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*,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

BRIEF OF WILLIAM P. BARR,
EDWIN MEESE III, DICK THORNBURGH,
AND WASHINGTON LEGAL FOUNDATION
AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

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QUESTIONS PRESENTED

Section 702 of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 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. Respondents are United States persons who are not permissible surveillance targets under Section 1881a. Respondents filed this action on the day that Section 1881a was enacted in 2008, 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.

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INTERESTS OF *AMICI CURIAE*

The *amici curiae* are three former Attorneys General of the United States and a public interest law firm.[1] They believe that a federal court should consider constitutional challenges to federal legislation only after fully satisfying itself that the plaintiffs possess Article III standing to raise their challenges.

The Honorable William P. Barr served as Attorney General of the United States from 1991 to 1993. He also served as Assistant Attorney General for the Office of Legal Counsel from 1989 to 1990 and Deputy Attorney General from 1990 to 1991.

The Honorable Edwin Meese III served as Attorney General of the United States from 1985 to 1988. He also served as Counsellor to President Ronald Reagan from 1981 to 1985.

The Honorable Dick Thornburgh served as Attorney General of the United States from 1988 to 1991. He also served as Assistant Attorney General for the Criminal Division from 1975 to 1977 and Governor of Pennsylvania from 1979 to 1987.

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Ten days prior to the due date, counsel for *amici* provided counsel for Respondents with notice of intent to file. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

all 50 States. WLF has frequently appeared in this and other federal courts to urge courts to confine themselves to deciding cases that fall within their jurisdiction as set forth in Article III of the U.S. Constitution. *See, e.g., Boumediene v. Bush,* 553 U.S. 723 (2008); *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), *cert. denied*, 552 U.S. 1179 (2008); *Al-Haramain Islamic Found. v. Obama*, No. 11-15468 (9th Cir., dec. pending).

The Executive and Legislative Branches have determined that the electronic surveillance authorized by 50 U.S.C. § 1881a is an important tool in maintaining America's national security. The program allows the Attorney General and the Director of National Intelligence – with the approval of the Foreign Intelligence Surveillance Court – to authorize the electronic surveillance of foreigners believed to be located outside the United States, for the purpose of obtaining foreign-intelligence information. Although § 1881a contains numerous provisions designed to ensure that constitutional rights are respected, Respondents contend that those provisions do not go far enough, and are asking the federal courts to strike down the statute. However, because Respondents are U.S. citizens, they may not be targeted under the statute, and they have produced no evidence that any of their communications have been intercepted. *Amici* are concerned that the federal courts not pass judgment on the constitutionality of federal legislation when the plaintiffs, as is true here, cannot demonstrate that they have suffered an injury directly traceable to the legislation they challenge. *Amici* believe that courts should be particularly reluctant to hear such challenges when, as here, the legislation at issue has been deemed

vital to the national defense by the other branches of government and any airing of the relevant facts in a federal courtroom poses risks to national security.

STATEMENT OF THE CASE

For national security reasons, the United States government has long engaged in significant amounts of surveillance activity outside the United States. Since 1978, a portion of that surveillance – "electronic surveillance" – has been subject to congressional regulation pursuant to the Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, 50 U.S.C. §§ 1801 *et seq*.[2] Overseas surveillance not covered by FISA is governed by Executive Order No. 12,333, § 2.2, 3 C.F.R. § 200.

FISA established procedures whereby the Attorney General and other federal officials could obtain authorization from the Foreign Intelligence Surveillance Court (FISC) to engage in regulated "electronic surveillance" for national security purposes. 50 U.S.C. §§ 1803, 1804. FISC judges grant *ex parte* approval to surveillance applications for a specified time period if they determine that federal officials have met the prerequisites set forth in FISA. 50 U.S.C. § 1805.

Congress amended FISA in 2008 by adopting the

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[2] FISA's definition of "electronic surveillance" is relatively narrow as applied to overseas activities. It does not, for example, include acquiring a wire or radio communication of a U.S. citizen who is outside the United States unless the communication is to or from a "person in the United States" and the "acquisition occurs in the United States." 50 U.S.C. § 1801(f).

FISA Amendments Act of 2008 (FAA), Pub. L. No. 110-261. Among other things, the FAA added Section 702 to FISA, 50 U.S.C. § 1881a, to establish a supplemental procedure for obtaining authorization to engage in overseas electronic surveillance. Most importantly for purposes of this case, § 1881a does not permit the Executive Branch to "target a United States person," regardless where that person is located, or a non-United States person located in the United States.

Section 1881a is designed to permit surveillance of non-United States persons when the acquisition involves obtaining foreign-intelligence information from or with the assistance of an electronic service provider. Except in limited "exigent circumstances," § 1881a authorizes surveillance only after a FISC court has approved the targeting and "minimization" procedures to be employed and has approved a certification from the Attorney General and the Director of National Intelligence that:

- the acquisition of information does not violate the Fourth Amendment;

- the acquisition involves obtaining "foreign intelligence information" from an electronic service provider;

- the targeting procedures are reasonably designed to ensure that the acquisition targets only individuals who are reasonably believed to be outside the United States; and

- the minimization procedures are designed to

limit access to information about U.S. persons.

50 U.S.C. § 1881a(g)(2)(A).

On the day of § 1881a's enactment in 2008, Respondents filed this lawsuit challenging its constitutionality. Pet. App. 197a-242a. They seek declaratory relief and a permanent injunction against the conduct of surveillance pursuant to the authority granted by § 1881a. They allege that § 1881a violates the First and Fourth Amendments as well as separation-of-powers principles. Named as defendants in their official capacities are the three Petitioners: Director of National Intelligence James R. Clapper, Director of the National Security Agency Keith B. Alexander, and Attorney General Eric H. Holder, Jr.

Petitioners (collectively, "the Government") filed a motion for summary judgment, claiming that Respondents (four attorneys and five organizations) lacked Article III standing to challenge the facial validity of § 1881a. In support of their standing claims, Respondents stated that their work requires them to communicate regularly with overseas individuals, some of whom the Government believes to be associated with terrorist organization. They claimed that because of that belief, and because many of the overseas individuals are located in areas that are a focus of the Government's counterterrorism efforts, their electronic communications with those individuals are likely to be acquired by the Government pursuant to § 1881a. Their claimed injuries fell into two categories: (1) "an actual and well-founded fear" of future surveillance of their communications with overseas individuals; and (2)

the cost of measures designed to minimize the likelihood of such surveillance (such as traveling overseas to speak with the overseas individuals, rather than communicating with them by wire).

The district court determined that Respondents lacked Article III standing and granted summary judgment to the Government. Pet. App. 62a-113a. It determined that Respondents' fear-of-surveillance injury was too speculative to constitute injury-in-fact because "a surveillance order from the FISC . . . cannot target the plaintiffs and whether an order will be sought that affects the plaintiffs' rights, and whether such an order would be granted by the FISC, is completely speculative." *Id.* at 85a. The court also held that the costly measures undertaken by Respondents to protect the privacy of their communications did not constitute injury-in-fact because those costs flowed from Respondents' "purely subjective fear of surveillance," not from evidence that the overseas individuals with whom they communicate will, in fact, be targeted under § 1881a. *Id.* at 101a.

The Second Circuit reversed the district court's judgment and reinstated the lawsuit. Pet. App. 1a-61a. It held that both of Respondents' claimed injuries (their fear of future surveillance and their expenditures to minimize the chances of surveillance) were sufficient to satisfy Article III standing requirements. The appeals court held that Respondents' expenditures were "fairly traceable" to the FAA because their fears that the government would intercept their communications under the FAA were "reasonable" and it thus was "reasonable" for them to expend funds to prevent the

interceptions. *Id.* at 27a-28a. Among the factors that led the court to conclude that future surveillance of Respondents is "reasonably" likely: (1) the FAA authorizes surveillance of non-United States persons located overseas, a group with which Respondents communicate regularly, *id.* at 36a; (2) it is "fanciful" to suggest that the Government will not exercise its new surveillance authority, given statements by federal officials that authorizing such surveillance is "necessary to protect[ ] the nation against attack," *id*. at 37a; and (3) Respondents' belief that those with whom they communicate will be targeted for surveillance is "reasonable," given the location of those individuals and the Government's belief that they are associated with terrorist organizations. *Id.*

The court said its conclusion was unaffected by the fact that the FAA does not authorize the Government to target Respondents directly (because they are U.S. citizens). It stated that so long as Respondents can demonstrate that they reasonably fear that the Government's targeting of others will result in the surveillance of their communications, they are not precluded from demonstrating Article III standing simply because the Government did not set out to target them. *Id.* at 41a-50a. The court rejected the Government's reliance on two decisions from other federal appeals courts – *ACLU v. NSA* and *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984) – stating that "those cases do not bind us" and are "factually distinguishable from the instant case" and that it "d[id] not find their interpretation" of this Court's standing case law "to be persuasive." *Id.* at 58a-59a.

The appeals court denied the Government's petition for rehearing *en banc* by an equally-divided, 6-6 vote. Pet. App. 114a-115a. Four judges authored opinions dissenting from denial of the petition. The principal dissent – authored by Judge Raggi and joined by four other judges, *id*. at 133a- 175a – stated that the panel decision was "at odds" with Supreme Court precedent holding that "a subjective fear of challenged government conduct is insufficient to support standing." *Id*. at 133a-134a. Judge Raggi stated that the panel's decision was particularly unwarranted because "the nature and source" of the Fourth Amendment rights being asserted by Respondents was so unclear. *Id*. at 138. Noting that Respondents do not assert that they might be the target of surveillance under the FAA and that they are not permitted to assert the Fourth Amendment rights of others who *are* targeted, she questioned how "the panel could recognize [Respondents'] standing without a clearer comprehension of the personal Fourth Amendment rights at stake." *Id*. at 144a.

REASONS FOR GRANTING THE PETITION

The petition raises issues of exceptional importance. Respondents seek invalidation of a significant national security statute designed to protect the Nation from terrorist activity. Before they decide any case – and certainly before they decide a case in which important national security concerns are at stake – federal courts are under a duty to ensure that they possess Article III jurisdiction over the claims being asserted. As this Court has repeatedly explained:

> Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)).

The Second Circuit held that Respondents possess Article III standing to challenge § 1881a even though they concede that they have no evidence that the Government has ever acquired, or is planning to acquire, any of their electronic communications pursuant to that statute. Indeed, they concede that, due to their U.S. citizenship, the law prohibits the Government from targeting them for surveillance. The appeals court held that Respondents had demonstrated injury-in-fact that was directly traceable to § 1881a because: (1) their fears that the Government would intercept their communications were "reasonable"; and (2) they acted reasonably in spending money to order to minimize the likelihood of such interception. As the Petition fully explains, and as the Second Circuit essentially concedes, Pet. App. at 59a, the decision below is in direct conflict with decisions from the Sixth and D.C. Circuits regarding what is required to establish standing to challenge government surveillance programs. Review is warranted to resolve that conflict.

Amici will not repeat the Petition's analysis regarding why the decision below cannot be reconciled with the decisions of the Sixth Circuit (*ACLU v. NSA*)

and the D.C. Circuit (*United Presbyterian Church*). We write separately to focus on several other reasons why review is particularly appropriate. First, the decision below conflicts sharply with this Court's standing decisions. In particular, this Court has repeatedly rejected claims that a "reasonable" fear of future injury can satisfy Article III's injury-in-fact requirement. Rather, the Court has made clear that future injury can provide the requisite injury-in-fact only when its threat is "imminent." Nor can a plaintiff create his own injury-in-fact by expending funds to prevent future injury in the absence of such an imminent threat.

Second, review is warranted because federal courts should be especially cautious about permitting national security cases of this sort to proceed to trial in the absence of clear evidence that the plaintiffs possess standing. A trial in this case would undoubtedly require the Government to reveal significant information about the manner in which it is implementing the surveillance authority granted to it by § 1881a. Disclosure of such information could prove valuable for enemies of the United States who seek to prevent their electronic communications from being intercepted. The Executive Branch is understandably reluctant to short-circuit litigation by asserting the state secrets privilege unless such an assertion is absolutely necessary, and it has not done so in this case. But the absence of such an assertion in this case should not blind the Court to the potential damage to national security that a trial of this case might entail. Given that potential, it is particularly important for the Court to heed the Government's request for review of the extremely generous standing rules invoked by the Second Circuit as its basis for

upholding Respondents' Article III standing.

Finally, review is warranted because, as Judge Raggi pointed out in her dissent from denial of rehearing *en banc*, the nature and source of the constitutional rights that Respondents assert are so unclear. Pet. App. 138a. Without a clearer understanding of the Fourth Amendment rights allegedly at stake, "it is impossible to conclude that these plaintiffs are the persons best suited to challenge the constitutionality of a statute that cannot target them." *Id.* at 144a. While such prudential considerations do not necessarily affect Respondents' Article III standing, those considerations do provide additional grounds to question the Second Circuit's singular decision to grant Article III standing to parties that have shown nothing more than that their fears of future injury are "reasonable."

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS SHARPLY WITH THIS COURT'S STANDING CASE LAW

Article III, § 2 of the Constitution extends the "judicial Power" of the United States only to "Cases" and "Controversies." Standing to sue is part of the common understanding of what it takes to make a justiciable case. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Review is warranted because the Second Circuit upheld Respondents' standing by applying legal standards that conflict sharply with those traditionally employed by this Court.

The Supreme Court has explained Article III standing requirements as follows:

> The irreducible constitutional minimum of standing contains three requirements. . . . First, and foremost, there must be alleged (and ultimately proven) an "injury in fact" – a harm suffered by the plaintiff that is "concrete" and "actual and imminent, not 'conjectural' or 'hypothetical.'" . . . Second, there must be causation – a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. . . . And third, there must be redressability – a likelihood that the requested relief will redress the alleged injury.

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102-103 (1998) (citations omitted).

The Second Circuit held that both of the Respondents' claimed injuries (their fear of future surveillance and their expenditures to minimize the chances of surveillance) were sufficient to satisfy Article III standing requirements. It held that a fear of future surveillance pursuant to § 1881a is sufficient to establish Article III standing so long as the fear is "reasonable." Pet. App. 30a.[3]

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[3] The appeals court ultimately concluded that Respondents' fear of future surveillance was sufficiently reasonable to constitute Article III injury-in-fact because: (1) Respondents regularly communicate with non-United States persons living overseas, and § 1881a authorizes surveillance of such individuals; (2) the Government is likely to exercise its new surveillance activity; and (3) it is reasonable to believe that the overseas individuals with

That holding sharply conflicts with this Court's far more stringent standard regarding when anticipated future injury can be sufficient to establish Article III standing. The Court has explained that injury-in-fact requires a harm that is "concrete and actual and imminent, not conjectural or hypothetical." *Steel Co.*, 523 U.S. at 102-03. Even if, as the Second Circuit concluded, it was "reasonable" for Respondents to conclude that they will be subjected to surveillance pursuant to § 1881a, that is a far cry from a finding that such surveillance is "imminent."

Respondents are asserting, of course, not merely that they will be injured in the future when they are subjected to surveillance, but also that their fear of

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whom Respondents communicate will be targeted under § 1881a, given their location and the Government's belief that they are (or were) associated with terrorist groups. *Id.* at 36a-37a. The appeals court's factual conclusion are open to serious question. First, as then-Judge Scalia concluded in his D.C. Circuit opinion in *United Presbyterian Church*, in a suit seeking to enjoin government action that allegedly would cause injury, the likelihood of future injury is significantly heightened when the challenged exercise of governmental power is "regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging." *United Presbyterian Church*, 738 F.2d at 1378. When, as was true in that case and is also true here, the challenged rule merely authorizes but does not command the government to take action, a plaintiffs' ability establish injury-in-fact by demonstrating the likelihood of future injury is considerably reduced. Second, in the absence of any evidence regarding how the Executive Branch is actually administering § 1881a, there is no basis for concluding that, among the billions of individuals worldwide who are eligible to be targeted under § 1881a, the Executive Branch is likely to focus on the very overseas individuals with whom Respondents regularly correspond.

future surveillance is a present-day injury. But the Supreme Court case principally relied on by the Second Circuit regarding fear of future injury – *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) – cuts strongly against the Second Circuit's position. *Lyons* held that a plaintiff's fear of police misconduct is not enough to demonstrate that the threat is sufficiently "actual and imminent" to constitute injury-in-fact. *Id.* at 107. The Court explained, "It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions." *Id.* at 107 n.8 (emphasis added). The plaintiff in *Lyons* was denied standing because the Court determined that the feared future injury (the recurrence of an episode in which Los Angeles police placed him in a choke hold) was not sufficiently imminent. Respondents, who (unlike Lyons) have not alleged that they ever previously were subjected to unconstitutional government actions, have similarly failed to demonstrate that their fear of future surveillance is based on imminent government conduct.

The decision below also conflicts with this Court's decision in *Laird v. Tatum*, 408 U.S. 1 (1972). *Laird* held that the present-day effects on a plaintiff caused by his fear that he will be subjected to government surveillance in the future (in that case, an alleged "chilling effect" on the exercise of a plaintiffs' First Amendment rights) are insufficient to satisfy Article III standing requirements. *Id.* at 13-14. The panel's efforts to distinguish *Laird*, Pet. App. 56a-58a, are unavailing. The panel may be correct that the plaintiffs in *Laird* presented significantly weaker evidence than did Respondents regarding the likelihood of future injury, but that observation does nothing to

eliminate the conflict between *Laird* and the decision below regarding whether the effects on a plaintiff caused by his fear that he will be subjected to government surveillance are sufficient to establish injury-in-fact.

The decision below also conflicts with this Court's decisions, in finding that Respondent's expenditure of funds to reduce the likelihood of surveillance constituted injury-in-fact fairly traceable to § 1881a. The panel held that those expenditures were sufficient to meet Article III standing requirements because Respondents' fears that the Government would intercept their communications under § 1881a were "reasonable" and it thus was "reasonable" for them to expend funds to prevent the interceptions. *Id.* at 27a-28a.

But this Court has repeatedly held that an injury is insufficient to establish Article III standing if it is not "fairly traceable to the challenged action of the defendant." *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436, 1442 (2011). Any claim that Respondents' expenditures were "fairly traceable" to § 1881a is highly problematic, given that the expenditures were designed to prevent a future injury that was neither "actual" nor "imminent." As Judge Raggi observed, if the panel were correct that expenditures designed to address a non-imminent future injury are sufficient to meet Article III standing requirements, then "for the price of a plane ticket, plaintiffs 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.'" Pet. App. 148a (Raggi, J., dissenting from denial of rehearing *en banc*). She added, "On that theory, every mobster's girlfriend who pays for a cab to meet with him in person rather than converse by telephone would be acting on a not-irrational fear of Title III interception and, therefore, have standing to challenge that statute." *Id.* at 133a. This Court has never countenanced such efforts by plaintiffs to bootstrap themselves into Article III standing.

In sum, review is warranted to resolve the considerable conflict between the Second Circuit's decision and this Court's case law addressing standing.

II. REVIEW IS WARRANTED IN VIEW OF THE NEED FOR CAUTION BEFORE COURTS AGREE TO HEAR THE MERITS OF CASES RAISING SENSITIVE NATIONAL SECURITY ISSUES

Review is also warranted because federal courts should be especially cautious about permitting national security cases of this sort to proceed to trial in the absence of clear evidence that the plaintiffs possess standing. The individual *amici*, while heading the Justice Department, were directly involved in the preparation of applications to the FISC for authority to engage in electronic surveillance for national security purposes. They are keenly aware of the highly sensitive nature of information contained in those applications. Because Respondents' suit challenges the constitutionality of § 1881a based on their assessment of how the

surveillance authorized by § 1881a is likely to be operated, any trial of Respondents' claims risks disclosure of sensitive information regarding those operations. In light of those concerns, prudence dictates that review be granted to ensure that this matter is not permitted to proceed to trial unless it is absolutely certain that Respondents can meet the Article III standing requirements.

Amici recognize that the Government could address such national security concerns by invoking the state secrets doctrine to prevent sensitive information from being introduced at trial, or even (in appropriate cases) to require dismissal of the lawsuit. *See United States v. Reynolds*, 345 U.S. 1 (1953); *Tenet v. Doe*, 544 U.S. 1 (2005). The Executive Branch, however, is understandably reluctant to invoke the state secrets privilege more often than absolutely necessary. *See* Office of the Attorney General, "Policies and Procedures Governing Invocation of the State Secrets Privilege" (Sept. 29, 2009) ("The Department is adopting these policies and procedures to strengthen public confidence that the U.S. government will invoke the privilege in court only when genuine and specific harm to national defense or foreign relations is at stake and only to the extent necessary to safeguard those interests.") The Justice Department's decision not to invoke the state secrets privilege thus far in this lawsuit may reflect a determination that invocation is unnecessary in light of Respondents' clear lack of standing to press their claims. The Second Circuit's decision upholding Respondents' standing may nonetheless force the Attorney General belatedly to invoke the state secrets privilege in order to eliminate the potential for harm to

national defense or foreign relations. Review is warranted to ascertain whether such invocation can be avoided. Invocation of the privilege would, of course, be unnecessary if, as the Government contends, the suit should be dismissed because Respondents lack Article III standing.

The Government's decision to date not to assert the state secrets privilege should not blind the Court to the potential damages to national security that a trial of this case might entail. A trial in this case would undoubtedly require the Government to reveal significant information about the manner in which it is implementing the surveillance authority granted to it by § 1881a. Disclosure of such information could prove valuable for enemies of the United States who seek to prevent their electronic communications from being intercepted. Review is warranted to ensure that the Nation will not be required to bear the costs of such disclosures unless this Court is satisfied that Respondents have satisfied the Article III standing requirements.

III. REVIEW IS WARRANTED BECAUSE THE SECOND CIRCUIT FAILED TO ARTICULATE THE NATURE AND SOURCE OF THE CONSTITUTIONAL CLAIMS IT IS ALLOWING RESPONDENTS TO PURSUE

Review is also warranted because the nature and source of the constitutional rights that Respondents assert are so unclear. *Amici* respectfully suggest that it would be highly imprudent for the federal courts to

continue to exercise jurisdiction over this matter unless the nature of Respondents' claims are more clearly defined.

The heart of Respondents' claim is that § 1881a violates the Fourth Amendment. Surprisingly, the Second Circuit failed to explain its views regarding the nature of Respondents' Fourth Amendment claims – and thus failed to ascertain whether Respondents were proper plaintiffs to be pursuing claims of that nature.

The Fourth Amendment protects against "unreasonable searches and seizures" of one's person, house, papers, and effects. Given the FAA's explicit admonition that no electronic surveillance may be conducted pursuant to the FAA unless it complies with the Fourth Amendment, § 1881a(b)(5), the peculiar nature of Respondents' claim – that § 1881a is facially invalid under the Fourth Amendment – is readily apparent.

Importantly, Respondents – who are all U.S. citizens – are not themselves the targets of the statute they seek to invalidate. *See* § 1881a(b)(1) & (4) (prohibiting targeting of all U.S. persons, and of all people known to be living in the United States). If their electronic communications are ever acquired by the United States, it will be because, by coincidence, they were communicating with a non-U.S. person who was the actual target of § 1881a surveillance. But as Judge Raggi points out, Pet. App. 142a, courts have generally understood the Fourth Amendment as requiring the officials seeking a warrant to establish probable cause only with respect to the target of their investigation, not

with respect to others who may communicate with the target. So this lawsuit cannot be based on a claim that the Government violated Respondents' Fourth Amendment rights by acquiring their electronic communications without first establishing probable cause to conduct a search.

On the other hand, non-United States persons – the only permissible targets of § 1881a surveillance – lack any rights under the Fourth Amendment by virtue of their non-resident alien status. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274 (1990). Accordingly, Respondents cannot claim to be acting on behalf of their overseas correspondents and asserting the latter's Fourth Amendment rights.

The decision below does nothing to clear up the nature of the Fourth Amendment claims being asserted by Respondents. But until the nature of those claims is made clear, "it is impossible to conclude that these plaintiffs are the persons best suited to challenge the constitutionality of a statute that cannot target them." *Id.* at 144a. While such prudential considerations do not necessarily affect Respondents' Article III standing, those considerations do provide additional grounds to question the Second Circuit's singular decision to grant Article III standing to parties that have shown nothing more than that their fears of future injury are "reasonable."

CONCLUSION

Amici curiae request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

Richard A. Samp
Washington Legal Found.
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

Dated: March 19, 2012