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

BRIEF OF JOHN D. ASHCROFT, WILLIAM P. BARR, BENJAMIN R. CIVILETTI, EDWIN MEESE III, MICHAEL B. MUKASEY, DICK THORNBURGH, AND WASHINGTON LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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August 2, 2012

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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—by law—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.

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INTEREST OF *AMICI CURIAE*

The *amici curiae* are six former Attorneys General and a public interest law firm who believe that the standing doctrine provides important legal protections to federal government defendants who must be able to perform their duties without the distraction of litigation premised solely on a policy disagreement with their actions or the scope of their authority.[1] The existence of a concrete "case or controversy" is especially important because this litigation touches upon issues of vital importance to the security of the United States.

The *amici curiae* are concerned that the decision below relaxes the standing doctrine to such a degree that a plaintiff who disagrees with a federal law or policy can inflict upon himself some harm in order to secure a federal forum to litigate his grievance. Among other dangers, such a relaxed standing requirement will unjustifiably force the government to defend policies and statutes in the abstract before actual applications and conflicts arise, increase the risk of disclosure of confidential national security information in litigation, and expose government officials and private companies more easily to suit regarding national security activities. Each of the *amici curiae* has appeared previously in litigation concerning national security interests, and desires to provide this Court with the perspective of those who have undertaken sensitive national security activities.

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1. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part; and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief. Letters of consent have been lodged with the Clerk.

The Honorable John D. Ashcroft served as Attorney General of the United States from 2001 to 2005.

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 Benjamin R. Civiletti served as Attorney General of the United States from 1979 to 1981. He also served as Assistant Attorney General for the Criminal Division from 1977 to 1978 and as Deputy Attorney General from 1978 to 1979.

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 Michael B. Mukasey served as Attorney General of the United States from 2007 to 2009. From 1988 to 2006, he served as a federal judge on the U.S. District Court for the Southern District of New York, serving as Chief Judge from 2000 to 2006.

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 non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. It regularly appears 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.

STATEMENT OF THE CASE

Litigation involving national security policy is nothing new. But in the recent past, shifting threats, seamless borders, and evolving technologies have required changes to the nature and conduct of national security activities. These changes have spurred a barrage of unnecessary and disruptive lawsuits premised on policy disagreements with the government's response to these challenges. This litigation is no exception.

This case concerns part of the FISA Amendments Act of 2008 ("FAA"), which Congress passed after vigorous debate with 69 votes in the Senate and 293 votes in the House. The goal was simple: to update the nation's intelligence tools for use in monitoring overseas threats, while protecting Americans' civil liberties and safeguarding those who assist the government. Though controversial in some quarters, the FAA was hailed by the President,[2] congressional leaders,[3] and the national

2. *See* Remarks by the President on the Signing of the FISA Amendments Act of 2008 (July 10, 2008) ("[The FAA] will protect the liberties of our citizens while maintaining the vital flow of intelligence."), *available at* http://www.justice.gov/archive/ll/docs/fisa-amendments-act-2008.pdf (last visited Aug. 2, 2012).

3. *See* Remarks of Sen. Rockefeller, 154 Cong. Rec. S6465 (2008) ("The [FAA] is, therefore, critical to the Nation's security, and it sets forth a legal framework to reflect the enormous changes in telecommunications technology over the last 30 years. The bill couples this improvement in foreign intelligence collection against foreign targets overseas with important protections for civil liberties, including the review by the Foreign Intelligence Surveillance Court of the targeting and minimization procedures governing these collection activities.").

security community as ensuring that the government could adapt surveillance methods to meet modern threats.

The FAA provision challenged here, Section 702, codified at 50 U.S.C. § 1881a, was designed to permit electronic surveillance of non-United States persons reasonably believed to be outside of the United States upon satisfaction of certain statutory requirements and in compliance with the Fourth Amendment. Specifically, except in limited "exigent circumstances," Section 1881a authorizes surveillance only after the Foreign Intelligence Surveillance Court ("FISC") approves "targeting" and "minimization" procedures and accepts a certification from the Attorney General ("AG") and the Director of National Intelligence ("DNI") that:

- 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 not U.S. persons and are reasonably believed to be outside the United States;
- the minimization procedures are designed to limit access to information about U.S. persons; and
- the procedures and guidelines for surveillance are consistent with the Fourth Amendment.

50 U.S.C. § 1881a(g)(2)(A).

The FAA was immediately subjected to legal challenge, including in this lawsuit.[4] Respondents filed this suit the day of the FAA's enactment based on their fundamental disagreement with the authority and methods for conducting foreign surveillance codified in Section 1881a. Their suit is not based on how the AG, the DNI, or FISC have implemented or will implement the FAA, nor is it based on any actual targeting of their communications or contacts abroad.

Nonetheless, Respondents ask a federal court to evaluate whether Section 1881a violates the Fourth Amendment (contrary to its express terms) because it may "authorize[] the dragnet surveillance of Americans' international communications." Br. in Opp. at 1, *Clapper v. Amnesty Int'l USA*, No. 11-1025 (Apr. 17, 2012). Respondents also seek a ruling that Section 1881a violates the First Amendment because it may chill international communications, and that it violates the separation of powers by allowing the FISC to make "an abstract assessment of the general rules that will govern a [dragnet] surveillance program." Pls.' Mem. in Supp. of

4. Litigants also challenged Congress's decision "to empower the Attorney General to immunize from suit telecommunications companies that had cooperated with the government's intelligence gathering, including post-September 11 activities." *In re Nat'l Sec. Agency Telecomms. Records Litig. (Hepting)*, 671 F.3d 881, 891 (9th Cir. 2011). The Ninth Circuit rejected that constitutional "broadside," *see id.* at 904, and the separate claim that the provision constituted an unconstitutional taking, *see In re Nat'l Sec. Agency Telecomms. Records Litig.* (*McMurray*), 669 F.3d 928 (9th Cir. 2011). The Ninth Circuit's determination in *Hepting* is the subject of a pending petition for certiorari. *Hepting v. AT&T Corp.*, No. 11-1200 (filed Mar. 28, 2012).

Mot. for Summ. J. at 49, *Amnesty Int'l USA v. Clapper*, No. 08-6259, Doc. 7 (S.D.N.Y. Sept. 12, 2008).

On cross-motions for summary judgment, Respondents' case was dismissed for lack of Article III standing. *Amnesty Int'l USA v. McConnell*, 646 F. Supp. 2d 633 (S.D.N.Y. 2009). Respondents had premised standing on their asserted fear that the FAA may be implemented in a manner that could impact their communications with overseas contacts. They also relied on steps that they had taken, or planned to take, to minimize the chance that their communications would be collected should surveillance of their contacts be authorized. The District Court concluded that the asserted fears and self-inflicted avoidance measures did not satisfy Article III.

The United States Court of Appeals for the Second Circuit disagreed. *Amnesty Int'l USA v. Clapper*, 638 F.3d 118 (2d Cir. 2011). A panel found that the claimed injuries satisfied Article III. In its view, the avoidance costs incurred by Respondents constituted injuries-in-fact that were traceable to the FAA because the fears that prompted them were "reasonable." It was no impediment, in the panel's view, that Respondents' allegations of harm depend on posited—but unconfirmed and unspecified—activity targeted at third parties overseas. So long as Respondents could demonstrate that they reasonably fear that the government's targeting of others may result in incidental surveillance of their communications, the panel held that they are not precluded from suing for a declaration of the FAA's constitutionality.

An equally-divided court denied a petition for rehearing *en banc*, generating several strenuous dissents.

The dissenting judges detailed how the panel's innovation in Article III standing was "at odds" with this Court's precedent. *Amnesty Int'l USA v. Clapper*, 667 F.3d 163 (2d Cir. 2011). The dissenters also expressed deep concern with the conclusion that standing could rest on such scant and tenuous allegations of harm in a case where the constitutional claims were so vague and the ramifications for national security so great.

SUMMARY OF THE ARGUMENT

"The power to declare the rights of individuals and to measure the authority of governments, . . . 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.'" *Valley Forge Christian College v. Ams. United for Separation of Church & State*, 454 U.S. 464, 471 (1982) (quoting *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892)). The standing doctrine enforces these Article III limitations, which ensure that the judiciary does not superintend policy disagreements or prematurely hear potential disputes.

Standing is critical to the "proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Its role is all the more important when claims touch on sensitive national security questions. Inchoate and unnecessary litigation forces the government to focus on litigation rather than national defense, to prematurely confront hypothetical scenarios that may never occur, to risk revealing sensitive national security information, and to consider invoking other doctrines designed to apply in limited circumstances to protect national security and the separation of powers.

The Second Circuit's analysis strips Article III standing of its gatekeeping role. Respondents were afforded Article III standing based on their speculation about future government action with respect to other persons, their subjective fears about the consequences of such action, and some expenses that may minimize the possibility of such an impact should their conception of the statute prove correct and be acted upon. By permitting abstract and speculative syllogisms to substitute for actual and imminent redressable harm caused by the FAA, the panel gutted Article III and invited Respondents to litigate abstract policy disputes.

Article III's faithful application here will not "insulate the FAA from judicial review altogether." Br. in Opp. at 2. As explained below, FISA is designed to protect Respondents' rights. There is meaningful review, including of the consistency of FISA surveillance with the Fourth Amendment, through the FISC and in any appropriate as-applied litigation. In these circumstances, federal courts should not be called upon to determine the legality of Congress's careful compromise based on speculation about hypothetical activities that may—or may not—indirectly impact the Respondents.

Because Respondents do not satisfy the fundamental prerequisites of Article III standing, this Court should reverse the Second Circuit.

ARGUMENT

I. The Standing Doctrine Precludes Adjudication Of Abstract Disagreements Over National Security Policy.

A. The requirement of a concrete factual dispute between specific adverse parties protects the separation of powers.

The "law of Art[icle] III standing is built on a single basic idea—the idea of separation of powers." *Allen v. Wright*, 468 U.S. 737, 752 (1984). By "enforc[ing] the Constitution's case-or-controversy requirement,'" *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004), the doctrine "prevents courts of law from undertaking tasks assigned to the political branches," *Lewis v. Casey*, 518 U.S. 343, 349 (1996). It requires that "legal questions presented to the court 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*, 454 U.S. at 472.

Article III limits the federal judiciary's "Power" to the resolution of "Cases" or "Controversies"—"not questions and issues." *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1441 (2011). As Chief Justice Marshall explained, "[if] the judicial power extended to every *question* under the constitution it would involve almost every subject proper for legislative discussion and decision"—and then "[t]he division of power [among the branches of government] could exist no longer, and the other departments would be swallowed up by the

judiciary." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (quoting 4 Papers of John Marshall 95 (C. Cullen ed. 1984)).

The standing doctrine "assures that 'there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party.'" *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974)). It "prevents the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States v. SCRAP*, 412 U.S. 669, 687 (1973). Standing "helps assure that courts will not pass upon . . . abstract, intellectual problems, but [will] adjudicate concrete, living contests between adversaries." *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20 (1998) (citation omitted).

The requirement that there be a concrete dispute affecting the particular parties prevents courts from becoming "forum[s] in which to air . . . generalized grievances about the conduct of government or the allocation of power in the Federal System." *United States v. Richardson*, 418 U.S. 166, 174 (1974). Such review "would deputize federal courts as 'virtually continuing monitors of the wisdom and soundness of Executive action,' and that, most emphatically, 'is not the role of the judiciary.'" *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 612 (2007) (quoting *Allen*, 468 U.S. at 760).

This is why "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Valley Forge*, 454 U.S. at 486. "The desire to obtain (sweeping relief) cannot be accepted as a substitute for

compliance with the [standing requirements]." *Schlesinger*, 418 U.S. at 221-22. The Constitution requires a concrete dispute between actually adverse parties, so that courts are not asked to "rule on important constitutional issues in the abstract." *Id.* at 222. This is true even where alleged wrongdoing is plausible or confirmed historically, but is not alleged with specificity between the particular parties. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983) (finding no standing despite undisputed past occurrence of challenged law enforcement activity, where individual plaintiff did not demonstrate sufficient likelihood that he would be wronged in the future).

B. Litigation over national security demands particular fidelity to Article III.

Where standing is not clearly established, a court "must put aside the natural urge to proceed directly to the merits of [an] important dispute and to 'settle' it for the sake of convenience and efficiency," especially if doing so "would force [the court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997). This is particularly true where, as here, "matters of great national significance are at stake." *Elk Grove*, 542 U.S. at 11.

Indeed, insistence on a "concrete factual context conducive to a realistic appreciation of the consequences of judicial action," *Valley Forge*, 454 U.S. at 472, is vitally important in the national security context, where broad challenges have a uniquely dangerous potential to expose sensitive information and undermine efforts to secure the peace. The many "doctrines that cluster about Article

III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways," to restrain the judiciary. *Allen*, 468 U.S. at 750. But standing "is perhaps the most important of these doctrines." *Id.* It protects against judicial overreach and unwarranted litigation, and ensures that other doctrines, including the political question and state secret doctrines, retain their properly limited role in the adjudicative system.

Standing vindicates these interests in very practical terms. As *amici* Attorneys General are all too aware, the mere filing of lawsuits attacking national security activity diverts the attention of government officials. High ranking government officials and staff throughout the Executive Branch must evaluate claims, consider and make defenses and dispositive motions, and take steps to fulfill basic investigative and discovery obligations. *Cf. Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (explaining that litigation comes "at a cost not only to the defendant officials, but to society as a whole" through the "expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office").

Litigating the merits imposes still more burdens. If no particular facts bound a plaintiff's allegations, government officials must defend against any number of hypothetical scenarios. This enhances the risk that sensitive material will be made public and increases the need for government officials to turn to doctrines, like the state secrets and political question doctrines, to shield sensitive methods and strategies. But properly applied, the standing doctrine will limit litigation to "a concrete factual context" that is "conducive to a realistic appreciation of the consequences of judicial action." *Valley*

Forge, 454 U.S. at 472. This focuses scarce government resources on particularized harm, sharpens disputes over classified information, and prevents the government from unnecessarily invoking doctrines intended only for infrequent application.[5]

Adherence to Article III's standing limitations has ramifications beyond the parties to this suit. High ranking government officials are often sued in their personal capacity long after their service concludes. *See Br. of United States, Ashcroft v. Iqbal*, No. 07-1015 (2008) (explaining personal litigation burdens that extend long after the conclusion of service). Other private actors likewise face the threat of litigation. For example, in matters of national defense, "[s]ecurity at home" depends more than ever on the government's "shared efforts" with "private-sector partners." *Nat'l Security Strategy* at 18 (May 2010).[6] The government needs "the power of the private sector" in its counterterrorism efforts. *Nat'l Strategy for Counterterrorism* at 2 (June 2011).[7] And it depends on "a public-private partnership" for maintaining a "resilient

5. For example, the state secrets doctrine "is not to be lightly invoked," *United States v. Reynolds*, 345 U.S. 1, 7 (1953), because "[e]ach assertion of the privilege can provide another clue about the Government's covert programs or capabilities," *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900, 1907 (2011). Here, the United States reserved the right to invoke the doctrine. *See* Defs.' Mem. in Opp. to Pls.' Mot. for Summ. J. and in Supp. of Defs.' Cross-Mot. for Summ. J. at 29 n.22, *Amnesty Int'l*, No. 08-6259, Doc. 10 (Oct. 28, 2008). Proper application of the standing doctrine should prevent the United States from having to invoke and litigate the doctrine in the face of Respondents' varied factual allegations.

6. *Available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (last visited Aug. 2, 2012).

7. *Available at* http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf (last visited Aug. 2, 2012).

information and communications infrastructure" because "[i]nformation and communications networks are largely owned and operated by the private sector." *Cyberspace Policy Review* at i (undated).[8]

An undisciplined approach to standing increases the litigation risks to high ranking officials and private actors and threatens to discourage cooperation in these vital efforts. Absent a case or controversy, private entities should not be the target of litigation seeking to change national security policies, as they recently have been.[9] Rather, the jurisdiction of the federal judiciary must be exercised only as a "last resort," *Valley Forge*, 454 U.S. at 471, and only between truly adverse parties presenting a concrete controversy.

II. Claims Such As Respondents' Should Be Properly Heard, If At All, In A Future Case Or Controversy.

A. Respondents' inchoate claims present policy disagreements unsuitable for judicial resolution.

Although Respondents frame their dispute in First Amendment, Fourth Amendment, and separation of powers terminology, their generic claims reveal their true goal. As Judge Jacobs recognized below: Respondents

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8. *Available at* http://www.whitehouse.gov/assets/documents/Cyberspace_Policy_Review_final.pdf (last visited Aug. 2, 2012).

9. *See, e.g., Al Shimari v. CACI Int'l.*, 679 F.3d 205 (4th Cir. 2012) (challenging detention at Abu Ghraib); *Fisher v. Halliburton*, 667 F.3d 602 (5th Cir. 2012) (challenging decisions made in light of risk of insurgent violence in Iraq); *In re Nat'l Sec. Agency Telecomms. Records Litig. (Hepting)*, 671 F.3d 881 (9th Cir. 2011) (challenging FISA); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (challenging extraordinary rendition program).

want to "claim a role in policy-making." *Amnesty Int'l*, 667 F.3d at 203 (dissenting from denial of rehearing en banc). Should their broad claims proceed, Respondents would force the judiciary to "rule on important constitutional issues in the abstract." *Schlesinger*, 418 U.S. at 222. This is precisely what the standing doctrine is designed to prevent.

Fourth Amendment claims are inherently fact- and context-dependent, making Respondents' speculation particularly ill-suited for judicial resolution. "The Fourth Amendment is designed to account for an unpredictable and limitless range of factual circumstances, and accordingly it generally should be applied after those circumstances unfold, not before." *Warshak v. United States*, 532 F.3d 521, 531 (6th Cir. 2008) (en banc). While the judiciary "may have to grapple with these 'vexing problems' in some future case . . . there is no reason for rushing forward to resolve them" before they even occur. *United States v. Jones*, 132 S. Ct. 945, 954 (2012).

Facial challenges under the Fourth Amendment are disfavored for good reason. There is "no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable." *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987). Nor does any "single factor determine[] whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant." *Oliver v. United States*, 466 U.S. 170, 177 (1984). Even slightly different fact patterns can yield different results. *See Jones*, 132 S. Ct. at 950-53. "The constitutionality of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual

context of the individual case." *Sibron v. New York*, 392 U.S. 40, 59 (1968). "[T]horny problems" presented by particular factual situations should be confronted as they arise, *Jones*, 132 S. Ct. at 954, rather than predicted and decided without need, *see Allen*, 468 U.S. at 752 (pointing to standing's role in ensuring the "gradual clarification of the law through judicial application").

The speculation required to unwind Respondents' claims is especially pronounced because it is not clear what Fourth Amendment rights they assert. They seem to allege injury to residents of foreign countries. *See, e.g.*, Decl. of Naomi Klein at ¶ 8, *Amnesty Int'l*, No. 08-6259, Doc. 7-4 (Sept. 12, 2008); Decl. of Joanne Mariner at ¶ 10, *Amnesty Int'l*, No. 08-6259, Doc. 7-5 (Sept. 12, 2008). But "the Fourth Amendment has no application" to non-citizens living abroad, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271, 275 (1990), and, in any event, "Fourth Amendment rights are personal" and "may not be vicariously asserted," *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978) (citation omitted).

Respondents also appear to assert their own Fourth Amendment interests, although they do not clarify how their rights are violated by incidental collection during surveillance that is unquestionably lawful as to its overseas target. *Cf. United States v. White*, 401 U.S. 745, 751-53 (1971). But even if some conceivable collection could violate their rights, the standing doctrine should protect courts from having to decide the question in the abstract. "[T]he federal courts . . . do not render advisory opinions," *Laird v. Tatum*, 408 U.S. 1, 14 (1972) (citation omitted), and should not opine on whether hypothetical incidental interception of communications to or from foreign terrorism suspects, foreign "guerillas," "indigenous groups," "advocates,"

or "people all over the world" could violate the Fourth Amendment rights of American attorneys, reporters, or human rights advocates. *See* Decl. of Scott McKay at ¶¶ 5-7, *Amnesty Int'l*, No. 08-6259, Doc. 23 (Dec. 15, 2008); Decl. of Klein at ¶ 6; Decl. of Mariner at ¶ 7.

The policy-driven nature of Respondents' complaints about hypothetical surveillance is particularly stark when compared to the specific inquiries the FISC confronts. As detailed *infra*, Section II.B., the FISC considers specific requests for surveillance under Section 702 based on representations by the AG and DNI that enable the FISC to review statutory and constitutional compliance. By contrast, Respondents seek an immediate judicial ruling based on sweeping allegations of possible "dragnet" surveillance that they cannot allege has occurred or is likely to occur. On such a claim, they are no more than "concerned bystanders" and cannot invoke the Court's jurisdiction. *SCRAP*, 412 U.S. at 687.

Respondents' novel First Amendment claim is a similarly abstract conduit for their policy arguments. They invoke several strains of First Amendment jurisprudence, from overbreadth to vagueness, but their claim appears to merely repackage the Fourth Amendment challenge. And, even if that were appropriate,[10] Respondents have provided the Court with no factual context for use in balancing the governmental interests involved and the means selected against whatever speech is stake.

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10. *But see Gordon v. Warren Consol. Bd. of Educ.*, 706 F.2d 778, 781 n.3 (6th Cir. 1983) (explaining that surveillance, which falls under the Fourth Amendment, "does not violate First Amendment rights, even though it may be directed at communicative or associative activities").

Respondents' allegations are even more attenuated than the allegations found insufficient in *Laird*, where this Court held that "the jurisdiction of a federal court [could not] be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity." 408 U.S. at 10. As in *Laird*, the standing doctrine prevents Respondents from using the courts "to probe into the [government]'s intelligence-gathering activities, with the district court determining at the conclusion of that investigation the extent to which those activities may or may not be appropriate." *Id.* at 14.

Similarly, Respondents' separation of powers challenge confirms they present no concrete dispute. They do not allege that they have been subjected to any interception under the FAA or that such surveillance is imminent. Their gripe is with the regime itself. But an individual may not "invoke separation-of-powers or checks-and-balances constraints" unless he or she has suffered a sufficient and particularized harm. *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011); *see also Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3151 (2010) (considering separation-of-powers claim brought by a firm audited and investigated under the challenged regime). "Individuals have 'no standing to complain simply that their Government is violating the law.'" *Bond,* 131 S. Ct. at 2366 (quoting *Allen*, 468 U.S. at 755). Absent evidence that Respondents have been, or are imminently likely to be, subject to surveillance under Section 1881a, this claim also amounts to a mere generalized complaint about government policy.

Section 1881a is scheduled to sunset at the end of 2012 and presently is being debated. This Court should reject Respondents' attempt to convert their policy arguments favoring the law's sunset or amendment into a federal lawsuit.

B. Constitutional questions can and will be addressed on concrete facts by the FISC and other courts.

That Respondents lack standing here does not mean that the constitutionality of FISA surveillance will never be considered or subject to judicial review. To the contrary, the system requires oversight and judicial review to protect civil rights on an as-applied basis.[11]

Before surveillance occurs,[12] FISA includes significant procedural and substantive protections with which good faith compliance is presumed. *See Brown v. Plata*, 131 S. Ct. 1910, 1965 (2011).

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11. To be sure, unreviewability would not provide Respondents with standing they do not have. As this Court noted, "the absence of any particular individual or class to litigate" particular claims "gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process," rather than the courts. *See United States v. Richardson*, 418 U.S. 166, 179 (1974).

12. If the AG and the DNI determine that "exigent circumstances" exist, they may authorize foreign intelligence surveillance to commence but they must submit the full certification for FISC review and authorization "as soon as practicable but in no event later than 7 days after such determination is made." 50 U.S.C. § 1881a(a), (c)(2), (g)(1)(B).

The AG and the DNI must present the FISC with a certification that requested surveillance will be conducted in a manner "consistent with the requirements of the fourth amendment to the Constitution of the United States." 50 U.S.C. § 1881a(g)(2)(A)(iv). The statute requires targeting procedures "reasonably designed to ensure" that only foreign communications will be obtained, and that United States persons are not targets. *Id.* § 1881a(b)(3), (b)(5), (d)(1), (g)(2). The Executive must implement procedures that "minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons." *Id.* §§ 1881a(e)(2), (g)(2)(A)(iv), 1801(h)(1).

The FISC's Article III judges are appointed by the Chief Justice. *Id.* § 1803(a)(1). They are "federal district judges, and as such they are insulated from political pressures by virtue of the protections they enjoy under article III." *United States v. Cavanagh*, 807 F.2d 787, 791 (9th Cir. 1987).

The FISC reviews each application to ensure that it is authorized by the statute and its procedures are consistent the Fourth Amendment. 50 U.S.C. § 1881a(i)(1)(A). The FISC makes a case-by-case determination that: (a) the certification contains all required elements, (b) the targeting procedures are reasonably designed to ensure that the target and all recipients of the communication are outside the United States, and (c) the minimization procedures are adequate. *Id.* § 1881a(i)(2). The FISC independently confirms that surveillance procedures comport with the

Fourth Amendment. *Id.* § 1881a(i)(3)(A).[13] The FISC can require that the government "correct any deficiency." *Id.* § 1881a(l)(3)(B). Also, over the years, the FISC has substantively modified hundreds of FISA applications.[14]

The FISC Court of Review, consisting of three federal district or appeals court judges, can review FISC orders and directives at the request of the government or specified third parties. *See, e.g.*, *id.* § 1881a(h)(6)(A), (i)(4)(A). The Court of Review has considered whether earlier amendments to FISA were "consistent with the Fourth Amendment." *In re Sealed Case*, 310 F.3d 717, 736 (Foreign Int. Surv. Ct. Rev. 2002); *see also In re Directives*, 551 F.3d 1004, 1006 (Foreign Int. Surv. Ct. Rev. 2008) ("[T]he petition [for review] requires us to weigh the nation's security interests against the Fourth Amendment privacy interests of United States persons."). The Court of Review in those cases permitted third parties, including the ACLU, to submit briefs as *amici curiae*, *see Sealed Case*, 310 F.3d at 737, and evaluated petitions by non-governmental entities, *see Directives*, 551 F.3d at

13. A recent report by the Senate Select Committee on Intelligence on the FAA Sunsets Extension Act of 2012 noted that "the FISA Court . . . has repeatedly held that collection carried out pursuant to the Section 702 minimization procedures used by the government is reasonable under the Fourth Amendment." S. Rep. No. 112-174 at 5-6(2012).

14. *See, e.g.*, Mem. from the Dep't of Justice to the Hon. Joseph R. Biden (Apr. 30, 2012); Mem. from the Dep't of Justice to the Hon. Richard B. Cheney (Apr. 30, 2008); Mem. from the Dep't of Justice to the Hon. J. Dennis Hastert (Apr. 1, 2005), *all available at* www.justice.gov/nsd/foia/foia_library/foia_library.htm (last visited Aug. 2, 2012).

1008, when reviewing the constitutionality of particular applications of FISA. Additionally, the Supreme Court can exercise certiorari review over Court of Review decisions. *See, e.g.,* 50 U.S.C. § 1881a(i)(4)(D), (h)(6)(B).

In light of all this, "judicial review of FISA applications . . . is far from a meaningless rubber-stamp." *United States v. Mubayyid*, 521 F. Supp. 2d 125, 136 (D. Mass. 2007).

Beyond the judiciary, Executive and Legislative review ensures ongoing compliance with the statute and the Constitution. "Oversight of activities conducted under [FAA] section 702 begins with components in the intelligence agencies themselves, including their Inspectors General." Dep't of Justice and Office of Dir. of Nat'l Intelligence, *Background Paper on Title VII of FISA* at 3 (2012). The Justice Department and the DNI "routinely review the agencies' targeting decisions" at least once every 60 days. *Id.*

Several congressional committees conduct oversight, including by reviewing the required annual and semi-annual compliance reviews. 50 U.S.C. § 1881a(l). Congress engages directly with the FISC[15] and relevant Executive Branch officials, and can receive briefings, along

15. *See, e.g.*, Letter from Patrick Leahy, Chairman, Sen. Comm. on the Judiciary to Hon. Colleen Kollar-Kotelly, Presiding Judge, FISC, 2002 WL 1949260 (July 31, 2002) (inquiring about FISC internal rules of procedure); Letter from Hon. Colleen Kollar-Kotelly, Presiding Judge, FISC to Patrick Leahy, Chairman, Sen. Comm. on the Judiciary, 2002 WL 1949262 (Aug. 20, 2002) (answering questions).

with appropriate access to classified FISC opinions and related pleadings.

Finally, judicial review of the statute and its constitutionality can be obtained on an as-applied basis in appropriate circumstances. For example, in various criminal proceedings, defendants have challenged the constitutionality of FISA—unsuccessfully—in connection with suppression motions seeking to exclude evidence obtained from the electronic surveillance. *See, e.g.*, *United States v. Stewart*, 590 F.3d 93, 125-29 (2d Cir. 2009), *cert. denied sub nom. Sattar v. United States*, 130 S. Ct. 1924 (2010); *United States v. Wen*, 477 F.3d 896, 898 (7th Cir. 2007); *United States v. Damrah*, 412 F.3d 618, 625 (6th Cir. 2005); *United States v. Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987); *United States v. Cavanagh*, 807 F.2d 787, 790-92 (9th Cir. 1987); *Mubayyid*, 521 F. Supp. 2d at 135-37; *United States v. Holy Land Found. for Relief & Dev.*, No. 3:04-CR-240-G, 2007 WL 2011319, at *5-6 (N.D. Tex. July 11, 2007).

Surveillance authorized by FISA has also been challenged in the context of a Freedom of Information Act request, *see Am. Civil Liberties Union v. U.S. Dep't of Justice*, 265 F. Supp. 2d 20, 31-32 (D.D.C. 2003), and in a declaratory judgment action brought by a suspect in the 2004 Madrid train bombings who was "subjected to surveillance, searches, and seizures authorized by FISA and the FISC," *Mayfield v. United States*, 599 F.3d 964, 966, 970 (9th Cir.), *cert. denied*, 131 S. Ct. 503 (2010).

The fact that Respondents want their own day in court does not diminish the practical superiority or constitutional necessity of awaiting a proper case or controversy that satisfies Article III.

III. Respondents Have Not Satisfied Article III's Particular Demands.

The government has explained why the evidence proffered by Respondents is insufficient under the elements of standing—injury-in-fact, traceability, and redressibility. These "are not mere pleading requirements but rather an indispensable part of the plaintiff's case," so "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). *Amici* will not repeat the government's arguments, but emphasize a few crucial deficiencies in Respondents' showing.

As an initial matter, by relying heavily on their assertion that there are no contested facts that are material to their standing claims, Respondents misperceive their burden. *See* Br. in Opp. at 9, n.6 ("[T]he government clarified that it was accepting the factual submissions of the plaintiffs as true for purposes of these motions.'") (quoting Pet. App. 77a). As the "part[ies] invoking federal jurisdiction," Respondents "bear[ ] the burden of establishing" standing. *Lujan*, 504 U.S. at 561. They cannot rest on "mere allegations," but must set forth "specific facts" to support their standing. *Id.* Respondents have not satisfied that requirement. Their pleadings and declarations indicate that they merely "*believe*" that some of their overseas communications "will *likely* be" subject to surveillance because they *think* that the FAA can be interpreted to "allow[] the executive branch sweeping and virtually unregulated authority to monitor the international communications . . . of law-abiding U.S. citizens and residents." *Amnesty Int'l*, 638 F.3d at 126-27.

Such allegations are far "into the area of speculation and conjecture." *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974). Respondents have no evidence or allegation that they have, in fact, been subjected to surveillance under the FAA, or that any such surveillance is imminent. Their fear, coupled with expenditures that they choose to incur, does not to transform their policy disagreement into a case or controversy.

A. The feared government actions are not "certainly impending."

Respondents rely on their "fear" and belief that their international communications will be incidentally intercepted under Section 1881a, although they concede that they are not permissible targets of surveillance under that statute. They are "United States person[s]" (by virtue of U.S. citizenship) within the FAA who may not be "intentionally target[ed]" for electronic intercepts under Section 1881a. 50 U.S.C. § 1881a(b)(1), (3). As Respondents concede, their communications will not be intercepted under Section 1881a unless the AG and DNI target *other* individuals with whom Respondents happen to engage in overseas electronic communications.

Indeed, for Respondents' feared incidental interception to materialize, a series of events involving independent actors must occur including: (1) government officials, including but not limited to the named defendants, must decide to target suspected overseas terrorists who are not U.S. citizens; (2) the FISC must approve the surveillance request without limiting its targeting or minimization measures; and (3) the overseas individuals must decide to communicate, and must actually communicate, with

Respondents at a time when Section 1881a surveillance is occurring.

Because Respondents are not "an object of the action (or foregone action) at issue," and the actions of independent actors are key to their claim, this Court requires "much more." *Lujan*, 504 U.S. at 561-62. Respondents must show that "the unfettered choices made by independent actors not before the courts"—such as the AG, DNI, and judges on the FISC—"whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict . . . will be made in such manner as to produce causation and permit redressability of injury" with respect to Respondents. *Id.* at 562 (citations omitted). This standard is "substantially more difficult" to meet. *Id.* (citations omitted).

Indeed, because of the chain of events required to support Respondents' "fear," Respondents cannot show that any "injury in fact" from the FAA is "certainly impending," as required. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (citation omitted). In this regard, the Second Circuit held Respondents to an impermissibly low standard, finding that they need only "show a realistic danger" of surveillance. *Amnesty Int'l*, 638 F.3d at 135. As this Court "ha[s] said many times before and [should] reiterate today: Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be 'certainly impending' to constitute injury in fact." *Whitmore*, 495 U.S. at 158 (1990) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)).

The *Whitmore* Court's refusal to find standing based on a speculative string of events confirms that what Respondents' "fear" is not "certainly impending." For the

petitioner in *Whitmore* to establish standing, he needed to show, among other things, that state judges would reach particular decisions on review of his capital case and separately in the case of another inmate on death row, and that those decisions would negatively impact his legal rights on a possible future appeal. *See id.* at 156-57. The Court explained that the petitioner had not shown that "specific and perceptible harms . . . would befall [him] imminently." *Id.* at 159. The Court rejected the claim *not* because the Court found that the "string of occurrences" could *never* occur, but because the petitioner could not allege that they "would happen immediately" given their dependence on the results of judicial review. *Id.* In such a situation, it was "just not possible for a litigant to prove in advance that the judicial system will lead to any particular result." *Id.*

Respondents similarly have not and cannot show that the feared future foreign surveillance which could incidentally intercept their communications is "certainly impending." As in *Whitmore*, the "string of occurrences" that must occur includes particular outcomes of subsequent judicial proceedings—only here, judicial review is designed to *prevent* the harm that Respondents fear. *See* 50 U.S.C. § 1881a(b)(5) ("An acquisition authorized . . . shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States.").

The chain of speculation required to give Respondents standing is evident from their Complaint, which "does not make—and could not responsibly make—a . . . claim of immediate harm." *Whitmore*, 495 U.S. at 159. Respondents frame the source of their fear in terms of what they "believe" officials may seek to authorize under the FAA, and what the FISC may conceivably approve.

Their allegations turn on what they think the outer limit of the FAA "permits," Compl. ¶ 3, *Amnesty Int'l*, No. 08-6259, Doc. 1 (July 10, 2008), which third parties they speculate the government "is likely to target," *id.* at ¶ 46, and what they fear government officials, including the FISC, "may authorize," *id.* at ¶ 36. Their declarations are similarly based on how they are "concerned" the FAA will be interpreted and applied. *See* Decl. of Mariner at ¶ 11 ("I am concerned that now the U.S. government may be able to engage in almost entirely unsupervised surveillance."); Decl. of McKay at ¶ 8 ("I believe that the government will monitor my communications under the FAA."). But just because "nothing in the Act forecloses" conceivable actions, Compl. ¶ 40, does not mean that the government will take those or any other actions—let alone that it will do so in the imminent future.

Respondents have not made an adequate showing regarding the immediacy of government action giving rise to their fears. Those fears may be sincere, but they cannot support standing because they are too attenuated from any allegation of an actual or imminent threat of incidental interception.

B. Expenditures voluntarily undertaken to reduce the possibility of a non-immediate threat are also insufficient.

Respondents also assert that the cost of taking steps to reduce the possibility of incidental surveillance—such as traveling to meet a correspondent rather than communicating by wire—supports Article III standing here. *Amnesty Int'l*, 638 F.3d at 140. But these self-imposed costs cannot support standing because they

are not "caused by the defendant." *See Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 869 (2011). They are instead the result of Respondents' decision to incur costs in response to a speculative, non-imminent fear, *see supra*, Section III.A.

This Court has never permitted plaintiffs to "bootstrap" themselves into Article III standing by expending funds to ward off a non-immediate, indirect threat. Rather, "[n]o [plaintiff] can be heard to complain about damage inflicted by its own hand." *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). Where "[t]he injuries to the plaintiffs[] . . . were self-inflicted, resulting from [their own] decisions," standing does not lie. *Id.* Any other standard would, as Judge Raggi recognized below, allow plaintiffs to manufacture standing "for the price of a plane ticket." *Amnesty Int'l*, 667 F.3d at 180 (dissenting from denial of reh'g en banc).

Similarly, when plaintiffs merely allege that a statute, not targeted at them, nonetheless has a "chilling effect" on actions that they previously engaged in, this Court has found that standing is absent. *Laird*, 408 U.S. at 3. An "individual's knowledge that a governmental agency was engaged in certain activities" and "fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual" such that they have changed their conduct in response, is not enough to invoke the authority of the courts. *Id.* at 11. Indeed, "[g]iven the complexity and interdependence of our society and governmental policies, it will often be possible to allege with some plausibility that a change in a governmental policy is likely to cause" a change in behavior. *Haitian Refugee Ctr. v. Gracey*, 809

F.2d 794, 805 (D.C. Cir. 1987) (citation omitted). Should such claims be "accepted as sufficient to confer standing, courts would be thrust into a far larger role of judging governmental policies than is presently the case, or than seems desirable." *Id.*

Respondents' decision to incur expenses in response to the FAA's enactment cannot create standing that is otherwise absent. Permitting standing to be created so easily "would pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs" established by Congress and implemented by the Executive. Without specific facts concerning actual government activity, judges would have to opine on the programs' overall "wisdom and soundness." *Allen*, 468 U.S. at 760 (quoting *Laird*, 408 U.S. at 15). And that, most definitely, "is not the role of the judiciary." *Id.*

CONCLUSION

Respondents seeks a federal judicial opinion about novel legal theories, based on indirect injuries from government activities they fear but have not alleged are or will be occurring, imminently or otherwise. This case is unfit for judicial resolution. The judgment below should be reversed.

Respectfully submitted,

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August 2, 2012