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

PETITION FOR A WRIT OF CERTIORARI

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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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The Solicitor General, on behalf of the Director of National Intelligence and the other petitioners, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

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 not yet reported in the *Federal Reporter* but are available at 2011 WL 4381737. 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 including January 19, 2012. On January 10, 2012, Justice Ginsburg further extended the time to February 18, 2012. The jurisdiction of this Court is invoked under 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 domestic 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"; (2) the acquisition of the contents of a wire communication to or from

[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.

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 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" 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). 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 would 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]

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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.

Because of FISA's definition of "electronic surveillance," FISA as originally enacted did not apply to the vast majority of surveillance that the government conducted 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. 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. 200 (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, § 101(a)(2), 122 Stat. 2438. That provision—referred to here as Section 1881a—establishes new, supplemental procedures for authorizing certain types of surveillance targeting non-United

[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).

States persons located outside the United States when the acquisition involves obtaining foreign-intelligence information from or with the assistance of an electronic communication service provider.[4]

Section 1881a permits the Attorney General and Director of National Intelligence jointly to authorize the "targeting of persons reasonably believed to be located outside the United States" to acquire "foreign intelligence information." 50 U.S.C. 1881a(a). 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 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).

Except in certain "exigent circumstances," 50 U.S.C. 1881a(c)(2), Section 1881a requires the government to obtain the FISC's approval of (1) a government 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) and (e). The certification must be 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 com-

[4] The FAA enacted other amendments to FISA, including new provisions that now govern the targeting of United States persons abroad to collect foreign-intelligence information in certain contexts. See 50 U.S.C. 1881b, 1881c. Those provisions are not at issue in this case.

plies 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 for the acquisition. 50 U.S.C. 1881a(i)(3)(A).

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, even if the person was not 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 legality 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.[5]

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 Section 1881a's constitutionality. Pet. App. 197a, 200a-203a, 240a-241a. Respondents seek a declaration that Section 1881a is unconstitutional and an injunction permanently enjoining the government from "conducting surveillance pursuant to the authority granted by section [1881a]." *Id.* at 241a.

At summary judgment, three attorney respondents and three organizational respondents submitted evidence supporting their assertion of Article III standing.[6] 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 Section 1881a, because they communicate with people abroad whom they believe the "U.S. government is likely

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[5] Cf. also, *e.g.*, *In re Directives*, 551 F.3d 1004 (FISC Rev. 2008) (addressing Fourth Amendment challenge brought by electronic service provider under a predecessor provision in the Protect America Act); *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).

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

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 sensitive 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.* Respondents believe that some of the information they exchange with those individuals involves "foreign intelligence information" as defined by FISA. *Id.* at 215a. Based on their fear that their communications may be incidentally intercepted by Section 1881a surveillance targeting others, respondents assert 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 claims 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 that, in this case, respondents' 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 its 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 assume 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 activi-

ties 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' assertion that respondents believed 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," explaining 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 Los Angeles* 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 it noted that *Laird* held that 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 First Amendment 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 & n.31 (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 opined that the "interpretations of *Laird*" adopted by those circuits—both of which read "*Laird* essentially the same way [as] the government"—was not "persuasive," was not "bind[ing]" in the Second Circuit, and arose in contexts that the court found "factually distinguishable." *Id.* at 58a-59a & n.32.

d. Finally, the court of appeals held that respondents satisfied the redressability prong of standing. Pet. App. 41a n.24. It reasoned that judicial relief would likely redress respondents' claimed injury, because "[respondents'] injuries stem from their reasonable fear of being monitored by FAA-authorized government surveil-

lance," 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, and that the panel's decision was inconsistent with settled standing precedent. *Id.* at 136a.

Judge Raggi found that a central flaw in the panel's analysis was its improper "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

likelihood of interception becomes relevant only to causation, *i.e.* were the incurred costs 'fairly traceable' to the FAA?" *Id.* at 147a-148a. Under that rationale, 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 opined 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 also 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 pointed out that other courts of appeals had "confronted challenges to other programs authorizing, but not directing, intelligence surveillance" and that those courts had "uniformly found that plaintiffs lacked standing precisely because they could not demonstrate actual or imminent interception." Pet. App. 162a. The panel's contrary reasoning, she concluded, created a "circuit split." *Id.* at 163a-164a. 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 surveillance under traditional FISA orders. *Id.* at 172; see *id.* at 171a n.22. Judge Raggi also recognized 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 "self-inflicted" injury 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.

REASONS FOR GRANTING THE PETITION

The court of appeals has held that respondents—who cannot be targeted by surveillance conducted under Section 1881a and who have not established that they have been or ever will be incidentally subjected to any Section 1881a-authorized surveillance targeting third parties abroad—possess Article III standing to challenge Section 1881a's constitutionality. The court based that holding 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) a "present injury" by electing to incur costs in an effort to minimize the possibility of the surveillance they fear. That unprecedented decision is inconsistent with this Court's decisions, which (1) require proof of a non-conjectural and "imminent"—*i.e.*, "certainly impending"—injury in fact where the prospect of future injury is asserted, and (2) reject as insufficient a self-imposed injury stemming from the asserted chilling effect of a plaintiff's fears concerning a defendant's future actions. The panel's decision also conflicts with the decisions of other courts of appeals in analogous surveillance contexts, and it re-

quires that the constitutionality of an Act of Congress authorizing important foreign-intelligence-gathering activity directed abroad at third parties be litigated in the abstract without an appropriate factual context. In view of those considerations, and the vitally important national-security context in which the issue arises, this Court's review is warranted.

A. The Court Of Appeals Erroneously Based Article III Standing On Asserted Future Injuries That Are Conjectural And Not Imminent And On Asserted Self-Inflicted Harms

To establish Article III standing, a plaintiff must establish (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 injunctive relief, the plaintiff must establish a 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 imminent injury must be present "at the commencement of the litigation," *Davis* v. *FCC*, 554 U.S. 724, 732 (2008) (citation omitted), which in this case was the date Section 1881a was enacted.

The court of appeals departed from these principles in basing Article III jurisdiction on (1) a purported "fu-

ture injury"—the incidental interception of respondents' communications under Section 1881a—that is conjectural and not imminent; (2) respondents' self-inflicted "present injury" resulting from their own fear of such surveillance; and (3) speculation that an injunction targeting only Section 1881a-authorized surveillance (and not any other) would redress the asserted injury.

1. The "purpose" of the requirement that the plaintiff establish that he will sustain an "imminen[t]" and non-conjectural "future injury" is "to ensure that the alleged injury is not too speculative for Article III purposes" by requiring proof that "the injury is '*certainly* impending.'" *Defenders of Wildlife*, 504 U.S. at 565 n.2. (citation omitted) Proof of an imminent and concrete 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 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)). An injury cannot be "imminent" if it is based on "speculati[on] that [government] officials will" take harmful actions, because such conjecture gives "no assurance that the asserted injury is * * * 'certainly impending.'" *DaimlerChrysler Corp.*, 547 U.S. at 344-345.

The court of appeals made no attempt to determine whether respondents established an "imminent" future injury from a Section 1881a-authorized acquisition of their communications, let alone conclude that such an acquisition was "certainly impending" on the day Section 1881a became law. It instead held that respondents

could prove 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 (emphasis added). That novel standard of "likelihood" of injury at some future point disregards this Court's repeated admonition that a "threatened injury *must be 'certainly impending'* to constitute injury in fact." *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990) (emphasis added; citation omitted). The Court has "said many times" that such "[a]llegations of possible future injury do not satisfy the requirements of Art. 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 use of 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 (like respondents here) attempted to challenge the regulations as an unlawful grant of authority, but *Summers* 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 here did precisely what *Summers* forbids: It allowed respondents to challenge Section 1881a's constitutionality "in the abstract,"

in the absence of any showing of an "imminent" and "concrete application" (*id.* at 494), because it found an "objectively reasonable likelihood" that the government would sometime in the future acquire respondents' communications 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 a "*realistic* threat" of injury instead of proof of an actual, imminent future harm. 555 U.S. at 499-500 (discussing the dissenting 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)). As the dissenting judges explained below, respondents have proffered nothing to prove any imminent future injury. Pet. App. 146a-148a, 175a-176a, 181a-188a.

The panel's decision simply cannot be reconciled with established standing jurisprudence. Section 1881a does not authorize surveillance targeting respondents or any other United States person, 50 U.S.C. 1881a(b)(1)-(3), and respondents have presented no evidence that their international communications have ever been incidentally acquired by the government in its surveillance of non-United States persons abroad. Respondents have instead sought to show that they "believe" that the

United States will "likely" acquire their communications with persons abroad because respondents conclude that those third parties may be targeted by the United States. *E.g.*, Pet. App. 343a-344a, 350a, 356a-357a, 366a. That showing fails for multiple reasons.

First, respondents' own "belief" reflects bare conjecture that the government will choose to expend its limited resources to target respondents' foreign contacts. Second, even if the government were to want to obtain the communications of such persons, respondents have proffered 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 persons outside the United States other than Section 1881a-authorized surveillance. Pet. App. 169a, 172a; cf. pp. 3-4, *supra*.[7] Even if the government were to seek FISC approval of surveillance activity, respondents have provided no basis for concluding that the FISC would approve the request under Section 1881a. Pet. App. 165a-167a (Raggi, J., dissenting).

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[7] Respondent Scott McKay, for instance, believes 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 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 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) and (4), 1805(a) (authorizing targeting of agents of foreign powers with surveillance directed at facilities used by the target if the acquisition occurs or a surveillance device is used in the United States).

Notwithstanding the absence of evidence about the United States' actual conduct of foreign-intelligence activities, the court of appeals relied on what the court itself regarded as a "realistic understanding of the world" to assess the likely nature and scope of future foreign-intelligence acquisitions under Section 1881a. Pet. App. 38a. 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))—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).[8]

2. The court of appeals' "present injury" theory of standing is equally troubling. The court 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.

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[8] Seven respondents failed to present *any* proof of standing at summary judgment. See p. 7 & n.6, *supra*. 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).

No litigant "can be heard to complain about damage inflicted by its own hand." *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 664 (1976) (per curiam). Respondents here have simply elected to expend their funds because they have decided to try to limit the possibility that their international communications might be incidentally acquired by government surveillance targeting others. 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 without an injunction.

There is no 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 an imminent injury from the defendant's challenged conduct. Any contrary rule, as Judge Raggi explained, would incorrectly permit litigants to manufacture Article III standing "for the price of a plane ticket." Pet. App. 148a.

The fact that respondents may 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 support Article III jurisdiction. "[I]n order to have standing, an individual must present more than '[a]llegations 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* v. *Tatum*, 408 U.S. 1, 13-14 (1972)). In other words, respondents' inability to show an imminent interception of their communications cannot be cured by the asserted chilling effect resulting from their fear of such surveillance.

In *Laird*, the plaintiffs challenged an Army domestic surveillance program, which they claimed had a "'chilling' effect" leading them to cease First Amendment activities. 408 U.S. at 3. The Court noted that the "alleged 'chilling' effect" apparently arose, *inter alia*, from plaintiffs' "apprehensiveness that the Army may at some future date * * * direct[ly] harm" them with information from the program. *Id.* at 13. But the Court held that such "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of * * * a threat of specific future harm" that would support Article III standing. *Id.* at 13-14. As five dissenting judges explained in this case, "*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.

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 respondents' self-imposed harms add nothing to the analysis. A plaintiff's decision to inflict a self-imposed injury because of fear—a fear that itself is insufficient to confer Article III standing

—cannot create a cognizable injury. Adding zero to zero is still zero.

The court of appeals mistakenly relied on *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), 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. 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." 528 U.S. at 183-184 (citation omitted; emphasis added). Evidence showing that recreation was reasonably curtailed, the river "looked and smelled polluted," and property values declined served to document the extent of the injury to those "recreational, aesthetic, and economic interests." See *id.* at 181-184. Similarly, in *Keene*, the government had already determined that three specific films Keene wanted to display had to be labeled as foreign "political propaganda." 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). Because *Laidlaw* and *Keene* involved concrete, proven conduct by the defendants and specific injuries other than "chill" that flowed directly from that conduct, they do not support the decision below.

3. The court of appeals' conclusion that respondents' self-imposed fiscal "injury" qualified as an injury in fact led it to err further in finding a "substantial likelihood that the requested relief will remedy" that asserted injury. Pet. App. 41a n.24 (citation omitted). It reasoned that, because "[respondents'] injuries stem from their reasonable fear of being monitored by FAA-authorized government surveillance," their injuries would be redressed by an "injunction prohibiting the government from conducting surveillance under the FAA." *Ibid.* That tautological approach to redressability highlights the speculative nature of respondents' contentions.

First, respondents' claimed 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 "injury." Plaintiffs can stop expending funds now and, alternatively, can continue to expend funds even if they prevail in this action.

Second, respondents do not seek to enjoin all possible government surveillance of their contacts abroad. They request an injunction that would stop only "surveillance [conducted] pursuant to the authority granted by section [1881a]." Pet. App. 241a. As Judge Raggi explained, that focus on only one provision authorizing foreign-intelligence surveillance itself undermines 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; see *id.* at 168a-173a.

FISA, for instance, leaves unregulated multiple means for collecting foreign-intelligence information. Congress intentionally limited FISA's reach by tailoring

its "definition of 'electronic surveillance'" to avoid regulating "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 (1978). In addition, traditional FISA orders can authorize the acquisition (in the United States) of communications by persons abroad who are associated with terrorist groups or other foreign powers. See p. 3, *supra*. Moreover, as respondents describe them, respondents' contacts abroad could well be "prime targets for surveillance by other countries, including their own." Pet. App. 172a (Raggi, J., dissenting). And foreign intelligence services are not bound by the United States Constitution or FISA when collecting intelligence about persons in foreign countries or deciding whether to provide that information to the United States. In short, it is wholly speculative that enjoining use of Section 1881a would likely redress respondents' perceived need to take affirmative measures to prevent surveillance of their international communications.

B. The Court Of Appeals' Holding Creates A Conflict In The Circuits

The D.C. and Sixth Circuits have confronted similar suits challenging the government's authority to conduct intelligence activities, and both have held that the plaintiffs lacked standing because they could not establish that they themselves would be subject to imminent surveillance. Both cases conflict with the decision here.

1. In *United Presbyterian Church* v. *Reagan*, 738 F.2d 1375 (1984), the D.C. Circuit, in an opinion authored by then-Judge Scalia, held that the plaintiffs failed to establish standing to challenge the legality of Executive Order No. 12,333, because they failed to show the "immi-

nence of concrete, harmful action." *Id.* at 1380. The plaintiffs, like respondents, could not prove that they had been surveilled as a "consequence of the [Order]," but argued that (1) "their activities are such that they are especially likely to be targets of the unlawful activities authorized by the order," and that (2) they had curtailed constitutionally protected activities because of "fear" that they would be "targeted for surveillance." *Id.* at 1377, 1380-1381. Indeed, the plaintiffs' claim to standing in *United Presbyterian Church* had an added feature that respondents' claim does not, because the plaintiffs there asserted that they had themselves "been subjected to unlawful surveillance in the past." *Id.* at 1380; see Pet. App. 163a & n.19 (Raggi, J., dissenting).

The D.C. Circuit held that, even assuming that the plaintiffs faced a "greater risk" of surveillance, they failed to show a non-speculative threat of future injury. 738 F.2d at 1380. The Executive Order, the court explained, "does not *direct* intelligence-gathering activities against all persons who could conceivably come within its scope, but merely *authorizes* them." *Ibid.* As such, the plaintiffs' contentions regarding the likelihood of future surveillance were "speculative" and did not prove the requisite "imminence of concrete, harmful action." *Ibid.*

The D.C. Circuit also concluded that the fact that plaintiffs' present activities had been "chilled" did not support standing. Under *Laird*, it explained, a plaintiff must "suffer[] some concrete harm (past or immediately threatened) apart from the 'chill' itself." *United Presbyterian Church*, 738 F.2d at 1378; see *id.* at 1380. In short, a "[c]hilling effect" is not a "*harm* which entitles the plaintiff to [sue]." *Id.* at 1378.

2. In *ACLU* v. *NSA*, 493 F.3d 644, 648 (2007), cert. denied, 552 U.S. 1179 (2008), the Sixth Circuit similarly

held that the plaintiffs failed to establish standing to challenge the Terrorist Surveillance Program (TSP), which authorized the collection of certain international communications into or out of the United States where there were reasonable grounds to believe that at least one party to the communication was a member of, affiliated with, or working in support of al Qaeda or an affiliated terrorist organization.

The *ACLU* plaintiffs asserted, *inter alia*, an "injury based on the increased financial burden they incur in having to travel substantial distances to meet personally with their clients and others relevant to their cases" to avoid TSP surveillance. *ACLU* v. *NSA*, 438 F. Supp. 2d 754, 767 & n.16 (E.D. Mich. 2006), rev'd, 493 F.3d 644 (6th Cir. 2007). That claim is materially the same as respondents' here.[9]

Although each judge in *ACLU* wrote separately, the opinions of Judges Batchelder and Gibbons formed a majority holding that the plaintiffs lacked standing. Judge Batchelder acknowledged the argument that "*immediate* injury result[ed] directly from [plaintiffs'] own

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[9] In *ACLU*, for instance, attorney Nancy Hollander declared that she "represent[ed] Mohommedou Ould Salahi" (a captured member of al Qaeda) in his habeas corpus petition; needed to "engage in privileged communications" with persons in foreign countries; "believe[d] it is likely that some or all of th[ose] communications will be intercepted"; and had limited her international communications and "instead had to take expensive and time-consuming trips abroad to obtain information." 06-cv-10204 Doc. 4, Exh. J ¶¶ 21, 23-25 (E.D. Mich. Mar. 9, 2006). Respondent Sylvia Royce's declaration is materially indistinguishable: She "also represent[s] Mohommedou Ould Salahi" in the same habeas petition; also claims a need to communicate with persons abroad; "believe[s] that [her] international communications are likely to be acquired under the new law"; and thus "ha[s] to travel to share information" that she deems sensitive. Pet. App. 349a-352a.

actions" taken to reduce the "possibility that [their] private communications" could be intercepted, and that that "injury manifest[ed] itself in * * * a quantifiable way (as the added time and expense of traveling overseas)." 493 F.3d at 654. She also observed that the plaintiffs' stated "well founded belief" that "the NSA is presently intercepting, or will eventually intercept, [their] communications * * * may be reasonable." *Id.* at 655-656; see *id.* at 667. But Judge Batchelder determined that, "[b]ecause there is no evidence that any plaintiff's communications have ever been intercepted," and because the NSA "might *never* actually intercept" any of the plaintiffs' communications, the plaintiffs failed to establish an injury in fact caused by the government. *Id.* at 656, 667. The "anticipated harm," she explained, was "neither imminent nor concrete," but rather was merely "hypothetical, conjectural, or speculative." *Ibid.*

Judge Gibbons likewise acknowledged that "the plaintiffs * * * may have a reasonable fear of harm from the [government's] conduct," but she concluded that, "regardless of how reasonable that fear may be," "a plaintiff must be actually subject to the [government's] conduct, not simply afraid of being subject to it," to sustain a nonspeculative Article III injury. 493 F.3d at 689-690. And because there was "no evidence in the record that any of the plaintiffs are personally subject to the TSP," Judge Gibbons concluded that the plaintiffs lacked standing. *Id.* at 691. Accord *Al-Haramain Islamic Found.* v. *Bush*, 507 F.3d 1190, 1205 (9th Cir. 2007) (holding that plaintiffs could not establish standing to challenge TSP surveillance without proof of such surveillance); *Halkin* v. *Helms*, 690 F.2d 977, 999-1000, 1001-1002 (D.C. Cir. 1982) (same for other surveillance activities).

The court of appeal's reasoning cannot be squared with *United Presbyterian Church* and *ACLU*. Like the programs challenged in those cases, Section 1881a does not require that intelligence-gathering activities be taken against respondents or their overseas contacts. It merely authorizes certain targeting that *may not* target respondents. The court of appeals' speculative reliance on its own asserted "realistic understanding of the world," and its focus on a "reasonable interpretation" of the scope of Section 1881a authority, Pet. App. 38a, cannot be reconciled with the logic of the D.C. and Sixth Circuits, which require non-conjectural, imminent injury.

Judge Lynch acknowledged that the panel opinion he authored was in "tension" with those decisions but concluded, like the panel, that the other circuits' cases were factually distinguishable. Pet. App. 116a (Lynch, J., concurring in denial of rehearing en banc); *id.* at 58a-59a & n.32 (panel). The panel deemed the TSP challenge in *ACLU* to be "narrow[er]" than that here, and the challenge in *United Presbyterian Church* to the Executive Order governing "the entire national intelligence-gathering system" to be broader and less specific. *Ibid.* But those distinctions concerning the breadth of surveillance that might *possibly* occur under a particular authorization do nothing to establish the scope of the activity *actually* conducted. See *id.* at 163a n.19 (Raggi, J., dissenting). The panel's conjecture about the latter directly conflicts with the holdings in both *United Presbyterian Church* and *ACLU*.

C. Review Is Warranted To Resolve An Important And Recurring Threshold Question Governing The Scope Of Federal Jurisdiction

The court of appeals' Article III holding raises exceptionally important questions for the Court's review. If allowed to stand, it will require the lower courts—based on respondents' speculative claims of harm—to adjudicate in the abstract the constitutionality of an Act of Congress governing exceedingly important foreign-intelligence surveillance targeting non-United States persons abroad. That decision is incorrect, has created a circuit conflict, disregards important separation-of-powers principles underlying the standing requirements of Article III of the Constitution, and cleanly presents significant legal issues for this Court's review.

No judge below—not even the panel opinion's author—"dispute[d] the 'exceptional importance'" of the question presented when the court of appeals denied en banc rehearing by an equally divided, six-to-six vote. Pet. App. 135a; see *id.* at 116a, 178a. As five dissenting judges explained, the panel's decision represents an "unprecedented" and "startling" (*id.* at 133a, 178a-179a) expansion of Article III principles that is unfaithful to this Court's standing jurisprudence and conflicts with decisions in other circuits. Those judges took the unusual step of expressing the "hope that [this Court's] doors will be opened for further discussion of this case." *Id.* at 175a (Raggi, J., dissenting).

Although the interlocutory posture of a case is normally a basis to defer review, there are compelling reasons for review in this case at this time. This Court's interlocutory review is warranted if the petition presents an "important and clear-cut issue of law" that "would otherwise qualify as a basis for certiorari" and "is funda-

mental to the further conduct of the case." Eugene Gressman et al., *Supreme Court Practice* 281 (9th ed. 2007) (citing cases). That holds particularly true where, as here, the court of appeals' decision disregards at the very threshold of the case the fundamental separation-of-powers principles upon which "the law of Art. III standing is built." *Raines* v. *Byrd*, 521 U.S. 811, 820 (1997) (quoting *Allen* v. *Wright*, 468 U.S. 737, 752 (1984)); see, *e.g.*, *Hein* v. *Freedom From Religion Found., Inc.*, 551 U.S. 587, 596-597 (2007) (interlocutory review following court of appeals' reversal of district court's dismissal of constitutional challenge on standing grounds).

The "Art. III notion that federal courts may exercise power only 'in the last resort, and as a necessity,'" *Allen*, 468 U.S. at 752 (citation omitted), is particularly salient when a court must discharge "the most important and delicate of its responsibilities": "constitutional adjudication." *Schlesinger*, 418 U.S. at 220-221. The standing inquiry therefore should be "especially rigorous when reaching the merits of the dispute would force [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 will 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. Review thus is particularly warranted to prevent the extraordinary inconvenience and untoward prospect of continuing the "conduct of the cause" on remand. *American Constr. Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893).

Directing such litigation in the context of an Act of Congress regulating the Nation's exceedingly important need to conduct foreign-intelligence surveillance targeting certain non-United States persons abroad threatens to disrupt important Executive Branch activities protecting the national security. The Court similarly granted the government's interlocutory petition to decide whether the plaintiffs in *Laird* had standing to challenge a domestic intelligence-gathering program that the plaintiffs —like respondents here—feared would cause them harm. No different result is warranted now. This Court's review is warranted at this critical juncture in the litigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

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