No. 07-468

In the Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Petitioners,

vs.

NATIONAL SECURITY AGENCY, ET AL.,

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that Petitioners lack standing to challenge the lawfulness of the Terrorist Surveillance Program, given that Petitioners cannot show that they have ever been, or will ever be, subject to surveillance under the Program

2. Whether the President has the power to authorize the National Security Agency to engage in the Terrorist Surveillance Program for the purpose of anticipating international terrorist threats and ensuring national security

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I. STATEMENT

A. Factual Background

This case involves a challenge to a national security program that was created in the wake of the terrorist attacks of September 11, 2001. In an effort to combat the ongoing terrorist threat to the United States, President Bush authorized the National Security Agency ("NSA") to begin a counter-terrorism operation known as the Terrorist Surveillance Program ("TSP" or "the Program"). (Record ("R.") at 13, 77-78.) Although the TSP is "highly classified," the media revealed information about the Program on December 16, 2005. (R. at 78.) Many facets of the TSP remain secret; details such as the number and identities of individuals whose communications have been intercepted have not been disclosed. (R. at 80-81.) The Administration has conducted congressional briefings on the TSP, although because of the extremely sensitive nature of the Program, briefings have been limited key congresspeople—ranking members of the House and Senate intelligence committees, and leaders from each chamber. (R. at 106, 99.)

The purpose of the TSP "is to detect and prevent terrorist attacks against the United States." (R. at 78.) The Program involves warrantless electronic surveillance where one of the parties is located outside of the United States and the NSA has a reasonable basis to conclude that at least one party to the communication "is either a member of al Qaeda or affiliated with al Qaeda." (R. at

80-81.) Because the demands associated with fighting terrorism have changed dramatically since the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1801 *et seq*., was enacted in 1978, the President authorized the TSP in order to provide the anti-terrorism intelligence community with tools to respond with greater "speed and agility" to imminent threats. (R. at 81-82.) Although the NSA continues to rely on information obtained pursuant to a FISA warrant, the surveillance authorized by the TSP has been characterized as "targeted" surveillance used when the government is in "hot pursuit." (R. at 90.) The TSP was not designed to gather "reams of intelligence." (R. at 83, 90.) Thus the TSP is "very narrow," (R. at 105) and the surveillance is "less intrusive" and operates for "far shorter periods of time" than does surveillance under FISA (R. at 83.)

The TSP contains "strict guidelines . . . to ensure that the program is operating in a way that is consistent with the President's directives." (R. at 81.) These guidelines include the same identity minimization standards used by the NSA "across the board, including for this program." (R. at 86.) Although it is "overwhelmingly unlikely," if information about someone who is not linked to al Qaeda (an "ordinary American") is inadvertently collected, "the information would be destroyed as quickly as possible." (R. at 105.)

Petitioners in this case are individuals and organizations who "frequently communicate by telephone and email with people outside the United States . . . ."

(R. at 4.) Because of the nature of these communications, Petitioners "have a well-founded belief that their communications are being intercepted under the Program." (R. at 4.) For example, some of the Petitioners are attorneys whose clients have been accused of terrorism-related offenses. (*See, e.g.*, R. at 125, 137.) Because they are unwilling to risk having their conversations intercepted under the TSP, Petitioners allege that they must incur additional effort and expense in order to communicate with their foreign contacts in person. (*See, e.g.*, R. at 4, 40-42.) Petitioners allege that because they cannot be certain that their conversations with clients and witnesses will not be overheard by the NSA, communicating by phone or email is a breach of their duty of confidentiality. (R. at 137.) Petitioners also allege that foreign contacts are reluctant to communicate with the attorneys in the United States because of the contacts' fears that communications will be intercepted. (R. at 175-76.) In sum, Petitioners allege that because of the "fear of interception, [their] ability to represent [ ] clients has been compromised . . . ." *Id.*

B. Procedural History

Plaintiff-Petitioners filed a Complaint in the Eastern District of Michigan against the NSA and its Director. The Complaint alleged that the TSP "violates the First and Fourth Amendments to the Constitution [and] also violates constitutional separation of powers principles because it was authorized by President George W. Bush in Excess of his Executive authority and contrary to the limits imposed by

Congress." (R. at 4.) Specifically, Petitioners contended that the President lacked the authority to authorize the TSP because two federal statutes, FISA and Title III of the Omnibus Crime Control and Safe Streets Act ("Title III"), 18 U.S.C. § 2510 *et seq.*, provide the "exclusive means" by which electronic surveillance may be conducted. (R. at 8.)

The Complaint requested declaratory relief in the form of a judgment stating that the TSP violates the First and Fourth Amendments to the Constitution, that the TSP violates separation of powers principles, and that the TSP violates the Administrative Procedures Act ("APA"). (R. at 61-62.) Petitioners also sought a permanent injunction, and fees and costs. (R. at 61-62.)

In the district court proceedings, the NSA properly invoked the state secrets privilege to bar the admission of evidence relating to specific details of the TSP. (R. at 201.) The NSA argued that without information linking specific Petitioners to the TSP, Petitioners did not have standing to pursue their claims. (R. at 192.) Petitioners, for their part, argued that publicly disclosed information about TSP was sufficient to support their claims. (R. at 201.) On cross-motions for summary judgment, the district court found that the TSP violated Petitioners' First and Fourth Amendment rights, the separation of powers doctrine, FISA, and the APA, and permanently enjoined the NSA from using the TSP. (R. at 231-32.)

On appeal to the Court of Appeals for the Sixth Circuit, Petitioners did not challenge the invocation of the state secret doctrine. (R. at 236.) The court therefore relied only on the same publicly disclosed information used by the district court in considering whether Petitioners could demonstrate standing to pursue their claims based on their "well-founded belief" that their communications had been intercepted. (R. at 239.) The Sixth Circuit held that none of the Petitioners could demonstrate a personal injury sufficient to confer standing. (R. at 268 (opinion of Batchelder, J.); 269 (opinion of Gibbons, J., concurring) ("The disposition of all of the plaintiffs' claims depends on the single fact that the plaintiffs have failed to provide evidence that they are personally subject to the TSP.").) The court therefore remanded the case to the district court with instructions to dismiss for lack of jurisdiction. (R. at 268.) Petitioners sought review in this Court.

II. SUMMARY OF THE ARGUMENT

Petitioners ask this Court to take an untenable position: they ask the Court to exceed its constitutional authority in order to declare that the President exceeded his. Petitioners failed to establish that they have standing to bring suit because they cannot allege specific facts demonstrating that the operation of the TSP invaded their interests and caused a harm that can be redressed in the courts. Even if Petitioners could properly appear before a court to air their grievances, the

challenge to the President's authorization of the TSP must fail because the power to gather international intelligence to protect the national security is within the President's constitutional authority.

First, Petitioners cannot establish standing for their Fourth Amendment claims—or indeed any of their claims—because they cannot demonstrate that they have been personally subject to surveillance under the Program. It is axiomatic that to have standing to challenge an illegal search, one must have been subject to the search. All of Petitioners' claims ultimately fail because they cannot show an injury-in-fact that is both definite, and personal to the Petitioners.

Petitioners also cannot meet the other two requirements of standing: causation and redressability. Petitioners' alleged injuries do not result from the TSP but rather from Petitioners' own decision to forgo phone and email-conversations. This type of "self-inflicted" injury breaks the chain of causation Petitioners must show to establish standing. In addition, while Petitioners speculate that it is "likely" that their communications will be intercepted under the program, it is similarly likely that their communications would be intercepted under FISA. Because an injunction against use of the TSP would not prevent Petitioners' communications from being intercepted under FISA, Petitioners cannot show that judicial relief will eliminate the harms they allege. Therefore, Petitioners do not have standing to press their claims.

Even if Petitioners were proper parties to bring suit, the President, as Commander-in-Chief, and relying on his inherent foreign-affairs powers, has the authority to authorize the TSP. Contrary to Petitioners' assertions, the TSP does not violate Title III's "exclusive means" provision, and the TSP therefore cannot be shown to conflict with congressional will. Indeed, Congress has acquiesced to the President's exercise of broad discretion in the conduct of national security matters after the terrorist attacks of September 11. Also, because any First and Fourth Amendment concerns are mitigated in the context of foreign intelligence gathering, the TSP is in harmony with constitutional limitations.

As a consequence, this Court is without jurisdiction, and Petitioners' claims are without merit. Respondents request that this Court affirm the decision of the Sixth Circuit Court of Appeals and deny Petitioners' proposed relief.

III. ARGUMENT

A. Petitioners Lack Standing Because They Cannot Demonstrate That They Have Suffered An Injury-In-Fact That Was Caused By The Operation Of The TSP, Nor That Any Alleged Harm Could Be Redressed By Injunction

Article III of the Constitution confines the reach of federal courts to the adjudication of "cases and controversies." U.S. Const. art III, § 2; *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972) (citations omitted). Courts have developed a number of doctrines that define the boundaries of the case-or-controversy

requirement; standing is "perhaps the most important of these . . . ." *Allen v. Wright*, 468 U.S. 737, 750 (1984).

To meet constitutional standing requirements, a plaintiff must demonstrate three elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("*Defenders of Wildlife*"). "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not conjectural or hypothetical.'" *Id.* (internal citations omitted). Second, there must be a causal connection between the injury and the defendant's conduct. *Id.* Third, it must be likely, and not merely speculative, that the injury would be redressed by a favorable judicial decision. *Id.* at 561.

The party invoking federal jurisdiction bears the burden of demonstrating these elements. *Id.*; *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 536 (1986) (stating that federal courts must presume that they lack jurisdiction in the absence of an affirmative demonstration in the record). At the summary judgment stage, the party seeking to demonstrate standing may not rely on general allegations, but must set forth specific facts to support its claims. *Defenders of Wildlife*, 504 U.S. at 561. The moving party is entitled to a judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof at trial. *Lujan*

v. Nat'l Wildlife Fed'n ("*National Wildlife Federation*"), 497 U.S. 871, 889 (1990) (citing *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986)).

Here, Petitioners have not, and indeed cannot, establish any of the elements that the Constitution and this Court's prior rulings require.[1] Petitioners' subjective belief that their communications have been intercepted does not demonstrate an injury-in-fact. (*See* R. at 239); *see also Halkin v. Helms*, 690 F.2d 977, 998 (D.C. Cir. 1982) (presence of one's name on an NSA watch list insufficient to establish that interceptions of communications have occurred). Because this Court has always required that an invasion of interests sufficient to confer standing be both personal and definite, Petitioners' speculations about the operational details of the TSP fall short of this court's requirements.

1. Petitioners cannot demonstrate that they have suffered an injury-in-fact because they cannot show that they have been subject to the TSP

Broadly speaking, to demonstrate an "injury-in-fact," a party must show two things: (1) that she is personally subjected to the challenged practice; and (2) that

[1] The Court of Appeal found that none of the Petitioners had alleged facts sufficient to establish standing under any of their causes of action, constitutional or statutory. However, Judge Gilman, in his dissent, found that the attorney-Petitioners had alleged "a distinct set of facts" that could support a finding of the type of personal injury that is necessary to confer standing. (R. at 278 (Gilman, J., dissenting).) Accordingly, in evaluating Petitioners' arguments for standing, Respondents consider only the arguments of the attorney-Petitioners.

the harm from that practice is existing or immediate. In essence, the injury-in-fact test supports the "case or controversy" requirement by ensuring both that the complainant is a proper party, and that an actual controversy exists.

The first part of the injury-in-fact test requires that "the party seeking review be himself among the injured." *Defenders of Wildlife*, 504 U.S. at 563 (quoting *Sierra Club*, 405 U.S. at 734). Because Petitioners cannot demonstrate they themselves have been subject to TSP surveillance, or indeed that they ever will be, they cannot meet their burden to show a personal injury. *See Defenders of Wildlife*, 504 U.S. at 563; *Rakas v. Illinois*, 439 U.S. 128, 138 (1978) (holding that Fourth Amendment rights may be enforced only by "one whose own protection was infringed by the search and seizure").

a. Because Petitioners cannot demonstrate that they are actually subject to surveillance under the TSP, they cannot demonstrate that they are "among those injured" by the Program

To have standing, a litigant must have personal stake in the controversy. *See id*. This Court has stressed the importance of refraining from adjudicating "generalized grievances" which are "pervasively shared and most appropriately addressed in the representative branches." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (quotations omitted)).

As an initial matter, to the extent that Petitioners allege a fear that the TSP might operate to the detriment of their *clients*, this allegation cannot establish standing for the attorneys. A plaintiff cannot base her claim on the rights or interests of third parties not before the court. *Id*. at 474.

With regard to Petitioners' other allegations, the Sixth Circuit determined that ultimately, Petitioners' arguments for standing, relating to all causes of action, both constitutional and statutory, fail because Petitioners cannot show that they were themselves subject to the TSP. (R. at 269 (Gibbons, J. concurring).) Because Petitioners cannot demonstrate that they were personally subject to the TSP, they cannot establish a sufficient personal connection to the Respondents' conduct to establish a cognizable injury. *See Allen*, 468 U.S. at 755.

For example, in *Allen v. Wright*, the plaintiffs challenged an Internal Revenue ("IRS") practice for verifying that tax-exemptions were not provided to racially discriminatory private schools. *Id.* at 743-44. The plaintiffs did not allege that their children had been denied admission to one of these schools. *Id.* at 746. Instead, the plaintiffs alleged that they were "harmed directly by the mere fact of Government financial aid" to discriminatory schools. *Id.* at 752.

The Court first considered that the alleged injury could be interpreted as a generalized complaint that the government's conduct was unlawful. *Id.* at 754. This interpretation fails under a long line of precedent establishing that an "abstract

injury" in the form of "nonobservance of the Constitution" is not cognizable in the courts. *Id.* (quoting *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 223 n. 13 (1974)). Another way to interpret this type of injury, however, is as a "stigmatic injury" suffered by a group against whom the government discriminates. *Id.* at 752-53. This is a cognizable claim, but requires that the plaintiff be *personally* denied equal treatment as a result of the challenged policy. *Id.* at 755. In *Allen,* the Court found that because the plaintiffs had not alleged that their children were excluded from a school that had received a tax exemption as a result of the IRS practice, the plaintiffs had not alleged a *personal* injury sufficient to confer standing. *Id.* at 755-56.

In the instant case, as in *Allen,* Petitioners have failed to allege that they are personally subject to the challenged practice. By alleging that they "frequently communicate by telephone and email with people outside the United States," and that the nature of their communications makes it "likely" that they will be subjected to the TSP, all Petitioners have done is to allege that they are members of a group who might be subject to the challenged practice. (*See* R. at 4.) Just as the plaintiffs in *Allen* could not demonstrate a personal injury to establish standing until they were *actually denied* equal treatment as a result of the IRS practice, Petitioners cannot demonstrate a personal injury to establish standing until they can show that they were *actually subjected* to the TSP. *See Allen,* 486 U.S. at 755-56.

Another demonstration of the kind personal stake required to establish standing can be seen in cases alleging harm to the environment. In *Laidlaw*, for example, this Court held that environmental groups had standing because they had alleged a sufficiently personal connection to the challenged conduct to demonstrate an injury-in-fact. *Friends of the Earth v. Laidlaw Envtl. Servs. TOC, Inc.* ("*Laidlaw*"), 528 U.S. 167, 181-82 (2000). In contrast, in two other cases—*Sierra Club* and *National Wildlife Federation*—the plaintiffs' connection to the defendants' conduct was too remote and indirect to support a finding of injury-in-fact. *See Sierra Club*, 405 U.S. at 734-35; *Nat'l Wildlife Fed'n*, 497 U.S. at 889.

First, in *Laidlaw*, the plaintiffs alleged they had been injured by unlawful discharge of waste into a river in their community. 528 U.S. at 181-83. Although the plaintiffs did not demonstrate that the discharge had actually harmed the environment, their fear of coming into contact with the hazardous materials in the face of the undisputed fact that hazardous waste was being released into the river constituted an injury-in-fact. *Id.* at 183.

In contrast, the plaintiff environmental groups in *Sierra Club* did not allege that they would *personally* be affected by the defendant's conduct—in that case a proposed development project that would have "destroy[ed] or otherwise adversely affect[ed]" the natural environment. *Sierra Club*, 405 U.S. at 734. Because the

plaintiffs did not allege that they used the recreation area, the Court determined that they were not "among the injured." *Id.* at 734-35.

Similarly, in *National Wildlife Federation*, the plaintiffs failed to provide evidence of a personal injury sufficient to withstand a motion for summary judgment. *Nat'l Wildlife Fed'n*, 497 U.S. at 889. The plaintiffs alleged that the Bureau of Land Management ("BLM") violated environmental statutes by opening public land to mining operations. *Id.* at 879. The plaintiffs alleged injury to their interests in recreational use and aesthetic enjoyment of the land. *Id.* at 886. The Court noted that these interests were "among the *sorts* of interests [the] statutes were specifically designed to protect," and that the only issue was therefore whether the plaintiffs' own interests were affected. *Id.* (emphasis in original). To support their claims, the plaintiffs provided affidavits stating that members of the group used land "in the vicinity" of the land covered by the BLM program. *Id* at 880. The Court held that averments that a member of the group "use[d] unspecified portions of an immense tract of territory, on some portion of which mining activity has occurred or probably will occur by virtue of the governmental action" was insufficient to establish that the plaintiffs were "aggrieved persons" who could challenge agency action under the APA. *Id.* at 888-89.

The facts in the instant matter are analogous to those in *Sierra Club* and *National Wildlife Federation*—and distinguishable from those in *Laidlaw*. Like the

plaintiffs in *Sierra Club* and *National Wildlife Federation*, Petitioners challenge government action that has the potential to affect a broad range of individuals. But here, Petitioners cannot demonstrate that they are themselves subject to the government's conduct: surveillance under the TSP. The plaintiffs in *National Wildlife Federation* alleged that unlawful acts had occurred or would occur in various unspecified locations in an immense area. *Id.* at 880. Here, Petitioners allege that unlawful acts have occurred or will occur to various unspecified persons, worldwide. (R. at 15-17.) Like the *National Wildlife Federation* plaintiffs, Petitioners are unable to aver specific facts showing that the alleged harm reaches them personally. *See Nat'l Wildlife Fed'n*, 497 U.S. at 880.

The plaintiffs in *Laidlaw*, on the other hand, *did* show that they were personally injured, because they demonstrated that they were personally subject to the unlawful conduct. *Laidlaw*, 528 U.S. at 183. Specifically, the *Laidlaw* plaintiffs alleged unlawful dumping occurring in their community's river, which gave rise to an injury in the form of a fear of the contaminants that were known to have been dumped at that site. Unlike the *Laidlaw* plaintiffs, however, Petitioners have not alleged a specific site of injury, or that they have been exposed to the harmful conduct. As this Court's rulings in *Sierra Club* and *National Wildlife Federation* make clear, these types of general allegations of injury are insufficient to confer standing, because they do not support a finding that the complainants are among

those injured. *See Sierra Club*, 405 U.S. at 734-35; *National Wildlife Federation*, 497 U.S. at 889.

b. Because Petitioners allege only speculative harms, they cannot establish that the alleged harm is existing or imminent

The second prong of the test requires a plaintiff allege a harm that either presently exists, or will inevitably occur in the immediate future. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). That is, the harm must be "actual or imminent, not 'conjectural or hypothetical.'" *Defenders of Wildlife*, 504 U.S. at 560 (quoting *Whitmore*, 495 U.S. at 155). In contrast, "[a]llegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be 'certainly impending' to constitute injury-in-fact." *Id.* (citing *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). This Court has "insisted that the injury proceed with a high degree of immediacy … to reduce the possibility of deciding a case in which no injury would have occurred at all." *Defenders of Wildlife*, 504 U.S. at 564 n.2. Where no injury would have occurred, there is no case or controversy and a federal court lacks jurisdiction. *See id.*

Petitioners have not alleged that they have been harmed because they have actually been subjected to warrantless surveillance. Rather, they allege that they have been harmed by their fear—and the fears of others—that they *may someday be subjected to this type of surveillance*. (R. at 18 (alleging that Petitioners

communicate about "subjects that are *likely* to trigger scrutiny by the NSA under the Program") (emphasis added)); *but see Halkin*, 690 F.2d at 998 (disallowing the presumption that communications are being intercepted on the basis that one party to the communication was on a government "watch list"). It is as though, under the facts of *Laidlaw*, a potential plaintiff attempted to establish standing by claiming that because she swims in a lot of rivers, she will surely come into contact with the defendant's pollution eventually. This type of claim is simply too uncertain to meet Petitioners' burden to demonstrate an injury-in-fact.

The facts of *Los Angeles v. Lyons* provide a useful illustration of what is required to meet the immediacy requirement. In that case, the plaintiff, Lyons, who had previously been subjected to a chokehold by a member of the Los Angeles Police Department ("LAPD"), sought a judgment that the use of a chokehold absent the threat of deadly force was a violation of constitutional rights. *Los Angeles v. Lyons*, 461 U.S. 95, 97-98 (1983). Lyons alleged that the police officers "regularly and routinely" applied chokeholds, injuring numerous persons. *Id.* at 98. Lyons alleged further that he "justifiably fear[ed]" that any subsequent contact he might have with members of the LAPD could result in "his being choked and strangled to death without provocation . . . ." *Id.*

The *Lyons* Court held that the allegation that LAPD officers "routinely" applied chokeholds was insufficient to establish a case or controversy. *Id.* at 105.

Lyons could not demonstrate "a real and immediate threat that he would again be stopped for a traffic violation . . . by an officer or officers who would illegally choke him . . . ." *Id.* In order to establish the certainty of the threatened injury, Lyons would have to make "the incredible assertion either (1) that *all* [LAPD officers] *always* choke any citizen with whom they happen to have an encounter … or (2) that the City ordered or authorized police officers to act in such a manner." *Id.* at 106 (emphasis in original). In other words, unless Lyons could credibly allege that future injury of this type was *certain* to occur to him personally, his subjective fear of being subjected a chokehold was insufficient to create an immediate threat. *See id.* at 107 n.8

Here, Petitioners' allegation that they justifiably fear surveillance under the TSP because such surveillance is likely to occur is simply too speculative an injury under *Lyons*. *See id.* at 105; (*see, e.g.*, R. at 129 (Declaration of Nancy Hollander) (alleging that "individuals abroad are more reticent in communicating … because of the *possibility* that their communications are being intercepted") (emphasis added).) Petitioners cannot rely on allegations that they might "some day" be subjected to government action—especially when they cannot state when or if that "some day" will ever arrive. *See Defenders of Wildlife,* 504 U.S, at 564 (stating that intent to visit area affected by challenged regulation at some unspecified time did not support a finding of "actual or imminent injury"). Moreover, unlike Lyons,

who *had actually been subject to the challenged action in the past*, Petitioners cannot allege that they have ever been subject to the challenged program. *See Lyons*, 461 U.S. at 97-98. Indeed, although Plaintiffs allege that they "feel certain that [their] communications … are intercepted and monitored," none of the Petitioners has alleged that the NSA has taken any action against them or a third party as a result. (*See* R. at 138.) Consequently, Petitioners' allegations of fear of events *that may never occur* fail to create an existent controversy sufficient to confer standing under Article III. *See Lyons*, 461 U.S. at 105-106.

c. Petitioners' claim of injury-in-fact based on a subjective chill of First Amendment expression is foreclosed by this Court's decision in *Laird v. Tatum*

"[A]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). In *Laird*, plaintiffs learned of the existence of an Army intelligence-gathering program from a magazine article, and alleged that the program caused them to forego political activity because they feared that the information gathered might someday be used against them. *Id.* at 3 n.1, 8. The Court found that allegations of "the mere existence, without more, of a governmental investigative and data-gathering activity" did not establish standing.

Supreme Court cases acknowledging a "chilling effect" and finding that a plaintiff could establish standing "involve situations in which the plaintiff has

unquestionably suffered some concrete harm apart from the 'chill' itself." *United Presbyterian Church v. Reagan* ("*Reagan*"), 738 F.2d 1375, 1378 (D.C. Cir. 1984) (Scalia, J.). That is, the something "more" required by the Supreme Court in *Laird* is a tangible harm that results from the exercise of governmental power that is "regulatory, proscriptive, or compulsory in nature, and [where] the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging." *Id.* (quoting *Laird*, 408 U.S. at 11). Examples of these types of tangible harms include: being denied admission to the bar, *Baird v. State Bar of Ariz.*, 401 U.S. 1 (1971), being discharged from state employment, *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967), being denied mail delivery, *Lamont v. Postmaster General*, 381 U.S. 301 (1965), or being required to take an oath on pain of dismissal from employment, *Baggett v. Bullitt*, 377 U.S. 360 (1964). In none of these cases did the chilling effect "arise merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant 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." *Laird*, 408 U.S. at 11.

For example, the plaintiffs in *Reagan* challenged an Executive order that prescribed certain procedures for intelligence gathering. 738 F.2d at 1377. The plaintiffs alleged that the Executive order was unconstitutional, and that it violated

separation of powers principles because it had been promulgated without congressional authorization. *Id.* The court held that the plaintiffs could not demonstrate an injury-in-fact because the executive order did not issue commands or prohibitions to the plaintiffs, nor did it set forth standards governing their conduct. *Id.* at 1378. The court reasoned that the "chilling effect" was "the *reason* why the governmental imposition is invalid rather than as the *harm* which entitles the plaintiff to challenge it." *Id.* (emphasis in original).

In other words, the injury that gives rise to standing is the defendant's harmful conduct—or the reasonable fear of that conduct—not the lost opportunities and expenses incurred as a result of the fear. *See Laidlaw*, 528 U.S. at 183-84. Thus, in *Laidlaw,* for example, the discharge of waste was the harm that adversely affected the plaintiffs' recreational, aesthetic, and economic interests in the river. *Id.* That the *Laidlaw* plaintiffs were deterred from using the river was evidence of the harm, not the harm itself. *See id.* In the instant case, in order to demonstrate an injury-in-fact, Petitioners must allege that the TSP injures them by subjecting them to harmful regulation, proscription, or compulsion; the asserted effect on communication and the performance of professional duties is evidence of deterrence, and is not itself injury-in-fact. *See Reagan*, 738 F.2d at 1378.

The First Circuit's decision in *Ozonoff v. Berzak* is not to the contrary. In that case, the court determined that Ozonoff, an applicant for a job with the World

Health Organization had standing to challenge an Executive order that required a "loyalty check" as a condition of employment. *Ozonoff v. Berzak*, 744 F.2d 224, 229-30 (1st Cir. 1984). Then-Circuit Judge Breyer distinguished *Laird* by noting first that the *Laird* plaintiffs had not alleged that "the information gathering activities were directed against them specifically, or that the gathered data could be directly used against them in any foreseeable way." *Id.* at 229. Thus, they failed to demonstrate that the harm was either personal or imminent, as discussed above. But Ozonoff was also subjected to compulsion by the order, because it was a condition of employment. *See id.* Accordingly, the denial of employment based on disfavored associations or speech that would be disclosed by the mandatory loyalty check met the "something more" measure of tangible harm required by *Laird. See Laird*, 408 U.S. at 10.

In contrast, Petitioners in this case have alleged nothing more than a chilling effect based on their subjective fear that the NSA *may* someday intercept their communications, which *may* then be used to the detriment of their clients. (*See, e.g.*, R. at 175, 179.) For example, one attorney, Joshua Dratel, alleges in his declaration that his overseas communications "will probably be intercepted," and that as a result, he "believes [he] should not discuss anything that may, if learned by the NSA, be detrimental to [his] clients' interests." *Id.* Another attorney, William Swor, alleges that he "presume[s]" that his communications with clients

are being monitored. (R. at 137.) Swor also alleges that he has curtailed his communications because he is "unaware of any limits on how the fruits of the surveillance may be used." (R. at 138.); *but cf. Laird*, 408 U.S. at 11 (fear that "fruits of [surveillance] activities" might be used the detriment of plaintiffs in the future did not constitute injury-in-fact).

Indeed, Petitioners' claims are even more attenuated than were the claims made by the plaintiffs in *Laird*. Like the *Laird* plaintiffs, Petitioners cannot show that any information gathering activities have been directed at them personally. (*See, e.g.*, R. at 137); *Laird*, 408 U.S. at 11. However, in this case, unlike in *Laird*, Petitioners do not allege a fear that any information obtained will someday be used in reprisal against *Petitioners themselves*, but rather allege a fear that the information may be someday used against their *clients*. (*See, e.g.*, R. at 175); *Laird*, 408 U.S. at 11. This claim must fail, because any asserted injury must be to the plaintiff. *Valley Forge*, 454 U.S. at 474. In sum, because Petitioners' claims amount only to a "subjective chill," they cannot state an injury under *Laird*. *See* 408 U.S. at 10.

2. Petitioners cannot demonstrate that any injuries they have alleged are caused by the TSP

Many of the defects in Petitioners' allegations with regard to demonstrating injury-in-fact create similar problems in demonstrating that their alleged injuries are caused by the operation of the TSP. In particular, Petitioners' allegations fail to

demonstrate that their injuries are caused by the TSP because these injuries—disruption of their ability to communicate with overseas contacts and expenses associated travelling for face-to-face communication—are instead the indirect results of Petitioners' own actions and the actions of third parties.

Causation, for the purposes of demonstrating standing, is "a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). The "case or controversy" limitation requires that the injury must be caused by the adverse party, not by the "independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976).

In the present matter, the "complained-of conduct" consists of surveillance under the TSP—the details of which remain largely secret—including eavesdropping without a FISA warrant and an alleged lack of minimization procedures. (R. at 15-17.) The injuries that Petitioners claim result from these aspects of the program include interference with the attorney-client relationship and the added expense of travel to facilitate face-to-face communication. (R. at 180.) As discussed above, because these "injuries" do not flow from "regulatory, proscriptive, or compulsory" aspects of the TSP, they are not injuries-in-fact for the purposes of conferring standing. Even if these alleged harms were cognizable

for this purpose, Petitioners cannot show a causal connection between the TSP and the alleged harms for several reasons.

First, the connection between Petitioners' fear that confidential information might be intercepted and then used to the detriment of Petitioners' clients is "attenuated at best." *See Allen*, 468 U.S. at 757-58 (plaintiffs failed to show causal link between racial segregation in schools and challenged tax exemptions where there was no evidence of the number of schools receiving exemptions and it was uncertain whether withdrawal exemptions would cause schools to change policies). Here, whether Petitioners' communications are being intercepted is unknown, and whether any harm would result if they were intercepted is also uncertain. *See Allen*, 468 U.S. at 757-58.

Second, Petitioners have not alleged that the TSP causes their injuries. Rather they have alleged that the measures *they themselves have taken* to limit exposure to the TSP have injured them. (*See* R. at 126, 175-76.) These measures and their ancillary effects, including travel expenses, are not imposed by regulations within the TSP, but are instead the consequence of Petitioners' own decisions to forgo telephone and e-mail communication. As such, this type of "self-inflicted" injury breaks the chain of causation required to demonstrate standing. *See McConnell v. FEC*, 540 U.S. 93, 228 (2003) (rejecting argument for standing for political candidates who claimed injury from law increasing limits on

"hard money" contributions; injury was caused by "their own personal 'wish' not to solicit or accept large contributions"); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (rejecting plaintiff states' standing to challenge defendant states' tax on income of nonresident employees; diminution of taxes paid to plaintiff states was "self-inflicted" by their decisions to credit taxpayers for income taxes paid to other states).

Third, to the extent Petitioners allege that knowledge of the existence of the Program has made their overseas contacts reluctant to communicate via phone or e-mail, this "chill" is caused by the independent decision of the third party contacts. It is not, therefore, caused by the TSP for the purpose of demonstrating standing. *See Simon*, 426 U.S. at 41.

Petitioners therefore cannot demonstrate that any disruption in providing services to clients is caused by the TSP. Allowing plaintiffs to demonstrate standing based on "injuries" that are the consequences of the plaintiff's own actions—born out of a subjective fear of a program that may or may not have any effect on the plaintiff—would transform the courts "a vehicle for the vindication of the value interests of concerned bystanders." *Allen*, 468 U.S. at 756.

3. Appellants cannot demonstrate that this Court can provide relief for their alleged injuries

The third element of standing, redressability, requires that the proposed relief will remove the harm. *Warth*, 422 U.S. at 505. A plaintiff must show that "he

personally would benefit in a tangible way from the court's intervention." *Id.* at 508 (footnote omitted). Because the potential for Petitioners' communications to be intercepted would exist even if the NSA were enjoined from using TSP procedures, this Court cannot provide a remedy for Petitioners' alleged injuries.

The specific harms Petitioners identify regarding the TSP are the warrantless nature of the surveillance and the absence of minimization procedures. (*See, e.g.*, R. at 138.) As an initial matter, the record does not reveal what minimization procedures exist (*see* R. at 253), but there is some evidence that minimization procedures exist, and that they are similar to those used under FISA. (R. at 86 (statement of Gen. Michael Hayden) ("We report this information the way we report any other information collected by the [NSA]. […] The same minimalizationist standards apply across the board, including for this program.").) Petitioners' general allegation about the lack of minimization procedures is therefore unsubstantiated by specific facts as required at this stage of the proceedings. *See* F. R. Civ. P. 56(e); *National Wildlife Fed'n*, 497 U.S. at 889.

Next, even assuming that the TSP provided no minimization procedures, it would make no difference to Petitioners' clients and contacts in this case. The minimization procedures in FISA apply only to "United States persons." 18 U.S.C § 1801(h). Plaintiffs have not alleged that any of the overseas contacts are "U.S. persons" who would be entitled to these protections. *See also Scott v. United*

States, 436 U.S. 128, 139-40 (1978) (Title III minimization requirements do not bar interception of all non-relevant communications).

Similarly, insofar as Petitioners argue that the lack of a warrant might be prejudicial to their clients' interests, it is questionable whether Petitioners' overseas clients would be entitled to the warrant protections of the Fourth Amendment. "[I]t was never suggested that [the Fourth Amendment] was intended to restrain the actions of the Federal Government against aliens outside of the United States territory." *United States v. Verdugo-Urquidez,* 494 U.S. 259, 266 (1990). Even under FISA these individuals could be subjected to warrantless surveillance. *See, e.g.*, *United States v. Odeh*, 548 F. 3d 276 (2d Cir. 2008) (evidence obtained from warrantless FISA surveillance of U.S. citizen in Kenya was properly admitted at trial because the surveillance of his telephone lines were reasonable under the circumstances).

It is also undisputed that Petitioners' communications could be intercepted lawfully with a FISA warrant. (*See, e.g.*, R. at 138.) Therefore, to the extent that Petitioners allege that the possibility their communication will be intercepted causes them to breach their duty of confidentiality to their clients, it is unclear how interception under FISA would be different in this regard. As an aside, Respondents note that the applicable rule of professional conduct states that an attorney shall not "knowingly reveal" a confidence, and thus the emphasis is on

affirmative disclosure, not passive interception. Mich. R. Prof. Cond. 1.6. Respondents are also unaware of any case in which an attorney was found liable for a breach of the duty of confidentiality because client communications were intercepted by government agents. Under Petitioners' logic, any unlawful interception of confidential information—including by theft or eavesdropping by a non-government actor—would constitute a breach of Petitioners' duty. Leaving aside the question of whether this proposition could be true, Petitioners "have not asserted, explained, or proven how … purely hypothetical changes that are unknown and unknowable based on the established record and the State Secrets doctrine—would alleviate their fears." (R. at 252.) This Court should therefore affirm the Sixth Circuit's holding that Petitioners have failed to allege facts sufficient to confer standing.

B. The Executive Has Inherent Authority To Order Warrantless International Surveillance For The Purpose Of Detecting Threats And Ensuring National Security

Article II of the Constitution begins: "The executive Power shall be vested in a President of the United States of America." U.S. Const. art. II §, 1. The President must "faithfully execute the office of President," and "preserve, protect and defend the Constitution." *Id.* In addition, the Constitution confers the rank of Commander in Chief of the armed forces upon the President. *Id* § 2.

This Court has not decided the issue of the President's inherent authority to order warrantless surveillance in an international context. However, it has noted that, implicit in the President's duty to preserve, protect, and defend the Constitution "is the power to protect our Government against those who would subvert or overthrow it by unlawful means." *United States v. United States District Court* ("*Keith*"), 407 U.S. 297, 310 (1972).

Moreover, this Court, writing in 1972, commented that the "marked acceleration" of technology had given rise to new techniques for planning and concealing crimes. *Id.* at 312. "It would be contrary to the public interest for Government to deny to itself the prudent and lawful employment of those very techniques which are employed against the Government and its law-abiding citizens." *Id.*

Because in this instance, the authorization of the TSP implicates the President's authority both as Commander in Chief, and in his role as the sole representative of the nation in foreign affairs, the Court should give deference to the President's exercise of the authority requisite to those functions. *See* U.S. Const. art II, § 2; *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 319 (1936). In addition, because the authorization for the TSP was intended to facilitate the acquisition of foreign intelligence in way that supplements, but does not contradict, the legislative framework of FISA, the President's actions do not

infringe upon legislative authority. Accordingly, this Court should decline to rule on the issue of the TSP until the legislature has spoken. *See Goldwater v. Carter*, 444 U.S. 996, 997 (1979) (mem.) (Powell, J., concurring) ("The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse."); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("[T]the very nature of executive decisions as to foreign policy is political, not judicial.").

1. Because the record does not support a finding that the NSA engages in "electronic surveillance" within the meaning of FISA, Petitioners cannot show that the TSP violates FISA's "exclusive means" language or that the President's authorization conflicted with a legislative directive

Petitioners contend that Title III and FISA, read together, limit the foreign intelligence surveillance capabilities of the Executive to the provisions enumerated in those two statutes. (R. at 4.) The Court of Appeal found, to the contrary, that the plain language of the statutes did not specify that Title III and FISA were the exclusive means by which the NSA can intercept *any* communication, but instead specified the means by which "electronic surveillance," *as defined by FISA* could occur. (R. at 265.) Because the exact details about interceptions under the TSP are unknown, Petitioners could not demonstrate that the TSP engaged in they type of electronic surveillance described by FISA.

The "exclusive means" provision of Title III appears in section 2511 of Title 18 of the U.S. Code, which relates to domestic crime and law enforcement. It states that FISA "shall be the exclusive means by which electronic surveillance, as defined in [FISA, 50 U.S.C. § 1801], and the interception of domestic wire, oral, and electronic communications may be conducted." 18 U.S.C. § 2511(f). However, Title III also provides that nothing in that chapter "shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications . . . *utilizing a means other than electronic surveillance as defined in* [*FISA*]." *Id.* (emphasis added). Therefore, the plain language of Title III makes clear that the "exclusive means" limitation applies only to the acquisition of international communications as described by FISA. (*See* R. at 266 (opinion of Batchelder, J.).)

FISA, in turn, defines electronic surveillance in two very specific ways. First, "electronic surveillance" is defined as the acquisition of communications sent or received by a particular, known, U.S. person *if* the communication is acquired by *intentionally targeting that person*, when that person has a reasonable expectation of privacy <u>*and*</u> a *warrant would be required for law enforcement purposes*. 50 U.S.C. § 1801(f)(1) (emphasis). Second, electronic surveillance under FISA also includes acquisition of electronic communications to or from a person in the United States, *if the acquisition occurs in the United States.* 50 U.S.C. §

1801(f)(2) (emphasis added). Therefore, to show that acquisitions under the TSP qualify as electronic surveillance under this definition, Petitioners would have to show either that the acquisition occurred with the United States, or that *all* of the following conditions were met: (1) that it was the U.S. person who was targeted, not the person located outside the United States; (2) that the U.S. person had a reasonable expectation of privacy and; (3) that a warrant would be required for surveillance conducted for law enforcement purposes.

As an initial matter, the record contains no evidence of where the acquisition takes place. This is precisely the type of operational detail that must remain secret in order for the TSP to be effective. Accordingly, Petitioners' unsubstantiated allegation that interceptions occur within the U.S. fails to set forth specific facts sufficient to overcome a motion for summary judgment. *See* F. R. Civ. P. 56(e); *Nat'l Wildlife Fed'n*, 497 U.S. at 889.

Next, the record does not support the conclusion that the conditions listed in section 1801(f)(1) have been met. The record is devoid of evidence of *how* individuals are targeted, except for the caveat that the NSA must believe that one of the parties must be affiliated with al Qaeda. (R. at 65.) Petitioners do not allege that they themselves have been targeted, but rather allege that they believe that it is their overseas contacts that would trigger scrutiny. (*See, e.g.*, R. at 175 (Declaration of Joshua Dratel) ("[I]t is likely that some if not many of [my]

international contacts qualify under [the TSP's definition of a person associated with al Qaeda]").) Therefore, Petitioners have not alleged facts that would tend to prove that the NSA is targeting a particular, known, U.S. person, but rather their allegations suggest that the target of any interception would be the person located overseas. (*See* R. at 137 (Declaration of William Swor) ("I believe that my communications . . . with individuals in the Middle East are likely being intercepted . . . because the United States has charged some of my clients with terrorism-related offenses")); *see also* 50 U.S.C. § 1801(f)(1).

Nor is it clear that Petitioners, in this case, had a reasonable expectation of privacy in their overseas phone calls. For example, Joshua Dratel alleges that he has "always been careful about the non-privileged communications" he has engaged in over the phone and by email, (R. at 175) and that he understood, even before the existence of the TSP was disclosed, that the government could "intercept and monitor communication related to" his clients under FISA. (R. at 176.)

Last, FISA's definition of electronic surveillance specifies that the circumstances must be such that a warrant would be required for law enforcement purposes. First, the purpose of the TSP is not to prosecute crimes, but rather to prevent terrorist attacks on the United States. (R. at 78.) Because the Fourth Amendment's protections are at their strongest when the purpose of a search is for

law enforcement and criminal sanctions are possible, the preventative purpose and "hot pursuit" character of TSP surveillance calls into question whether a warrant would be required. *See Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (warrant exception for "hot pursuit"); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666-67, 109 (1989) (noting that when the government "seeks to *prevent* the development of hazardous conditions to detect violations that rarely generate articulable grounds for searching any particular place or person" the probable cause and warrant requirements give way to an evaluation of reasonableness). Second, and more importantly, as discussed above, the protections of the Fourth Amendment do not extend to aliens overseas—like Petitioners' clients and witnesses in this case.

Accordingly, there is no evidence in this case that the NSA is engaging in "electronic surveillance" as defined by FISA. Rather, the TSP is a program that operates outside the narrow requirements imposed by FISA in order to more effectively detect and prevent attacks on the United States. Because the TSP does not conflict with FISA, the authorization for the TSP occurred in a legislative vacuum, consistent with the President's authority under Article II of the Constitution. Thus, because the President has acted where Congress has not, this Court should give deference to the Executive authority and leave it to the Legislature to speak if the TSP is inconsistent with congressional intent.

2. Authorization of the TSP is within the bounds of the President's Article II powers as they have been historically recognized

Intelligence gathering is an inherent element of the constitutional responsibilities assigned to the Executive. *See United States v. Butenko*, 494 F.2d 593, 603 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 881 (1974). This duty has been clear since the early days of the nation; George Washington asked Congress for a "competent fund" for intelligence operations in his first State of the Union address. *See* Annals of Cong., 1st Cong., 2d Sess. 2232, 1 Stat. 128. In the twenty-first century, the Executive's use of warrantless electronic surveillance to collect foreign intelligence may be critical in certain situations to fulfill his obligation to conduct the foreign affairs of the nation and to safeguard its security against foreign aggression or other hostile acts. *See Totten v. United States*, 92 U.S. 105, 106 (1875) ("We have no difficulty as to the authority of the President . . . . He was undoubtedly authorized during the war, as commander-in-chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy . . . .")

As previously noted, this Court has not decided whether the President has the authority to order warrantless wiretaps on international communications. In *Keith*, the Court considered the legality of electronic surveillance in a purely domestic context. 407 U.S. 297. In that case, defendants in a criminal trial who

were accused of bombing a Central Intelligence Agency ("CIA") office challenged the legality of warrantless wiretaps that had intercepted their communications. *Id.* at 300. The Court held that the Fourth Amendment requires prior judicial approval for purely domestic surveillance, but declined to address the nature of Executive authority with regard to foreign actors. *Id.* at 324, 308-309 ("[T]he instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country.").

In general, the President's authority includes the power to take measures not prohibited by the Constitution or statute. *See United States v. Midwest Oil Co.*, 236 U.S. 459, 472, 474 (1915) (superseded by statute on other grounds) (affirming Presidential action on the ground that congressional inaction represented acquiescence in the President's conduct); *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981). The need for Presidential autonomy is particularly great in confronting a crisis that Congress did not or could not have anticipated, as in the current instance where FISA, enacted in 1978, was inadequate to counter the immediate threat posed by al Qaeda after September 11. *See id.*

Additionally, this Court has recognized that, in areas relating to foreign affairs and national security, the President has broad constitutional authority independent of any congressional grant. *Hamdan v. Rumsfeld*, 548 U.S. 557, 679 (2006) (Thomas, J., dissenting); *see also Prize Cases*, 67 U.S. 635 (1863) ("If a

war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority"). This is in part because "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take." *Dames & Moore*, 453 U.S. at 678 (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981)).

The TSP was authorized to provide intelligence with the "speed and agility" required deal with a "new kind of enemy" and the advances in technology since FISA was enacted in 1978. (*See* R. at 81.) Thus, the TSP supplements, but does not supplant FISA. *See id.* Accordingly, the President acted in an area Congress had failed to address, and this Court should look to Congress to either acquiesce or disapprove of his action. *See Midwest Oil*, 236 U.S. at 472, 481; *see also Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). There is substantial evidence of acquiescence. The use of electronic surveillance in "internal security cases has been sanctioned more or less continuously by various Presidents and Attorneys General since July 1946." *Keith*, 407 U.S. at 310. For example, President Roosevelt authorized the Attorney General to approve electronic surveillance where "grave matters involving defense of the nation" were at stake. *See* S. Rep. No. 95-604, at 10 (1977). Although reforms relating to domestic surveillance, including FISA, were enacted in the 1970s, Congress has not attempted to impose restrictions on warrantless surveillance when implemented overseas. The FISA

reforms were largely concerned with the impact domestic surveillance could have on First and Fourth Amendment issues. *See* S. Rep. No. 94-755, 94th Cong., 2d Sess. (1976) ("the Church Committee Report"). As previously discussed, Fourth Amendment protections to not apply to aliens overseas, and are considerably weakened when applied even to U.S. citizens living abroad. *Verdugo-Urquidez*, 494 U.S. at 265-66; *Odeh*, 548 F. 3d 276. Accordingly, Fourth Amendment concerns are considerably mitigated in the international context and the President's authorization of the TSP does not, therefore, conflict with the directives contained in the Bill of Rights. *See Curtiss-Wright*, 299 U.S. at 320 (plenary and exclusive power of the President in the field of international relations does not require congressional authorization but must be exercised in subordination to the Constitution).

In addition, other factors point to Congress' support of the President's actions. Specifically, Congress authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the [9/11] terrorist attacks" in order to prevent "any future acts of international terrorism against the United States." Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (Sept. 18, 2001) (reported as a note to 50 U.S.C.A. § 1541). The AUMF, while perhaps not expressly authorizing the kind of warrantless

surveillance prescribed by the TSP, is not "irrelevant to the question of the validity of the President's action" *Dames & Moore*, 453 U.S. at 677. Rather, the AUMF delegates broad authority to the President to act in response to the hostile acts of foreign agents, in particular, agents of al Qaeda. *See id.* (relying on congressional grant of authority to freeze Iranian assets as evidence of congressional acquiescence to President's authority to suspend claims related to those assets). In addition, as the AUMF authorizes the Commander in Chief to use "all necessary and appropriate force," "[n]o logical argument can be made for compelling the military to use *blind* force." *Laird*, 408 U.S. at 5. Rather, a military leader "must be governed by his intelligence . . . . It is his duty to obtain correct information." *Id* at 6 (quoting Chief Justice John Marshall, speaking about George Washington).

IV. CONCLUSION

Petitioners have failed to allege specific facts demonstrating that they have suffered injuries caused by the TSP that would entitle them to air their grievances in a federal court. Neither have Petitioners demonstrated that the TSP is unlawful, or that the President exceeded his constitutional authority to gather foreign intelligence in order to protect the security of the United States. Accordingly, Respondents ask this Court to affirm the Sixth Circuit's decision denying Petitioners their requested relief.

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Respectfully submitted,

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