Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CLAPPER, DIRECTOR OF NATIONAL INTELLIGENCE, ET AL. *v.* AMNESTY INTERNATIONAL USA ET AL.

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

No. 11–1025. Argued October 29, 2012—Decided February 26, 2013

Section 702 of the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U. S. C. §1881a, added by the FISA Amendments Act of 2008, permits the Attorney General and the Director of National Intelligence to acquire foreign intelligence information by jointly authorizing the surveillance of individuals who are not "United States persons" and are reasonably believed to be located outside the United States. Before doing so, the Attorney General and the Director of National Intelligence normally must obtain the Foreign Intelligence Surveillance Court's (FISC) approval. Surveillance under §1881a is subject to statutory conditions, judicial authorization, congressional supervision, and compliance with the Fourth Amendment. Respondents—attorneys and human rights, labor, legal, and media organizations—are United States persons who claim that they engage in sensitive international communications with individuals who they believe are likely targets of §1881a surveillance. On the day that the FISA Amendments Act was enacted, they filed suit, seeking a declaration that §1881a is facially unconstitutional and a permanent injunction against §1881a-authorized surveillance. The District Court found that respondents lacked standing, but the Second Circuit reversed, holding that respondents showed (1) an "objectively reasonable likelihood" that their communications will be intercepted at some time in the future, and (2) that they are suffering present injuries resulting from costly and burdensome measures they take to protect the confidentiality of their international communications from possible §1881a surveillance.

Held: Respondents do not have Article III standing. Pp. 8–24.

(a) To establish Article III standing, an injury must be "concrete,

particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co.* v. *Geertson Seed Farms*, 561 U. S. ___, ___. "[T]hreatened injury must be '"certainly impending"' to constitute injury in fact," and "[a]llegations of possible future injury" are not sufficient. *Whitmore* v. *Arkansas*, 495 U. S. 149, 158. Pp. 8–10.

(b) Respondents assert that they have suffered injury in fact that is fairly traceable to §1881a because there is an objectively reasonable likelihood that their communications with their foreign contacts will be intercepted under §1881a at some point. This argument fails. Initially, the Second Circuit's "objectively reasonable likelihood" standard is inconsistent with this Court's "threatened injury" requirement. Respondents' standing theory also rests on a speculative chain of possibilities that does not establish that their potential injury is certainly impending or is fairly traceable to §1881a. First, it is highly speculative whether the Government will imminently target communications to which respondents are parties. Since respondents, as U. S. persons, cannot be targeted under §1881a, their theory necessarily rests on their assertion that their foreign contacts will be targeted. Yet they have no actual knowledge of the Government's §1881a targeting practices. Second, even if respondents could demonstrate that the targeting of their foreign contacts is imminent, they can only speculate as to whether the Government will seek to use §1881a-authorized surveillance instead of one of the Government's numerous other surveillance methods, which are not challenged here. Third, even if respondents could show that the Government will seek FISC authorization to target respondents' foreign contacts under §1881a, they can only speculate as to whether the FISC will authorize the surveillance. This Court is reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment. See, *e.g., Whitmore*, *supra,* at 159–160. Fourth, even if the Government were to obtain the FISC's approval to target respondents' foreign contacts under §1881a, it is unclear whether the Government would succeed in acquiring those contacts' communications. And fifth, even if the Government were to target respondents' foreign contacts, respondents can only speculate as to whether their own communications with those contacts would be incidentally acquired. Pp. 10–15.

(c) Respondents' alternative argument is also unpersuasive. They claim that they suffer ongoing injuries that are fairly traceable to §1881a because the risk of §1881a surveillance requires them to take costly and burdensome measures to protect the confidentiality of their communications. But respondents cannot manufacture standing by choosing to make expenditures based on hypothetical future

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harm that is not certainly impending. Because they do not face a threat of certainly impending interception under §1881a, their costs are simply the product of their fear of surveillance, which is insufficient to create standing. See *Laird* v. *Tatum*, 408 U. S. 1, 10–15. Accordingly, any ongoing injuries that respondents are suffering are not fairly traceable to §1881a. Pp. 16–20.

(d) Respondents' remaining arguments are likewise unavailing. Contrary to their claim, their alleged injuries are not the same kinds of injuries that supported standing in cases such as *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, *Meese* v. *Keene*, 481 U. S. 465, and *Monsanto, supra.* And their suggestion that they should be held to have standing because otherwise the constitutionality of §1881a will never be adjudicated is both legally and factually incorrect. First, " '[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.' " *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 489. Second, the holding in this case by no means insulates §1881a from judicial review. Pp. 20–23.

638 F. 3d 118, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 11–1025

JAMES R. CLAPPER, JR., DIRECTOR OF NATIONAL INTELLIGENCE, ET AL., PETITIONERS *v.* AMNESTY INTERNATIONAL USA ET AL.

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

[February 26, 2013]

JUSTICE ALITO delivered the opinion of the Court.

Section 702 of the Foreign Intelligence Surveillance Act of 1978, 50 U. S. C. §1881a (2006 ed., Supp. V), allows the Attorney General and the Director of National Intelligence to acquire foreign intelligence information by jointly authorizing the surveillance of individuals who are not "United States persons"[1] and are reasonably believed to be located outside the United States. Before doing so, the Attorney General and the Director of National Intelligence normally must obtain the Foreign Intelligence Surveillance Court's approval. Respondents are United States persons whose work, they allege, requires them to engage in sensitive international communications with individuals who they believe are likely targets of surveillance under §1881a. Respondents seek a declaration that §1881a is unconstitutional, as well as an injunction against §1881a-authorized surveillance. The question

[1]The term "United States person" includes citizens of the United States, aliens admitted for permanent residence, and certain associations and corporations. 50 U. S. C. §1801(i); see §1881(a).

before us is whether respondents have Article III standing to seek this prospective relief.

Respondents assert that they can establish injury in fact because there is an objectively reasonable likelihood that their communications will be acquired under §1881a at some point in the future. But respondents' theory of *future* injury is too speculative to satisfy the well-established requirement that threatened injury must be "certainly impending." *E.g.*, *Whitmore* v. *Arkansas*, 495 U. S. 149, 158 (1990). And even if respondents could demonstrate that the threatened injury is certainly impending, they still would not be able to establish that this injury is fairly traceable to §1881a. As an alternative argument, respondents contend that they are suffering *present* injury because the risk of §1881a-authorized surveillance already has forced them to take costly and burdensome measures to protect the confidentiality of their international communications. But respondents cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending. We therefore hold that respondents lack Article III standing.

I

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In 1978, after years of debate, Congress enacted the Foreign Intelligence Surveillance Act (FISA) to authorize and regulate certain governmental electronic surveillance of communications for foreign intelligence purposes. See 92 Stat. 1783, 50 U. S. C. §1801 *et seq.*; 1 D. Kris & J. Wilson, National Security Investigations & Prosecutions §§3.1, 3.7 (2d ed. 2012) (hereinafter Kris & Wilson). In enacting FISA, Congress legislated against the backdrop of our decision in *United States* v. *United States Dist. Court for Eastern Dist. of Mich.*, 407 U. S. 297 (1972) (*Keith*), in which we explained that the standards and procedures that law enforcement officials must follow

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