 U.S. at 292 ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.").

The logic of the court of appeals' reasoning, moreover, extends well beyond the parties in this case. If respondents' speculative evidentiary proffer can establish standing based on what the court of appeals deemed to be an "objectively reasonable likelihood" (Pet. App. 29a) that the government would incidentally acquire international communications to which respondents might be parties sometime in the future while targeting third parties abroad using Section 1881a's authority, persons claiming to be likely *targets* of government surveillance in other contexts would be able to make a stronger (yet still speculative) claim to Article III standing. Permitting such challenges to the United States' foreign-intelligence-collection activities without requiring proof of a non-conjectural and imminent injury that would provide a concrete factual context for litigation would lead "the Judicial Branch [beyond] its proper, limited role in the constitutional framework of Government," *Defenders of Wildlife*, 504 U.S. at 581 (Kennedy, J., concurring in part and concurring in the judgment), and require the federal courts to sit, at the behest of and with direct involvement of private litigants, "as virtually continuing monitors of the wisdom and soundness of Executive action," when that oversight "role is [one] appropriate for Congress," *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972).[13]

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[13] The Executive Branch has kept Congress "fully inform[ed]" of its implementation of Section 1881a, 50 U.S.C. 1881f(a) and (b)(1); see 50 U.S.C. 1881a(*l*)(1)(B), (2)(D)(iii) and (3)(C)(iv), and Congress has exercised "close" and "extensive oversight" of the government's use of Section 1881a's authority ever since the 2008 enactment of Section 1881a. See S. Rep. No. 174, 112th Cong., 2d Sess. 2 (2012); see also *ibid.* (noting "extensive oversight by * * * the FISC"). The Senate Select Committee on Intelligence has found based on that extensive oversight

B. Respondents' Asserted Ongoing, Present Injuries Are Not Cognizable Injuries In Fact That Likely Would Be Redressed By Judicial Relief Enjoining Foreign-Intelligence Activity Authorized By Section 1881a

The court of appeals further held that respondents established Article III standing on the basis of "present" (ongoing) harms that respondents have chosen to sustain in an attempt to avoid the Section 1881a-authorized surveillance that they fear. Pet. App. 26a-28a, 41a n.24. That was error. Self-inflicted harms are not cognizable Article III injuries in fact and, even if they were, respondents failed to show that their requested relief would likely redress them.

1. Self-Inflicted Harms Are Not Cognizable Injuries In Fact

The court of appeals held that respondents' own "expenditure of funds" qualified as an injury in fact "caused by the challenged statute" because "it was not unreasonable for [respondents] to incur costs out of fear that the government will intercept their communications under [Section 1881a]." Pet. App. 26a-27a. The court stated that such a "self-inflicted injury" resulting from respondents' "fear of the FAA" establishes Article III standing because their fear was not "fanciful, paranoid, or otherwise unreasonable." *Id.* at 27a-28a. That expansive and novel holding is wrong.

a. No litigant "can be heard to complain about damage inflicted by its own hand." *Pennsylvania* v. *New*

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that Title VII of the FAA (including Section 1881a) provides authority to conduct "critical" foreign-intelligence activities that have been "implemented with attention to protecting the privacy and civil liberties of U.S. persons." *Id.* at 2; see *id.* at 7-8 (additional views of Chairperson Feinstein) (discussing oversight regarding Section 1881a).

Jersey, 426 U.S. 660, 664 (1976) (per curiam). Respondents here have simply elected to expend their funds and alter some of their communication practices because they have decided to try to limit the possibility that international communications involving them might be incidentally acquired by government surveillance targeting non-United States persons. As the D.C. Circuit has "consistently held," such "self-inflicted harm doesn't satisfy the basic requirements for standing": It "does not amount to an 'injury' cognizable under Article III" and, even if it did, "it would not be fairly traceable to the defendant's challenged conduct." *National Family Planning & Reprod. Health Ass'n* v. *Gonzales*, 468 F.3d 826, 831 (2006). Respondents are fully capable of avoiding their own expenditure of money and stopping any other self-inflicted harms without the exercise of federal judicial power.

Simply put, a federal suit is over once the plaintiff has failed to show a non-conjectural and imminent injury *from the defendant's* challenged actions. It is irrelevant whether the plaintiff also decides to impose other harms upon himself. Such self-inflicted damage adds nothing to the proper analysis. There is no sound basis for treating plaintiffs who decide to inflict harms upon themselves any differently than similarly situated plaintiffs who do not. Both will have (or lack) Article III standing based on the presence (or absence) of a non-conjectural and imminent injury from the defendant's challenged conduct. Any contrary rule, as Judge Raggi explained, would erroneously permit litigants to manufacture Article III standing "for the price of a plane ticket." Pet. App. 148a.

b. The fact that respondents assert that they have altered their behavior because they genuinely "fear" the

possibility that their communications will be incidentally acquired by Section 1881a-authorized surveillance targeting others likewise does not establish Article III jurisdiction. A plaintiff's decision to curtail his own conduct to avoid a future injury that he fears reflects nothing more than a "subjective chill." And "in order to have standing, an individual must present more than 'allegations of a subjective "chill."' There must be a 'claim of specific present objective harm or a threat of specific future harm.'" *Bigelow* v. *Virginia*, 421 U.S. 809, 816-817 (1975) (quoting *Laird*, 408 U.S. at 13-14) (brackets omitted). In other words, respondents' inability to show a non-conjectural and imminent interception of their communications cannot be cured by relying on an asserted chilling effect resulting from their own fear of such surveillance.

That conclusion flows directly from *Laird* v. *Tatum*. In *Laird*, this Court held that plaintiffs who allegedly sustained self-inflicted harms by curtailing their own First Amendment activity lacked Article III standing to challenge an Army domestic surveillance program that they claimed produced that "'chilling' effect." 408 U.S. at 3. "[M]ost if not all" of the plaintiffs established that they had "been the subject of Army surveillance reports," *id.* at 39 (Brennan, J., dissenting) (quoting court of appeals' decision in *Laird*), and the Army's domestic surveillance program's "alleged 'chilling' effect" arose, *inter alia*, from the plaintiffs' "apprehensiveness that the Army may at some future date * * * direct[ly] harm" them by using information from the program. *Laird*, 408 U.S. at 13. The Court determined that the plaintiffs' fear-induced self-inflicted harms were insufficient to establish Article III standing, because such "[a]llegations of a subjective 'chill' are not an adequate

substitute for a claim of * * * a threat of specific future harm." *Id.* at 13-14; see *id.* at 15 ("immediately threatened injury" is required).

As the D.C. Circuit explained in an opinion authored by then-Judge Scalia, *Laird* requires that a plaintiff show that he has "suffered some concrete harm (past or immediately threatened) apart from the 'chill' itself." *United Presbyterian Church*, 738 F.2d at 1378; see *id.* at 1380. The plaintiffs in *United Presbyterian Church*, who sought to challenge the legality of Executive Order No. 12,333, asserted that they had already "been subjected to unlawful surveillance in the past"; argued that "their activities are such that they are especially likely to be targets of the unlawful activities authorized by the order"; and alleged that they had curtailed constitutionally protected activities because of "fear" that they would be "targeted for surveillance" in the future. *Id.* at 1377, 1380-1381. But the D.C. Circuit held that the plaintiffs failed to establish standing because, like respondents here, they failed to show the "imminence of concrete, harmful action" that might result from surveillance activities governed by that Order. *Id.* at 1380. The D.C. Circuit further held that their allegation of self-imposed injury was insufficient, because a "[c]hilling effect" is itself not a "*harm* which entitles the plaintiff to [sue]." *Id.* at 1378. The same reasoning applies here. "*Laird* compels the conclusion * * * that [respondents] lack standing because any chilling of their electronic communications with foreign contacts, including costs incurred in forgoing such communications, arose 'merely' from their knowledge of the existence of a program that they feared could target their contacts." Pet. App. 152a (Raggi, J., dissenting).

The court of appeals attempted to distinguish *Laird* on the ground that respondents "detail specific, reasonable actions that they have taken to their own tangible, economic cost * * * to avoid being overheard in the way that the challenged statute makes reasonably likely." Pet. App. 54a. But there is no sound basis for concluding that self-inflicted economic harms are cognizable injuries in fact while self-inflicted injuries to constitutionally protected expressive conduct are not. Nor does characterizing a self-inflicted harm as a "reasonable action[]" escape *Laird*'s conclusion that self-inflicted injuries are by their nature insufficient: "Allegations of a subjective 'chill' are not an adequate substitute for a claim of * * * a threat of specific future harm." 408 U.S. at 13-14.

c. The court of appeals mistakenly relied on *Laidlaw*, *supra*, and *Meese* v. *Keene*, 481 U.S. 465 (1987), as support for its view that "alter[ing] or ceas[ing] conduct as a reasonable response to the challenged statute" will confer standing. Pet. App. 43a-46a. Neither decision stands for that proposition.

The "injury in fact" in *Laidlaw* was not the plaintiffs' cessation of activities based on a fear of yet-to-be-taken conduct; it was damage to an area's "aesthetic and recreational value[]" to the plaintiffs, where it was "*undisputed* that Laidlaw's unlawful *conduct*—discharging pollutants [into the water]—was occurring." *Laidlaw*, 528 U.S. at 183-184 (citation omitted; emphasis added). The Court was careful to explain that its precedents recognized harm to "'aesthetic and recreational values'" as a cognizable "injury in fact" for standing purposes. *Id.* at 183 (quoting *Sierra Club* v. *Morton*, 405 U.S. 727, 735 (1972), and citing *Defenders of Wildlife*, 504 U.S. at 562-563). Evidence showing that recreation

was reasonably curtailed and that the river "looked and smelled polluted" thus served to document the extent of the injury to those "recreational" and "aesthetic" interests. See *id.* at 181-184; cf. *id.* at 182-183, 184 (additionally noting an economic injury in the form of reduced property value).

Similarly, in *Keene*, the government had already determined that three specific films Keene wanted to display had to be labeled as foreign "political propaganda." *Keene*, 481 U.S. at 467 & n.1. Keene sought "to enjoin the application of the [labeling statute] to these three films," and he proved (with "detailed affidavits") that the government-required label would cause him actual, "reputation[al]" injury for displaying the films. *Id.* at 468, 473-474 & n.7. That reputational injury from *proven* government conduct "demonstrated *more than* a 'subjective chill.'" *Id.* at 473 (emphasis added).[14]

Because *Laidlaw* and *Keene* involved concrete, proven conduct by the defendants and specific injuries other than a "chill" that might flowed from that conduct, they do not suggest that self-inflicted harms are cognizable as Article III injuries in fact. And because respondents' ongoing decision voluntarily to incur economic costs and alter their communication practices does not constitute an injury in fact, respondents have failed to

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[14] Respondents have argued (Br. in Opp. 22-23) that *United States* v. *Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) *(SCRAP)*, found standing based on a plaintiff's self-imposed injury. But *SCRAP* based standing on the allegation that individuals' ongoing recreational *use* of natural resources would be less enjoyable. *Id.* at 678, 685, 688. The "asserted injury" in *SCRAP* thus was that "specific and perceptible harms—depletion of natural resources and increased littering—would befall [the plaintiff's] members imminently if the [agency] orders were not reversed." *Whitmore*, 495 U.S. at 159 (discussing *SCRAP*).

establish their standing on the basis of that asserted "present injury."

2. *Respondents Failed To Establish That Their Asserted Ongoing Injuries Would Likely Be Redressed By An Injunction*

Even if Article III standing could be built on a plaintiff's own self-inflicted harms, a plaintiff who proves a cognizable injury in fact must additionally demonstrate that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Defenders of Wildlife*, 504 U.S. at 561 (citation omitted). The court of appeals erred in finding a "substantial likelihood that the requested relief will remedy" respondents' self-imposed fiscal and other chilling "injuries." Pet. App. 41a n.24 (citation omitted). The court reasoned that, because "[respondents'] injuries stem from their reasonable fear of being monitored by FAA-authorized government surveillance," the injuries would be redressed by an "injunction prohibiting the government from conducting surveillance under the FAA." *Ibid.* That approach to redressability is incorrect and again highlights the highly speculative nature of respondents' standing contentions.

Respondents' claimed ongoing, present injuries are self-imposed ones that respondents contend are reasonable reactions to reasonable fears. But a court order is not needed to redress any such self-inflicted "injury." Respondents can stop expending funds now. Moreover, even if respondents were to obtain an injunction prohibiting acquisitions under Section 1881a, they have failed to show that it is likely—as opposed to speculative—that the relief would stop their perceived need for their expenditures and self-inflicted harms.

Respondents' showing of redressibility is speculative because, even though respondents' asserted self-imposed injuries flow from their fear (and the purported fears of their foreign contacts) "that their communications are being monitored by the United States," see, *e.g.*, Pet. App. 338a, 344a-345a, 351a-352a, 361a, 366a, they have not sought to enjoin all possible government surveillance of their contacts abroad. Respondents instead have requested an injunction that would stop only "surveillance [conducted] pursuant to the authority granted by section [1881a]." Pet. App. 241a. That focus on just one provision governing foreign-intelligence surveillance undermines their claim to redressability: "[I]f the United States intelligence community is as inclined to monitor [respondents' foreign contacts'] communications as [respondents] assert, then enjoining the FAA will merely eliminate one of several means for achieving that objective." *Id.* at 169a (Raggi, J., dissenting); see *id.* at 168a-173a.

The government may conduct foreign-intelligence-collection activities targeting non-United States persons abroad in multiple ways. See pp. 32-33, *supra*. "Electronic surveillance" conducted under traditional FISA orders is available if there is probable cause to believe the target is a "foreign power" or agent thereof, 50 U.S.C. 1805(a), which includes foreign governments, entities directed and controlled by foreign governments, certain foreign-based political organizations, international terrorist groups, and international proliferators of weapons of mass destruction. The government also may target non-United States persons abroad for foreign-intelligence collection of wire and wireless communications outside of the United States under Executive Order No. 12,333. See pp. 32-33 & n.12, *supra*. And

the government may indirectly obtain information from foreign intelligence agencies, the overseas activities of which are not governed by the United States Constitution or federal law.

Beyond that, as respondents describe them, respondents' international contacts could be "prime targets for surveillance by other countries, including their own." Pet. App. 172a (Raggi, J., dissenting). Respondents' surveillance-based fears thus would appear to extend beyond intelligence obtained by or provided to the United States. See, *e.g.*, Pet. App. 344a (noting communications with groups that are "targeted by their own governments"), 361a (noting contacts' fears that their communications "could be monitored by the Cuban government").

Given the alternative means of collecting the contents of communications of non-United States persons abroad, it is wholly speculative whether an injunction halting only Section 1881a-authorized surveillance would redress respondents' asserted injuries. Indeed, respondents' claim to redressability is particularly weak because their self-imposed injuries appear to depend not simply on their own subjective fears of surveillance, but also on their foreign contacts' fears, which might not be diminished sufficiently by a favorable ruling. See, *e.g.*, Pet. App. 344a, 353a, 357a-358a, 361a, 366a-367a. Where, as here, redressability hinges on the responses of "third part[ies]" to "government action or inaction," standing is generally "substantially more difficult to establish." *Defenders of Wildlife*, 504 U.S. at 562 (internal quotation marks omitted). And because "'courts cannot presume either to control or to predict'" the "'unfettered choices made by independent actors not before the courts,'" it was respondents' burden "to adduce facts

showing that those choices have been or will be made in such manner as to * * * permit redressability." *Ibid.* (quoting *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.)). Respondents have produced no facts to carry that burden.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT S. LITT
General Counsel

TRICIA S. WELLMAN
Deputy General Counsel

BRADLEY A. BROOKER
Associate General Counsel
Office of the Director of National Intelligence

RAJESH DE
General Counsel

ARIANE E. CERLENKO
Associate General Counsel
National Security Agency

DONALD B. VERRILLI, JR.
Solicitor General

STUART F. DELERY
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

ANTHONY A. YANG
Assistant to the Solicitor General

DOUGLAS N. LETTER
THOMAS M. BONDY
DANIEL J. LENERZ
HENRY C. WHITAKER
Attorneys

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