No. 11-1025

In the Supreme Court of the United States

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

v.

AMNESTY INTERNATIONAL USA, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and rule:

Statutes and rule—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

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The court of appeals held that respondents—who cannot be targeted by foreign-intelligence surveillance conducted under 50 U.S.C. 1881a (Supp. II 2008) and who have not established that communications involving them have been or ever will be incidentally collected by such surveillance targeting foreigners abroad—have Article III standing to challenge Section 1881a's constitutionality. The government's opening brief explains that respondents cannot establish standing based on their contentions that (1) the government could incidentally acquire their communications in the future using Section 1881a's authority, Gov't Br. 24-37, and (2) they suffered cognizable injury as a result of their own choice to incur costs to avoid the risk of surveillance they fear might be occurring, *id.* at 38-47. In response, respon-

dents argue (Resp. Br. (Br.) 53-60) that they have established an "imminent" future injury by showing an "objectively reasonable likelihood" that communications involving them will be acquired in the course of Section 1881a-authorized surveillance of foreigners abroad. They alternatively contend (Br. 28-53) that, even if they cannot establish imminent injury based on a likelihood that their communications will be acquired, their self-inflicted harms suffice to establish injury and would be redressed by an injunction prohibiting intelligence activity under Section 1881a. Respondents' theories are inconsistent with this Court's decisions, would require courts to adjudicate the constitutionality of an Act of Congress in the abstract in a vitally important national-security context involving highly classified information, and disregard the separation of powers principles upon which this Court's standing doctrine rests.

In the final analysis, respondents' case for standing depends entirely upon speculation. Lacking any evidence of concrete government action that has, or will, harm them, respondents offer conjecture about the nature and scope of potential surveillance under Section 1881a; the Executive's foreign-intelligence interests and targeting priorities at any particular time; the extent of the collection authority that would be allowed under a Section 1881a order of the Foreign Intelligence Surveillance Court (FISC); the government's use of Section 1881a rather than other foreign-intelligence-collection authorities; and, ultimately, whether Section 1881a-authorized surveillance targeting foreigners abroad would incidentally collect communications involving respondents. Such conjecture cannot establish Article III standing.

A. Respondents' Summary-Judgment Standing Evidence Is Entirely Speculative

Respondents premise their argument on the contention that Section 1881a authorizes and would be invoked by the government to conduct so-called "dragnet" or "vacuum-cleaner-style" surveillance of communications content "without individualized suspicion," which might otherwise limit acquisitions to "specific targets and facilities." Br. 7, 10-11. Respondents state (Br. 10-11) that Section 1881a "could authorize the acquisition of all communications to and from specific geographic areas of foreign policy interest," such as "Russia, Iran, or Israel," and "exposes *every* international communication—that is, every communication between an individual in the United States and a non-American abroad—to the risk of surveillance." Respondents additionally believe (Br. 16-17) their international communications are at particular risk because they posit that the government is interested in collecting communications from their (largely unidentified) foreign contacts, who respondents say are in "geographic areas" they surmise are of government interest or are persons who they surmise federal officials might want to target. Such conjecture is insufficient to carry respondents' burden of proving Article III standing and cannot be salvaged by respondents' claim that they assert a "facial" challenge to Section 1881a, their proffered evidence at summary judgment, or their reliance on extra-record materials.

1. Respondents assert (Br. 29-31, 46, 57 n.20) that they are challenging "the facial validity" of Section 1881a and argue that "[t]he statute" itself—not the possibility that its authority might "be abused"—"has compelled them to take costly and burdensome measures" to avoid their perceived risk of unfocused, "dragnet" sur-

veillance. Respondents' position underscores their conjectural basis for standing.

Section 1881a does not require an individualized court order for each non-United States person targeted, Gov't Br. 6, but that does not mean that it authorizes or would lead to the so-called "dragnet" surveillance of communications content that respondents claim to fear. Section 1881a specifically (1) requires the FISC to determine that the government's targeting and minimization procedures satisfy both statutory requirements and the Fourth Amendment, and (2) authorizes acquisitions only if, *inter alia*, they are conducted in accordance with those procedures and comply with the Fourth Amendment. 50 U.S.C. 1881a(b)(5) and (c)(1)(A) (Supp. II 2008); Gov't Br. 7-8, 34.

2. Respondents' declarations (Pet. App. 334a-395a) provide no evidentiary basis for respondents' fears of Section 1881a-authorized surveillance. The declarations state that the declarants "understand" that a dragnet of international communications content could be conducted under Section 1881a and "believe" that communications involving them are likely to be intercepted, based on conjecture about actions and decisions by the government and the FISC. See Gov't Br. 30-34. Because the declarations provide no "specific facts" about surveillance activity and are not based on "personal knowledge" reflecting matters about which the declarants are competent to testify, they amount to nothing more than "conclusory allegations" about surveillance activity and do not evince facts cognizable at summary judgment. *Id.* at 28-29; see Fed. R. Civ. P. 56(c)(4); *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827, 831 & n.4 (1950) (affidavits based on "information and belief" are insufficient); 11 James Wm. Moore

et al., *Moore's Federal Practice* § 56.94[2][b], at 56-218 to 56-224 & n.15 (3d ed. Supp. Dec. 2011); 10B Charles Alan Wright et al., *Federal Practice and Procedure* § 2738, at 345-353 & nn.32, 34 (3d ed. 1998). Respondents do not dispute that their declarants lack "personal knowledge" of actual government surveillance activities or the content of the FISC's decisions. In fact, respondents' brief conspicuously fails even to acknowledge (let alone dispute) their evidentiary burden at summary judgment. They have thus adduced no evidence substantiating their claim of dragnet surveillance or their assertion of a reasonable likelihood that their communications will be acquired by Section 1881a-authorized surveillance.

3. Respondents instead rely (Br. 10-12 & nn.5-6, 30-31) on several extra-record sources to support their assertions of "dragnet" or "vacuum-cleaner-style" surveillance. Those sources, which the court of appeals did not cite, do not support respondents' conjecture.

Respondents assert (Br. 10 n.5, 11) that congressional testimony by then-Director of the Central Intelligence Agency Hayden—who was formerly Director of the National Security Agency (NSA)—supports their dragnet theory. But respondents' selective quotation omits key language that emphasizes the focused nature of the government's interests. *FISA for the 21st Century, Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. 9 (2006) (*2006 Hearing*) ("the *al Qaeda communications* that are most important to us" are those "with one end * * * in the United States") (emphasis added). Indeed, Director Hayden was specifically asked whether the government could, for instance, "seize and record all the calls between the United States and India" with a type of "vacuum cleaner

surveillance" if Congress repealed FISA's provision regulating the acquisition of the contents of wire communications to or from a person in the United States when the acquisition occurs in the United States. *Id.* at 35 (discussing repeal of 50 U.S.C. 1801(f)(2)).[1] He answered, "no, not at all"; stated that such a repeal would permit "target[ed]" surveillance; and emphasized that surveillance under the President's Terrorist Surveillance Program (TSP) was "targeted," not "vacuum cleaner," surveillance. *Ibid.* ("[W]e do not vacuum up the contents of communications under the [TSP] and then use some sort of magic after the intercept to determine which of those we want to listen to."); cf. *id.* at 24 (NSA Director Alexander) ("We are going to focus it down onto the most important [phone calls], and we have ways and methods to do that that we should not discuss here."); Pet. App. 284a, 301a-302a, 306a (Director Hayden) (similar). In the same hearing, NSA Director Alexander added that "[t]here is no reason to believe that

[1] Because Section 1881a authorizes certain acquisitions of communications content by targeting non-United States persons abroad (with the assistance of an electronic-communication-service provider), it confers authority for collecting the contents of wire communications to or from a person in the United States, which would otherwise be regulated by Title I of FISA as "electronic surveillance" under 50 U.S.C. 1801(f)(2). Section 1881a's limitation to targeting non-United States persons abroad does not implicate authority to conduct the two other types of FISA "electronic surveillance" that cover the collection of the contents of wire or radio communications by "intentionally targeting [a] United States person," 50 U.S.C. 1801(f)(1), or intentionally acquiring a radio communication where "the sender and all intended recipients are located within the United States," 50 U.S.C. 1801(f)(3). Director Hayden's response discussing the repeal of Section 1801(f)(2) is thus relevant to whether Section 1881a would permit "dragnet" surveillance to collect the contents of wire or radio communications entering or exiting the United States.

[proposed legislation] would authorize programs that 'far exceed' the [TSP] in size and scope, since any such program would still have to meet the Fourth Amendment's reasonableness requirement." *2006 Hearing* 62.

Respondents also assert (Br. 11-12, 31-32 & n.13) that government officials "expressly sought authority to engage in dragnet" surveillance. But the letter they cite merely states that the government "may wish to target all communications in a particular neighborhood abroad before our armed forces conduct an offensive" and that such "targeting [of] a particular group of buildings or a geographic area abroad" before "military operations," which would not significantly affect "the privacy interests of United States persons," should be permitted. Letter from Attorney General Mukasey and Director of National Intelligence McConnell to Senator Reid 4 (Feb. 5, 2008), http://www.justice.gov/archive/ll/docs/letter-ag-to-reid020508.pdf. That focused and time-limited targeting activity bears no resemblance to respondents' speculative dragnet. Respondents also cite (Br. 9-10) a treatise's "discuss[ion of the] probable operation of the Program" to support their assertion that "millions of people" could be affected. But the treatise simply speculates that FISC-authorized surveillance from January 2007, the details of which were not made public, applied a "minimization standard * * * at the acquisition stage—i.e., before the government may listen to or record a communication"—that, "[d]epending on how it is being applied," might avoid "the problem of [intercepting] innocent user[s]." 1 David S. Kris & J. Douglas

Wilson, *National Security Investigations and Prosecutions* § 16.12, at 577 & n.18 (2d ed. 2012).[2]

Finally, respondents resort (Br. 12 n.6, 31-32 & n.14) to statements by individual opponents of the FISA Amendments Act of 2008 (FAA) and a predecessor bill, who asserted during debate preceding passage of the law that the then-pending bills would grant "authority to conduct a huge dragnet that will sweep up innocent Americans at home," 154 Cong. Rec. S568 (daily ed. Feb. 4, 2008) (Sen. Feingold); see *id.* at H5759 (June 20, 2008) (Rep. Scott). Such "fears and doubts of the opposition,"

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[2] The January 2007 FISC orders authorized the first of three successive legal regimes that displaced the post-September 11 foreign-intelligence surveillance authorized under the President's TSP. The FISC orders authorized the government to "target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization." Pet. App. 312a. In light of those orders, the President did not reauthorize the TSP, and any electronic surveillance that was occurring as part of the TSP was conducted under the January 2007 orders. *Id.* at 312a-313a.

In August 2007, Congress passed the Protect America Act of 2007 (PAA), Pub. L. No. 110-55, secs. 2-3, §§ 105A-105C, 121 Stat. 552-555 (50 U.S.C. 1805a-1805c (Supp. I 2007) (repealed effective February 2008 by sunset provision)). The PAA amended the definition of "electronic surveillance" subject to Title I of FISA to exclude "surveillance directed at a person reasonably believed to be located outside of the United States," 50 U.S.C. 1805a (Supp. I 2007), and authorized the Director of National Intelligence and Attorney General jointly to authorize for one-year periods foreign-intelligence collection "concerning persons reasonably believed to be outside the United States" if certain requirements were satisfied, including subsequent FISC review of the procedures used to determine that the relevant acquisitions did not constitute "electronic surveillance." 50 U.S.C. 1805b(a), 1805c(b) (Supp. I 2007). The FISA Amendments Act of 2008, including Section 1881a, replaced the PAA.

however, "are no authoritative guide to the construction of legislation," because, "[i]n their zeal to defeat a bill, they understandably tend to overstate its reach." *Bryan* v. *United States*, 524 U.S. 184, 196 (1998) (citations omitted). Indeed, after Senator Feingold opposed the legislation and advocated "safeguards *in case* the Government is, in fact, conducting massive dragnet surveillance," 154 Cong. Rec. at S569 (emphasis added), a leading proponent specifically noted the numerous "misconceptions and misinterpretations" in the debate, *id.* at S572 (Sen. Bond, Vice Chairman, Senate Select Committee on Intelligence) (stating that "only certain communications" were authorized for acquisition and, in any event, "acquir[ing] all the communications from all foreigners is an absolutely impossible task").

4. Respondents' asserted pursuit of a "facial" challenge to Section 1881a does not diminish the need for a sound evidentiary basis establishing actual or imminent Section 1881a-authorized collection of communications that involve respondents. Indeed, respondents' contention that the dragnet surveillance they fear would violate the Fourth Amendment, see Gov't Br. 34, itself indicates that respondents do not actually present a facial challenge. They instead apparently believe that the FISC and the government would *misapply* Section 1881a by permitting activity that violates the Fourth Amendment, which would also violate Section 1881a itself. See 50 U.S.C. 1881a(b)(5). That is, at bottom, an as-applied challenge, which would require competent evidence of the government's actual application of its Section 1881a authority in a concrete context, if surveillance of communications incidentally involving respondents should actually occur.

Respondents' standing contentions are particularly problematic because respondents would have federal courts adjudicate in the abstract the constitutionality of actions they speculate will be undertaken by a co-equal Branch of Government. Gov't Br. 35-36. The reasonableness of a Fourth Amendment search, for instance, is judged by the "totality of the circumstances" surrounding it, including the "degree to which it intrudes upon an individual's privacy" and the "degree to which it is needed for the promotion of legitimate governmental interests." See *Samson* v. *California*, 547 U.S. 843, 848 (2006) (citation omitted); cf. *Sibron* v. *New York*, 392 U.S. 40, 59-60 (1968) (a facial Fourth Amendment challenge to a statute is an "abstract and unproductive exercise"). The Foreign Intelligence Surveillance Court of Review has accordingly determined from the "totality of the circumstances" (which were classified and redacted from its public opinion) that foreign-intelligence surveillance targeting persons abroad under Section 1881a's statutory predecessor was reasonable under the Fourth Amendment and satisfied a constitutional "particularity requirement." *In re Directives*, 551 F.3d 1004, 1007, 1012-1014 (2008) (citing particularity analysis in *In re Sealed Case*, 310 F.3d 717, 740 (FISC Rev. 2002)); Gov't Br. 8 n.6. Although respondents assert (Br. 57 n.20) that their declarations contain "concrete facts," they identify no facts on which courts could properly adjudicate their claims.

Respondents' effort to characterize their action as a facial challenge appears designed to avoid implicating the highly classified national-security information that would be necessary to evaluate the merits of their challenge to foreign-intelligence collection under Section 1881a. Such information includes information about the

government's foreign-intelligence collection and targeting priorities; the foreign intelligence and threat assessments that may justify such targeting; the technical methods used for foreign-intelligence targeting and the associated degree of success in intelligence collection; the details of the FISC's rulings defining the nature and scope of, and the requisite procedures for, authorized foreign-intelligence collection under Section 1881a; and the government's alternative sources and methods for foreign-intelligence collection targeting non-United States persons abroad using authorities other than Section 1881a. Sacrificing such information not only would require that Article III courts speculate about the essential facts needed to adjudicate respondents' claims, it also would improperly require those courts to speculate about national-security decisions that Executive officials might make in the discharge of Article II responsibilities, without the information, expertise, or sometimes competing responsibilities of the Executive officials who make those decisions. That exercise of constitutional adjudication in the abstract would significantly trench upon the constitutional separation of powers that animate this Court's standing jurisprudence.

Respondents ultimately have proffered no non-speculative evidence indicating that their communications might be incidentally intercepted under Section 1881a-authorized surveillance targeting foreigners abroad. The most they can say is that "it is entirely possible that the surveillance [they] fear is taking place already." Br. 57 n.21. That is insufficient to establish Article III standing.

B. Respondents Have Not Established Imminent And Non-Speculative Future Surveillance Under Section 1881a

To establish Article III standing based on the contention that respondents' future communications will be collected by Section 1881a-authorized surveillance, respondents must prove that that asserted injury is imminent and non-conjectural. Gov't Br. 24-26. The Court's requirement of an "imminent" injury demands a showing that the asserted harm is "certainly impending" in order to ensure that the asserted injury "is not too speculative for Article III purposes" and to avoid adjudicating claims for which, even absent judicial action, "no injury would have occurred at all." *Id.* at 28 n.9 (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 565 n.2 (1992)) (emphasis omitted). "Imminence" does not rigidly limit cognizable future injuries only to those that occur within a particular timeframe. *Ibid.*; see, *e.g.*, *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 211-212 (1995) ("imminent" injury from minority-set-aside contracts established when injury would occur "in the relatively near future" because the plaintiff showed that it bid on "every guardrail project in Colorado" and that the State offered 1.5 such contracts on average annually). But it does require respondents to show a concrete, non-speculative future injury from government surveillance of their communications. Respondents' summary-judgment evidence falls far short of that standard.

Respondents assert (Br. 54-55) that they can establish standing by showing an "objectively reasonable likelihood of future harm," a standard they claim the Court uses "interchangeably" with "certainly impending." That is incorrect. This Court has made clear that "imminent" injury is "the standard mandated by [its] prece-

dents," *Defenders of Wildlife*, 504 U.S. at 564 n.2, and respondents themselves acknowledge that *Summers* v. *Earth Island Institute*, 555 U.S. 488 (2009), indicates that "'imminence' requires more than 'a realistic threat.'" Br. 56. Although respondents suggest (*ibid.*) that this aspect of *Summers* is dictum, the Court's considered articulation of the proper standing standard is not so easily dispatched. See 555 U.S. at 499-500 (rejecting the "realistic threat" standard embraced in a dissenting opinion); see Gov't Br. 26-27. Respondents point to no case in which this Court has found standing on anything like the speculative assertions made here.

The cases respondents cite (Br. 54-56) do not support diluting the imminent-injury standard to require nothing more than an "objectively reasonable likelihood" of government conduct that will cause future harm and, instead, address situations entirely different from those here. Statutes that impose substantial sanctions to regulate a plaintiff's primary conduct by directly proscribing actions a plaintiff claims a right to take, for instance, can effectively coerce compliance by the plaintiff in a way that eliminates what would otherwise be an "imminent" threat of enforcement when the plaintiff shows a sufficiently credible threat of prosecution. Gov't Br. 27-28 (discussing *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289 (1979)); see *Pennell* v. *City of San Jose*, 485 U.S. 1, 8 (1988) (following *United Farm Workers*); *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 387, 392-393 (1988). A judicial precedent declaring an official's conduct unlawful likewise causes imminent injury by coercing the prompt cessation of such conduct. *Camreta* v. *Greene*, 131 S. Ct. 2020, 2029 & n.4 (2011) (official must "change the way he performs his duties" or engage in prohibited conduct making him liable for

damages). And affirmative evidence that a litigant will take a particular harmful action can sometimes show that injury is imminent. See, *e.g.*, *Blum* v. *Yaretsky*, 457 U.S. 991, 995, 1000-1001 (1982) (finding a "sufficiently real and immediate" threat that nursing facility would discharge or transfer plaintiffs because its physician committee had already determined that they "should be transferred" to another facility) (citation omitted).[3]

The fundamental problem with respondents' position is that it relies entirely on speculation to substantiate the assertion that Section 1881a-authorized surveillance will injure them. They seek to give force to their speculation by claiming that Section 1881a authorizes dragnet surveillance that is likely to capture their communications. But to support that characterization respondents thus must conjecture about a number of matters, including (1) the government's foreign-intelligence collection interests; (2) the government's targeting decisions and priorities and whether they would lead to a decision to target respondents' contacts; (3) whether the government would conduct surveillance targeting those contacts under Section 1881a, as opposed to other authority for foreign-intelligence collection that respondents do not challenge, Gov't Br. 2-3, 32, 45-46; (4) whether the FISC would enter an order under Section 1881a based

[3] The environmental cases respondents cite rest standing on present aesthetic or recreational harms from proven conduct, not alleged future injuries. Gov't Br. 42-43 (discussing *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000)); see *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 73-74 (1978) (finding injury in environmental and aesthetic harms from thermal pollution; observing that radiation emissions would "also seem" to constitute an injury; and "not determin[ing]" whether "'objectively reasonable' present fear and apprehension" of increased radiation are cognizable injuries).

on the relevant government certifications and procedures; (5) whether the government would be successful in collecting the targets' communications; and (6) whether the collection would incidentally acquire respondents' communications. Respondents have proffered no competent evidence on any of those matters. Their speculation about "possible future injury" is plainly insufficient. *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990).

Respondents contend (Br. 57-58, 60) that the government's position could "immuni[ze]" surveillance claims from scrutiny, because they can never be certain that communications involving them have been acquired. That contention is misplaced. Others may be able to establish standing even if respondents cannot. As respondents recognize (Br. 58), the government must provide advance notice of its intent to use information obtained or derived from Section 1881a-authorized surveillance against a person in judicial or administrative proceedings and that person may challenge the underlying surveillance. Cf. Ashcroft Amicus Br. 23 (noting challenges in other FISA contexts); Gov't Br. 8 & n.6. Electronic-communication-service providers can also challenge government directives to assist in acquisitions under Section 1881a and thereby challenge the lawfulness of the underlying surveillance activity. Indeed, such a challenge under Section 1881a's statutory predecessor resulted in a public decision by the Foreign Intelligence Surveillance Court of Review. See *ibid.*

This Court has stressed that the "significant implications of constitutional litigation, which can result in rules of wide applicability that are beyond Congress' power to change," counsels that federal courts "be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131

S. Ct. 1436, 1449 (2011). It is particularly important to heed that caution and reject respondents' plea for abstract adjudication of the constitutional issues presented in this case. Section 1881a may be subject to challenge in a concrete factual context. In any event, 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).

C. Respondents' Self-Imposed Harms Are Not A Basis For Standing

Respondents contend (Br. 28-48) that, even if they have failed to establish an "imminent" and non-conjectural injury in the form of the government's *future* collection of their communications, they have established standing based on their "reasonable assumption that their communications will be monitored under" Section 1881a, which has led them to "take costly and burdensome measures" to avoid the surveillance they fear. Br. 29, 32. But such self-inflicted injuries based on subjective fears of surveillance are not cognizable Article III injuries, see Gov't Br. 38-44, and respondents have failed to show that any such harms would likely be redressed by an injunction enjoining only the subset of government surveillance conducted under Section 1881a, see *id.* at 44-47. If respondents cannot establish standing based on an imminent and non-conjectural future injury of surveillance, they cannot correct that basic defect by taking actions that cause themselves harm.

1. Respondents' self-inflicted harms do not qualify as cognizable injuries

a. Respondents restate (Br. 29-34) their assertions about a government "dragnet" of communications content into and out of the United States and their conjec-

ture that their foreign contacts are likely to be targeted for surveillance, and rely on that speculation to argue (Br. 29, 34, 41, 46) that, because they "reasonabl[y] assum[e]" that their communications will be monitored, "[t]he statute has compelled," "required," and "forced" them to take actions that cause themselves harm. That simply is not so. Section 1881a does not "compel," "require," or "force" respondents to do anything. Cf. *Laird* v. *Tatum*, 408 U.S. 1, 11 (1972) (contrasting surveillance program to government action "regulatory, proscriptive, or compulsory in nature"). The statute does not regulate their conduct in any way; it authorizes certain government surveillance targeting foreigners overseas if the government satisfies numerous statutory requirements and the Fourth Amendment and if the FISC issues an order under Section 1881a. Respondents' declarations thus at most support the view that they have taken steps based on their own *perception* that Section 1881a creates uncertainty regarding the privacy of their electronic communications. See, *e.g.*, Pet. App. 343a-344a, 350a, 356a, 361a, 366a, 370a, 377a.

The attorney respondents also raise the argument (Br. 34-35) that they face "possible bar discipline" if they do not take prophylactic actions to protect the confidentiality of their communications with foreigners abroad. But respondents ultimately rest their arguments on the same speculative beliefs about Section 1881a-authorized surveillance, and they fail to cite any state court that has construed state ethics rules as requiring such conduct based on conjecture about, for instance, surveillance under a statute that is not directed to the attorney-client relationship, but to the targeting of persons abroad for foreign intelligence. Such a decision would be surprising and could have sweeping appli-

cation for members of the bar. Cf. N.Y. State Bar Ass'n Amicus Br. 20 (asserting that it is "reasonable to be concerned that *any* communication with a non-citizen in a country of interest to the United States might be intercepted and stored, subject to review by the government"). By contrast, more routine ethics issues that may arise—for instance, when a lawyer receives a confidential email from a client from a computer owned by the client's employer, see *id.* at 11—address contexts in which a lawyer bases his actions on knowledge of relevant facts, not speculation about what might theoretically be possible.[4]

Where, as here, claims of feared surveillance targeting persons abroad are too speculative to confer Article III standing, a state ethics rule purporting to require an attorney to take action of the sort respondents purport to take would be based on nothing more than the same speculation. Even if a state would require a lawyer to protect confidentiality in these circumstances, respondents provide no sound basis for concluding that Article III standing should be governed by the same standard.

b. Respondents' self-inflicted harms are nothing more than the product of a subjective "chill" caused by their apprehensions about surveillance under Section 1881a. As the Court held in *Laird*, such "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of * * * a threat of specific future harm," *i.e.*, "immediately threatened injury." 408 U.S. at 13-15; see Gov't Br. 40-41.

Respondents' efforts to distinguish *Laird* are without merit. They assert (Br. 45-46) that the *Laird* plain-

[4] Even in that context, the obligation is only to take "reasonable" protective measures considering cost as one factor, not to take any steps that might reduce a possible risk to confidentiality.

tiffs "failed to establish" any "injur[y] *at all*," whereas respondents showed that they have "in fact altered their conduct because of" Section 1881a. A footnote in *Laird* notes "considerable doubt" whether the plaintiffs' activities were in fact chilled, 408 U.S. at 13 n.7, but the Court did not rest its decision on that fact-bound question. The Court instead decided whether Article III jurisdiction can rest on a plaintiff's "alleg[ation] that the exercise of his First Amendment rights is being chilled" by the existence of a government surveillance activity, where the "alleged 'chilling' effect" arises from a "speculative apprehensiveness" that the government would "cause direct harm" to the plaintiff "at some future date." *Id.* at 10, 13. The Court held that such "[a]llegations of a subjective 'chill,'" like those here, are insufficient. *Id.* at 13-14.

Respondents assert (Br. 45-46) that *Laird* "found that any 'chill'" in the case "was not a reasonable response" to the challenged program. But nothing in *Laird* analyzes the reasonableness of the response, and respondents' citation to two pages in *Laird*'s factual statement (408 U.S. at 6, 9) lends no support to that theory. Respondents are likewise wrong in contending (Br. 46) that this case is distinguishable because respondents' fears are based on their view that Section 1881a will be "used precisely as it was designed"—to conduct so-called dragnet surveillance—while the *Laird* plaintiffs feared "abuse" of the program. In both contexts, the plaintiff's own behavior, which flows from the plaintiff's own "speculative apprehensiveness" of future harm, is not "an adequate substitute" for the requisite showing of a non-conjectural "specific future harm," *i.e.*, "immediately threatened injury." 408 U.S. at 13-15.

c. Respondents argue (Br. 36-44) that their own actions are "avoidance injuries" like those that this Court recognized as sufficient to confer standing in *Meese* v. *Keene*, 481 U.S. 465 (1987), *Laidlaw*, *supra*, and *Monsanto Co.* v. *Geertson Seed Farms*, 130 S. Ct. 2743 (2010). That is incorrect.

Keene based standing on the actual reputational injury that would result from proven government conduct —labeling three specific films as propaganda—not the cost of avoidance behavior. Gov't Br. 43. Likewise, the Article III injury in *Laidlaw* was harm to the aesthetic and recreational interests of an association's members from proven water pollution, *id.* at 42-43, not, as respondents suggest (Br. 37-38), the members' "reasonable" decisions to curtail their recreational activity. *Laidlaw*'s attention to the objective "reasonableness" of each assertion of an otherwise purely subjective "aesthetic" and "recreational" injury (a reduction in one's personal enjoyment of nature) reflects that the Court demanded proof not only that the challenged conduct "directly affected [the individuals'] recreational, aesthetic, and economic interests" but also that each individual's subjective "concerns about the effects of [the challenged] discharges" were "reasonable." 528 U.S. at 183-184.

Monsanto addressed materially different circumstances. The district court in *Monsanto* found a "reasonable probability" that the farmer plaintiffs' conventional alfalfa-seed crops would be infected by genetically modified alfalfa, based on proof that (1) the genetically modified seed was already being planted in "all" major alfalfa seed production areas, and (2) the alfalfa seed farms were "much more concentrated" than the two- to ten-mile range of their pollinating bees. 130 S. Ct. at 2754 & n.3. In that context, where the plaintiffs had

proven that modified seeds were, in fact, being planted near their crops and that a naturally occurring phenomenon (bee pollination) would distribute modified genes at distances much greater than the distances between farms, the Court concluded that the "substantial risk" of contamination "injure[d]" the farmers and accepted their representations that they would need to mitigate that risk by testing their crops and taking protective measures. *Id.* at 2754-2755.

Unlike this case, the injury in *Monsanto* was not a subjective (or even an objectively reasonable) fear of unknown decisions by government actors who, if they were to make certain decisions in certain ways, might injure the plaintiffs. *Monsanto* dealt instead with the present deleterious effects of *proven* actions that themselves, through only natural processes, produced the substantial risk of injury. That practical evaluation of the natural consequences of actual human activity lends no support to respondents' conjecture that government officials and the FISC might make decisions that could result in the incidental collection of communications involving respondents. Such "speculati[on] that [government] officials will" take harmful actions simply gives "no assurance that the asserted injury is * * * 'certainly impending'" and does not establish an Article III injury. *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 344-345 (2006) (citation omitted); see *Summers*, 555 U.S. at 493-500 (no standing to challenge application of regulatory authority without showing that officials have decided to apply that authority at a location that the plaintiff's members will choose to visit).

d. Respondents ultimately give no reason to treat plaintiffs who decide to incur injury any differently than similarly situated plaintiffs who do not. Gov't Br. 39.

Respondents' argument (Br. 43) that their injuries flow from "the statute itself" in fact suggests that similarly situated plaintiffs *should* be treated the same, even if some simply accept a perceived risk of surveillance without taking self-harmful acts. But that theory does not account for the dispositive weight placed by respondents and the court of appeals on respondents' assertion that they have taken costly and burdensome measures to avoid surveillance. Respondents' fall-back argument —that others who fail to take such actions are "not similarly situated" because they were not "compel[led]" to take self-harmful acts—simply confirms that respondents use the phrase "were compelled" to mean "have chosen," and that respondents therefore advocate a theory that mistakenly allows Article III jurisdiction to be manufactured "for the price of a plane ticket." Pet. App. 148a.

2. Respondents have failed to establish redressability

Even if respondents' self-inflicted injuries flowing from their asserted fear of surveillance could be an independent basis for Article III standing, respondents have failed to carry their burden of establishing a nonspeculative likelihood that an injunction enjoining only Section 1881a-authorized surveillance would redress that asserted injury.

Although respondents note (Br. 49) that a plaintiff need not show that a favorable decision will relieve his every injury, respondents have given no sound reason why enjoining only Section 1881a-authorized surveillance would likely reduce their perceived need to take measures to protect the confidentiality of their communications. Such relief would leave unaffected any of the other means the government has to conduct electronic

surveillance of the communications of foreigners abroad, including authority that respondents know that the government has used to collect some communications in the past. Gov't Br. 32-33 & n.11, 44-47.

Respondents assert (Br. 51) that the "burden" of Section 1881a-authorized surveillance is "distinct" from that of other forms of surveillance, because (they believe) Section 1881a-authorized surveillance may sweep up "millions of communications" and permit surveillance "without individualized suspicion or individualized judicial review." Relieving that "burden," however, would presumably be of little comfort in light of respondents' concern with confidentiality if communications involving them would continue to face a risk of interception under different legal authorities. That risk is at least as tangible as respondents' fear of Section 1881a-authorized surveillance, because the communications that respondents describe could well be—and some have been—collected under other authority. See Gov't Br. 32-33 & n.11 (discussing prior use of traditional FISA surveillance to target the client contact of one attorney respondent); cf. N.Y. State Bar Ass'n Amicus Br. 29. If respondents' foreign contacts are, as they contend, of significant foreign-intelligence interest, respondents provide no reason to believe why they would perceive no need to protect the confidentiality of communications if only Section 1881a-authorized surveillance were terminated.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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