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

REPLY BRIEF FOR THE PETITIONERS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF AUTHORITIES

Cases: Page

Constitution and statutes: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 11-1025

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

REPLY BRIEF FOR THE PETITIONERS

Respondents may not be targeted by foreign-intelligence surveillance authorized under 50 U.S.C. 1881a (Supp. II 2008) and have proffered no evidence that they have been or ever will be incidentally subject to such surveillance targeting others abroad. The Second Circuit nevertheless held that respondents have Article III standing to challenge Section 1881a's constitutionality, because it (1) concluded there was an "objectively reasonable likelihood" that Section 1881a-authorized surveillance would collect respondents' communications in the future and (2) determined that respondents' own choice to expend funds to avoid a perceived risk of surveillance is a sufficient Article III "present injury." As the petition shows, that unprecedented ruling conflicts with decisions of other courts of

appeals. Pet. 27-31. It also erroneously permits the constitutionality of an Act of Congress governing vital foreign-intelligence-gathering activities directed at third parties abroad to be litigated in the abstract by (1) failing to require respondents to prove a non-conjectural and "imminent" future injury, Pet. 18-22, and (2) relying on respondents' self-imposed injury, which flows from the asserted chilling effect of their fear of possible surveillance, Pet. 22-27. The court of appeals denied en banc rehearing by an equally divided, six-to-six vote; five judges specifically suggested that this Court grant review; and even the panel opinion's author acknowledged the exceptional importance of this case. Pet. 32.

Respondents nevertheless argue that the court of appeals' decision is correct, Br. in Opp. (Br.) 16-28, and consistent with other decisions, Br. 33-35, and that review should be deferred. Br. 28-33. Those contentions lack merit.

1. a. *Future injury*. Respondents contend (Br. 25) that the court of appeals used an Article III standard "material[ly]" similar to the "imminent"-injury standard by concluding that their purported future injuries were "real and immediate." That is incorrect. The court made clear that it understood "real and immediate" to mean only what it deemed an "objectively reasonable likelihood" of surveillance in the future. Pet. App. 29a. That test falls far short of requiring that respondents' asserted "injury is '*certainly* impending,'" Pet. 18-20 (citation omitted), especially since the court of appeals found its test satisfied in the absence of any concrete, non-speculative evidence demonstrating a likelihood of surveillance. As *Summers* v. *Earth Island Institute*, 555 U.S. 488, 497-500 (2009), explains, a "statistical probability" or "realistic threat" of future harm does not

satisfy "the requirement of 'imminent' harm." Pet. 19-20. Respondents fail meaningfully to confront that holding. Br. 24-25.

Respondents instead assert that a "more lenient" Article III test applies to their asserted future injury because they raise a First Amendment claim. Br. 23-24. Article III's constitutional minimum is not "more lenient" for First Amendment claims and, in any event, the court of appeals emphasized that it did not rely on that "arguably less demanding standard." Pet. App. 30a & n.16.

Respondents find no shelter (Br. 24) in the understanding that a "realistic danger" of prosecution for violating a statute can confer standing to challenge the statute. *Babbitt* v. *United Farm Workers*, 442 U.S. 289, 298 (1979). Article III does not always require a plaintiff to violate the law before securing federal-court review, at least where the law's enforcement against him would be "certainly impending" were the plaintiff to engage in the proscribed conduct. *Ibid.* (citation omitted). A plaintiff need not violate the law and trigger his own prosecution, but that is because the "plaintiff's own action (or inaction) in failing to violate the law eliminates the [otherwise] *imminent* threat of prosecution." *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 129 (2007) (emphasis added). Those principles are inapplicable here: Section 1881a does not regulate respondents' conduct and, in any event, respondents have proven no imminent—*i.e.*, certainly impending—interception of their communications.

Respondents attempt to bolster their "future injury" and other contentions by repeatedly asserting that the government "conceded" or did "not dispute" or "controvert[]" various aspects of their case. Br. 24, 29-30, 35;

see also, *e.g.*, Br. 11, 13-14, 16 ("undisputed" or "[un]contested" evidentiary record). Those assertions fundamentally misunderstand the standing inquiry at summary judgment and serve to underscore the court of appeals' error.

It is respondents who "bear[] the burden of proof" and who thus must proffer at summary judgment admissible evidence of "specific facts" affirmatively establishing their Article III standing. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citation omitted). Respondents have failed to provide such proof and, instead, rely on "conclusory allegations" in their declarations, which cannot satisfy their affirmative *evidentiary* burden. *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 888 (1990); see Pet. App. 158a-159a (Raggi, J., dissenting). Because respondents' speculation that they would be incidentally subject to future surveillance was insufficient, the government had no obligation to present evidence in rebuttal.

For instance, respondents assert (Br. 20-21, 24) that they established that "their communications were *likely* to be monitored under [Section 1881a]." The court of appeals, in turn, stated that "[respondents] testify" that they communicate with the "sorts of individuals that the government will most likely seek to monitor" and that the government did not "dispute[] that assertion." Pet. App. 37a. No such evidentiary proffer by the government was necessary, because respondents' submission simply showed that they "*believe* that at least some of [their] international communications are likely to be collected," *id.* at 337a (emphasis added); accord *id.* at 343a-

344a, 350a, 356a-357a, 366a, 370a. That belief is wholly speculative and unsupported by specific facts.[1]

Respondents relatedly contend (*e.g.*, Br. 1, 7, 33) that Section 1881a authorizes what they call "dragnet" surveillance—the acquisition of communications content without even an Executive-Branch finding of individualized suspicion to limit surveillance targets—which, respondents assert, could include the acquisition of "all communications to and from specific countries" that would capture the communications of "thousands or even millions of U.S. citizens and residents." Respondents offer no facts supporting that speculation. They simply state in their declarations that their "understanding" is that such "dragnet" surveillance would occur under Section 1881a. See, *e.g.*, Pet. App. 336a-337a, 356a, 365a, 370a, 374a.

Respondents' speculative position, moreover, is internally inconsistent. Respondents assert (Br. 9) that the type of unfocused surveillance they "understand" could be conducted would violate the Fourth Amendment. See also Dist. Ct. Doc. 21, at 5, 20 & n.10, 28. But Section 1881a expressly provides that its authorization extends only to surveillance conducted "consistent with the [F]ourth [A]mendment," 50 U.S.C. 1881a(b)(5), and specifically requires the Foreign Intelligence Surveillance Court to ensure that the government's targeting

---

[1] Respondents' related contention that the government "conceded" that Section 1881a "plainly authorizes the acquisition of [*respondents'*] international communications" is misleading. Br. 20, 24 (emphasis added). The government acknowledged that it might incidentally collect certain communications of U.S. persons if they communicate with a third party overseas targeted for Section 1881a surveillance, but respondents have proffered no evidence that they communicate with persons actually targeted under Section 1881a.

procedures comply with the Fourth Amendment, 50 U.S.C. 1881a(i)(3)(A). In other words, under respondents' view of the Fourth Amendment, Section 1881a *could not* authorize the very type of surveillance activity that respondents nevertheless speculate—without evidence—would be undertaken under the authority of Section 1881a.

That self-contradictory conjecture underscores the court of appeals' error. Allowing this case to proceed based on a litigant's speculative "beliefs"—unsupported by specific facts establishing an imminent injury in fact—wholly disregards this Court's longstanding requirement of a "concrete factual context conducive to a realistic appreciation of the consequences of judicial action," and effectively requires federal courts to resolve important legal questions in the abstract and "rarified atmosphere of a debating society." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). That error is particularly acute here, where a federal court must exercise its most important and delicate responsibility: constitutional review of the actions of co-equal Branches of Government. Pet. 33.

b. *Present injury.* Respondents alternatively argue (Br. 16-23), that they suffer a "present injury" because "they have taken costly and burdensome measures to protect their sensitive communications from interception," Br. 16. They contend (Br. 21-23) that this self-imposed injury establishes standing, because if the government's "conduct" puts a plaintiff to the "choice" of suffering an injury from that conduct or taking "costly and burdensome measures" to avoid that injury, the latter, self-imposed measures are a cognizable Article III injury, Br. 21. That is incorrect. The Article III injury

(if any) in such contexts must be an "imminent" future injury from the government's actions, not a present injury from the plaintiff's own conduct. Respondents, as explained above, have not established any "imminent" and allegedly harmful government conduct—namely, Section 1881a-authorized acquisition of their communications. Any contrary rule would improperly treat similarly situated plaintiffs differently by allowing plaintiffs to manufacture standing for, as here, the price of a plane ticket. Pet. 23.

Respondents rely (Br. 21-23) on *Meese* v. *Keene*, 481 U.S. 465 (1987); *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000); and *United States* v. *Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) *(SCRAP)*. But none of those cases found standing based on a plaintiff's self-imposed injury. *Keene* and *Laidlaw* both involved *proven conduct* by the defendant that itself caused (or threatened imminent) injury to the plaintiff. Pet. 25. *SCRAP* similarly based standing on the allegation that individuals' ongoing recreational *use* of natural resources would be less enjoyable. 412 U.S. at 678, 685, 688. The "asserted injury" thus was that "specific and perceptible harms—depletion of natural resources and increased littering—would befall [the plaintiff's] members imminently if the [agency] orders were not reversed." *Whitmore* v. *Arkansas*, 495 U.S. 149, 159 (1990) (discussing *SCRAP*).

The fact that respondents' decision to incur self-inflicted injuries flows from the asserted chilling effect of their "fear" of possible surveillance adds nothing to the analysis. Pet. 23-25. Respondents attempt (Br. 17-19) to distinguish *Laird* v. *Tatum*, 408 U.S. 1 (1972), on the grounds that the *Laird* plaintiffs' activities were not

"chilled" and that those plaintiffs suffered no "specific present objective harms." Neither ground withstands scrutiny. Although *Laird* noted "considerable doubt" whether the plaintiffs' activities were in fact chilled, *id.* at 13 n.7, it did not rest its decision on that observation. The "alleged 'chilling' effect" from the plaintiffs' fear of future harm, the Court held, was a "subjective 'chill'" that is "not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Id.* at 13-14. Respondents have no meaningful explanation for their assertion that a self-imposed expenditure of funds because of a similar fear constitutes an Article III injury, but the self-imposed cessation of constitutionally protected activity does not.[2]

2. Review is warranted because the decision below directly conflicts with *United Presbyterian Church* v. *Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984) (Scalia, J.), and *ACLU* v. *NSA*, 493 F.3d 644 (6th Cir. 2007), cert. denied, 552 U.S. 1179 (2008). See Pet. 27-31. Respondents' contrary contentions (Br. 33-35) are unavailing. Indeed, respondents do not meaningfully attempt to distinguish the legal holdings in those cases and instead focus on factual distinctions that have no bearing on the analysis.

---

[2] Respondents contend (Br. 26-28) that the courts have no meaningful role under the government's understanding of Article III standing. That contention is misplaced. The fact that respondents' own speculation about a possible future injury cannot establish a non-conjectural, imminent injury does not suggest that no one has had or could have standing to challenge Section 1881a surveillance. See Pet. 6-7 & n.5. In any event, it is well settled that the "assumption that * * * no one would have standing" is "not a reason to find standing." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974).

The assertion (Br. 35) that respondents' challenge to "a specific federal statute" is different than the challenge to the Executive Order in *United Presbyterian Church* may be true, but it is irrelevant here. The point is that each "merely *authorizes*" certain intelligence-gathering activities and does "not *direct* [such activities] against all persons." 738 F.2d at 1380. Respondents' speculation (like that of the plaintiffs in *United Presbyterian Church*) that they are "especially likely to be [subjected to] the [purportedly] unlawful activities authorized" is insufficient to show any "imminen[t]" future injury. *Ibid.* *United Presbyterian Church* also explains that, under *Laird*, a self-imposed harm from a "chilling effect" is insufficient. *Id.* at 1378-1379. Even the court of appeals here agreed that *United Presbyterian Church* (like *ACLU*) reads "*Laird* essentially the same way [as] the government," but it then expressly rejected that analysis. Pet. App. 59a. Finally, respondents' contention (Br. 35) that the existence of Section 1881a has "compelled" them to take actions that injure them is no better than the claims that *United Presbyterian Church* rejected. See Pet. 28.

Respondents' effort (Br. 33-34) to distinguish *ACLU* is equally unavailing. Like respondents, the plaintiffs in *ACLU* asserted self-imposed injuries incurred to avoid the interception of their communications that they claimed to reasonably fear. The Sixth Circuit rejected that assertion as a basis for standing, because the plaintiffs presented no non-speculative evidence of such surveillance. Pet. 29-30 & n.9. Respondents argue (Br. 33) that the "crucial" difference is that the Terrorist Surveillance Program (TSP) challenged in *ACLU* involved targeted surveillance whereas Section 1881a, according to respondents, authorizes a type of "dragnet surveil-

lance" that they believe makes their communications more "likely to be intercepted." That contention, however, is just as speculative as the contention in *ACLU* because respondents present no evidence regarding *actual* surveillance.

Respondents' remaining contentions are also unpersuasive. In *ACLU*, the state-secrets privilege prevented the plaintiffs' discovery of information about the government's actual intelligence operations and targets. The Sixth Circuit then concluded that the plaintiffs' speculative evidence was insufficient. 493 F.3d at 650 & n.3, 653 (Batchelder, J.); *id.* at 692 (Gibbons, J.); see Pet. 29-30. Respondents fail to establish their standing for the same reason: They failed to carry their summary-judgment burden of providing non-speculative evidence of surveillance activity that would imminently intercept their communications. Finally, the fact that the TSP was a "surveillance program" whereas Section 1881a is a "public law" (Br. 34) has no material effect on the analysis. In both cases, Article III standing was and is lacking because the plaintiffs failed to proffer evidence establishing an "imminent" injury in fact.

3. Respondents' contention (Br. 28-33) that review should be deferred is unpersuasive. As in *Laird*, the important Article III question now presented warrants review at the threshold to safeguard the constitutional separation of powers in this critical national-security context. Pet. 32-34. No judge on the equally divided court of appeals that denied rehearing en banc questioned that question's exceptional importance, and five specifically suggested that this Court grant review. Pet. 32. Moreover, the assertion (Br. 29) that the record in this case contains "concrete facts" on which judicial review of an Act of Congress could proceed is illusory.

Although respondents' evidence provides speculation about government surveillance purportedly authorized by Section 1881a, it provides no specific facts upon which such merits review might properly rest. See pp. 4-5, *supra*.

Nor is the need for review diminished by the December 31, 2012, sunset date for Title VII of FISA. National-security legislation enacted after the attacks of September 11, 2001, has often included sunset dates that Congress has repeatedly extended. See, *e.g.*, PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-14, § 2, 125 Stat. 216 (four-year extensions for multiple statutes); USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, §§ 102-104, 120 Stat. 194-195 (repealing sunset dates for various provisions and extending others). The government's use of its Title VII authority "continues to produce significant intelligence that is vital to protect the nation," and "[r]eauthorizing this authority is the top legislative priority of the Intelligence Community." Letter from Director of National Intelligence James R. Clapper and Attorney General Eric H. Holder to Speaker John Boehner, Majority Leader Harry Reid, Minority Leader Nancy Pelosi, and Minority Leader Mitch McConnell 1-2 (Feb. 8, 2012), http://www.dni.gov/electronic_reading_room/dni_ag_letter.pdf. The Administration therefore is working with Congress to "reauthoriz[e] Title VII, without amendment." *Id.* at 2; see Letter from Director of National Intelligence James R. Clapper to Speaker John Boehner, Majority Leader Harry Reid, Minority Leader Nancy Pelosi, and Minority Leader Mitch McConnell (Mar. 26, 2012), http://www.dni.gov/electronic_reading_room/dni%20letter%20with%20

fisa%20amendments.pdf (transmitting government's proposed four-year-extension legislation).

Even if Congress were to modify Title VII or permit its expiration in 2013, the Article III question presented would warrant review at this time. The logic of the court of appeals' unprecedented holding, which directly conflicts with decisions of other courts of appeals in analogous contexts, does not turn on statutory details. Moreover, the potential application of the Second Circuit's holding is expansive. If respondents' own speculative assessment that they are "likely" to be affected by intelligence activity targeting persons overseas established Article III standing, persons or entities that present equally speculative claims that they are likely *targets* of the United States' foreign-intelligence activities could bring suit within the Second Circuit to adjudicate the lawfulness of those purported activities. Others could similarly manufacture Article III standing where none otherwise would exist, simply by sustaining a self-inflicted injury. Before the federal courts are forced to feel their way into that uncharted territory, and before Article III power is exercised to resolve respondents' constitutional challenge to vitally important national-security legislation, this Court should grant review at this critical juncture of this case.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MAY 2012