No. 11-_____

In The Supreme Court of the United States

TASH HEPTING, *et al.*,

Petitioners,

v.

AT&T CORPORATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress added section 802 to the Foreign Intelligence Surveillance Act in 2008. 50 U.S.C. § 1885a. In so doing, Congress created a set of new legal standards potentially applicable to lawsuits alleging unlawful electronic surveillance by telecommunications carriers, encompassing lawsuits in either state or federal court and lawsuits raising claims under state law, federal statutory law, or federal constitutional law.

Congress, however, did not put the new legal standards of section 802 into effect; after enactment, preexisting law continued to govern lawsuits challenging unlawful surveillance by telecommunications carriers. Instead, Congress gave the Attorney General the power to choose which of two irreconcilable legal standards should be applied to those lawsuits: If the Attorney General does nothing, the lawsuit remains governed by preexisting law. If the Attorney General chooses to file a section 802 certification in the lawsuit, his action nullifies legal standards established by preexisting law and replaces them with the legal standards of section 802. The Attorney General did so in these lawsuits, which were then dismissed pursuant to section 802.

The questions presented are these:

1. In the case of a federal statutory claim, may Congress grant the Attorney General the power to choose which of two inconsistent statutory standards should govern the claim?

QUESTIONS PRESENTED – Continued

2. In the case of a state-law claim, may Congress grant the Attorney General the power to choose whether the state law governing the claim should be preempted by federal law?

3. In the case of a federal constitutional claim, may Congress grant the Attorney General the power to choose whether to exclude the claim from the jurisdiction of the federal and state courts?

4. Even if Congress may grant the Attorney General the powers described in Questions One, Two, and Three, did Congress provide an intelligible principle limiting the Executive's discretion in exercising those powers?

PARTIES TO THE PROCEEDING

Petitioners are Tash Hepting; Gregory Hicks; Erik Knutzen; Carolyn Jewel; Sean Basinski; Richard D. Suchanek, III; Charles F. Bissitt; Sandra Bissitt; George Hayek, III; June Matrumalo; Gerard Thibeault; Arthur Bouchard; Maryann Bouchard; Aldo Caparco; Janice Caparco; Jenna Caparco; Rose Deluca; Nicole Mirabella; Patricia Pothier; Paul Pothier; Marshall Votta; Vincent Matrumalo; Paula Matrumalo; Jennifer Thomas; Christine Douquette; Maryann Klaczynski; Christopher Bready; Anne Bready; Kyu Chun Kim; Jenet Artis; Claudis Artis; David Beverly, Jr.; Tom Campbell; George Main; Dennis P. Riordan; Margaret Russell; Robert Scheer; Peter Sussman; Richard Belzer; Marc Cooper; Stephen J. Mather; Sandra Richards; Curren Warf; American Civil Liberties Union Of Northern California, Inc.; ACLU Of Southern California; American Civil Liberties Union Of San Diego/ Imperial Counties; Edward Gerard De Bonis; Robert S. Gerstein; Rod Gorney; Robert Jacobson; Vincent J. Maniscalco; Carol Sobel; Glen Chulsky; Alejandro Trombley; Samuel Fisher; Omar Moreno; Paul Robilotti; Stephen Ternlund; Anatoly Sapoznick; Charmaine Crockett; A. Joris Watland; Anakalia Kaluna; Kim Coco Iwamoto; William R. Massey; Travis Cross; John Elder; Gabriel Fileppelli; Sam Goldstein; Healing Arts Center; David Kadlec; The Libertarian Party of Indiana; Tim Peterson; Carolyn W. Rader; Sam Goldstein Insurance Agency, Inc.; Sean Sheppard; Joan Dubois; Christopher Yowtz; Rebecca Yowtz; Pat

PARTIES TO THE PROCEEDING – Continued

Mahoney; Pamela A. Mahoney; Mark P. Solomon; Rhea Fuller; Shelly D. Souder; Steve Dolberg; Theresa Fortnash; D. Clive Hardy; James C. Harrington; Richard A. Grigg; Louis Black; The Austin Chronicle; Michael Kentor; Tina Herron; Brandy Sergi; Darryl Hines; Alex Klabacka; Jana Klabacka; Howard Jacobs; Laurence Kornblum; Kathleen Miller; Claudia Mink; Richard Roche; Benson B. Roe; Paul Goltz; Elaine Spielfogel-Landis; Studs Terkel (now deceased, as authorized by his estate); Barbara Flynn Currie; Diane C. Geraghty; Gary S. Gerson; James D. Montgomery; Quentin Young; American Civil Liberties Union of Illinois, Inc.; and Herbert Waxman.

Respondents are AT&T Inc.; AT&T Corp.; American Telephone and Telegraph Co.; AT&T Communications of California, Inc.; AT&T Communications of the Southwest, Inc.; AT&T Communications – East, Inc.; AT&T Operations Inc.; AT&T Teleholdings, Inc.; BellSouth Corp.; BellSouth Communications Systems, LLC; BellSouth Telecommunications, Inc.; Cingular Wireless LLC; Illinois Bell Telephone Co. d/b/a AT&T Illinois; New Cingular Wireless Services, Inc.; Pacific Bell Telephone Co. d/b/a AT&T California; SBC Long Distance, LLC d/b/a AT&T Long Distance; Sprint Nextel Corporation; Sprint Communications Company L.P.; Nextel West Corp.; Sprint Spectrum L.P.; Verizon Communications Inc.; Verizon Florida LLC; Verizon Global Networks Inc.; Verizon Maryland Inc.; Verizon Northwest Inc.; Verizon Business Global LLC;

PARTIES TO THE PROCEEDING – Continued

MCI Communications Services, Inc.; the United States; Steven Lebow, Rabbi; Steven Bruning; Cathy Bruning; Jonnie Starkey; Brian Bradley; Barry Kaltman; Meredith Kaltman, Ray Anderson; Collin Baber; Mark Barker; John Barrett; Anthony Bartelemy; William Betz; Fran Blamer; Trudy Bond; Kristen Brink; Shane Brink; Michael Brooks; Paul Bruney; Peter Catizone; Steve Christianson; John Clark; Kingsley Clark; Thomas M. Cleaver; Gerard P. Clerkin; Peter B. Collins; Kris Costa; Mark Costa; Julie Davis; Sharon L. Davis; Toni Didona; Theresa R. Duffy; Thomas S. Dwyer; Thomas Michael Fain; Shawn Fitzgibbons; John Fitzpatrick; Jennifer Florio; Margaret Franklin; Dawn Furler; C. Garifo; Diane Gavlinski; Joseph Gehring; Jane Gentile-Youd; Mark Gentile-Youd; G. Lawrence Gettier; Linda Gettier; Linda J. Gettier; Jit Gill; Mike Gilmore; Jayson Gleason; Marc Goldstone; Todd Graff; Janet Granja; Susan Grossman; Stephanie Gustave; Pam Haddon; Vern Haddon; Don Hawkins; Donna Hawkings; Jose V. Heinert; Lamar Henderson; Carolyn R. Hensley; Douglas S. Hensley; Donald Herron; Jennifer Hontz; Joyce Jackson; Andrew Jaffe; Randel James; Michael Johnson; Diane Juliano; Fay Kaiser; Rajendram Krishnan; Barbara Langer; Michael Lavo; Fred Leak; Ken Leha; Ben Lindsey; Lisa Lockwood; Ms. Lodge; Nancy K. Lorey; Michael T. Lyda; Eleanor M. Lynn; Esq.; Terry Mancour; Charlene Mann; Rev.; Jon Paul McClellan; Alicia McCollum; James McGrattan; Rev. Joe McMurray; Stephanie Meket; Clyde Michael

PARTIES TO THE PROCEEDING – Continued

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CORPORATE DISCLOSURE STATEMENT

Petitioners American Civil Liberties Union of Northern California, Inc., American Civil Liberties Union of Southern California, American Civil Liberties Union of San Diego/Imperial Counties, American Civil Liberties Union of Illinois, Inc., Sam Goldstein Insurance Agency, Inc., and Austin Chronicle Corp. state that none of them has a parent corporation, and that no publicly held corporation owns 10% or more of the stock of any of them.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Tash Hepting, *et al*., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-56) is not yet reported but is available at 2011 WL 6823154. The district court's opinion (Pet. App. 57-109) is reported at 633 F. Supp. 2d 949.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 2011. On March 26, 2012, parties to the proceedings in the court of appeals who are not petitioners here timely filed a petition for rehearing and rehearing en banc, after being granted an extension of time to do so by the court of appeals. The petition remains pending. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 802 of the Foreign Intelligence Surveillance Act ("FISA"), codified at 50 U.S.C. § 1885a, provides as follows in subsections (a), (b), and (c):[1]

> (a) Requirement for certification. Notwithstanding any other provision of law, a civil action may not lie or be maintained in a Federal or State court against any person for providing assistance to an element of the intelligence community, and shall be promptly dismissed, if the Attorney General certifies to the district court of the United States in which such action is pending that –
>
> > (1) any assistance by that person was provided pursuant to an order of the court established under section 103(a) [50 U.S.C. § 1803(a)] directing such assistance;
> >
> > (2) any assistance by that person was provided pursuant to a certification in writing under section 2511(2)(a)(ii)(B) or 2709(b) of title 18, United States Code;
> >
> > (3) any assistance by that person was provided pursuant to a directive under section 102(a)(4) [50 U.S.C. § 1802(a)(4)], 105B(e) [50 U.S.C. § 1805b(e)], as added by section 2 of the Protect America Act of 2007 (Public

[1] Section 802 of FISA (herein "section 802" or "§ 802") was enacted as a portion of section 201 of the FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436, and is codified at 50 U.S.C. § 1885a.

Law 110-55), or 702(h) [50 U.S.C. § 1881a(h)] directing such assistance;

(4) in the case of a covered civil action, the assistance alleged to have been provided by the electronic communication service provider was –

(A) in connection with an intelligence activity involving communications that was –

(i) authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007; and

(ii) designed to detect or prevent a terrorist attack, or activities in preparation for a terrorist attack, against the United States; and

(B) the subject of a written request or directive, or a series of written requests or directives, from the Attorney General or the head of an element of the intelligence community (or the deputy of such person) to the electronic communication service provider indicating that the activity was –

(i) authorized by the President; and

(ii) determined to be lawful; or

(5) the person did not provide the alleged assistance.

(b) Judicial review.

(1) Review of certifications. A certification under subsection (a) shall be given effect unless the court finds that such certification is not supported by substantial evidence provided to the court pursuant to this section.

(2) Supplemental materials. In its review of a certification under subsection (a), the court may examine the court order, certification, written request, or directive described in subsection (a) and any relevant court order, certification, written request, or directive submitted pursuant to subsection (d).

(c) Limitations on disclosure. If the Attorney General files a declaration under section 1746 of title 28, United States Code, that disclosure of a certification made pursuant to subsection (a) or the supplemental materials provided pursuant to subsection (b) or (d) would harm the national security of the United States, the court shall –

(1) review such certification and the supplemental materials in camera and ex parte; and

(2) limit any public disclosure concerning such certification and the supplemental materials, including any public order following such in camera and ex parte review, to a statement as to whether the case is dismissed and a description of the legal standards that govern the order, without disclosing the paragraph of subsection (a) that is the basis for the certification.

———♦———

STATEMENT OF THE CASE

Petitioners are customers within the United States of the respondent telecommunications carriers, and are not agents of any foreign power. About 10 years ago, initially as part of the so-called "President's Surveillance Program," the respondent telecommunications carriers began a massive, unlawful program of electronic surveillance, intercepting and disclosing to the government both the communications and the communications records of millions of their customers.[2]

Petitioners' claims center on these two categories of unlawful activities by the respondent telecommunications carriers. The first category – the telecommunications dragnet – involves the mass, indiscriminate interception and diversion to the government of the content of the telecommunications of millions of ordinary Americans as those communications transit respondents' domestic telecommunications facilities. ER 483-84; *Hepting v. AT&T Corp.*, 439 F. Supp. 2d

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[2] *See* FISA Amendments Act of 2008, Pub. L. No. 110-261, § 301, 122 Stat. 2436, 2471 (defining "President's Surveillance Program"). As the Inspectors General of the Justice Department, Defense Department, Central Intelligence Agency, National Security Agency, and Office of the Director of National Intelligence have confirmed, the surveillance was broader than the so-called "Terrorist Surveillance Program" ("TSP") that was initially disclosed by the President in December 2005. *See* Inspectors General, *Unclassified Report On The President's Surveillance Program* (July 2009) at 1-2, 5-6, 36-37 (available at www.dni.gov/reports/report_071309.pdf); *see also* Court of Appeals Excerpts of Record ("ER") 508-11.

974, 986-90 (N.D. Cal. 2006). In San Francisco and other cities across the country, for example, AT&T has installed special fiber-optic "splitters" that copy and divert all of its Internet traffic into the control of the National Security Agency. ER 323-26, 358-77, 469-71, 491-96.

The second category of unlawful activities giving rise to petitioners' claims is the carriers' mass, indiscriminate disclosure to the government of the communications records of millions of Americans. ER 484-91. AT&T, for example, has provided the government with its telephone communications record database called "Hawkeye" and its Internet communications record database called "Aurora." ER 56-58.

Petitioners' complaints state claims against the telecommunications carrier respondents arising under federal constitutional and statutory law and state constitutional, statutory, and common law.[3] Many of the complaints allege causes of action under the First

[3] This petition encompasses 30 actions filed in 2006. The first-filed action, Hepting v. AT&T Corp., was filed in the Northern District of California. ER 47-77. Twenty-five of these actions were filed elsewhere; six of those were actions removed from the state courts of Florida, Indiana, Maryland, Minnesota, Missouri, and New Jersey. These 25 actions were transferred to the Northern District and consolidated for pretrial proceedings with the Hepting action by the Judicial Panel on Multidistrict Litigation. ER 309-19. Four additional actions pending in the Northern District (two of which were removed from California state court) were consolidated with the Multidistrict Litigation proceeding by the district court. ER 78-105.

and Fourth Amendments, FISA (50 U.S.C. §§ 1809, 1810), the Wiretap Act (18 U.S.C. §§ 2511, 2520), the Stored Communications Act (18 U.S.C. §§ 2702, 2707), and the Communications Act of 1934 (47 U.S.C. § 605). *See*, *e.g.*, ER 63-72, 112-14, 136-48, 184-93, 222-31, 265-75. Many of the complaints also allege causes of action under state law, presenting claims, for example, under the privacy guarantee of Article I, section 1 of the California Constitution, under section 2891 of the California Public Utilities Code, and under California common law for breach of contract. ER 87-90, 101-03, 148-50, 193-200, 232-43, 275-306. For purposes of the Multidistrict Litigation proceedings, petitioners filed master consolidated complaints against the Sprint, MCI/Verizon, BellSouth, and Cingular groups of respondents. ER 117, 153, 203, 245. The claims against the AT&T group of respondents are found in the complaints in each action against those respondents. *See*, *e.g.*, ER 47, 78, 106. The district court had jurisdiction over these actions under 28 U.S.C. §§ 1331, 1332, 1367, and 1441.

Respondent United States intervened in these actions soon after they were filed in 2006. Later, after the enactment of section 802 of FISA in 2008, the Attorney General filed a section 802 certification in the district court (filing both a public version and a secret, *ex parte* version which petitioners have never seen). Pet. App. 110-120. In his public certification, the Attorney General asserted that petitioners' actions "fall within at least one provision contained in Section 802(a)(1)-(5)" and denied that the government conducted dragnet collection of communications content "for

the purpose of analyzing those communications through key word searches to obtain information about possible terrorist attacks" (petitioners' dragnet surveillance claims were not limited to the collection of communications content for this purpose, and the Attorney General did not deny that the government had conducted dragnet surveillance for any other purpose). Pet. App. 113, 115, 117. The government then moved to dismiss these actions, or in the alternative for summary judgment, pursuant to section 802(a).

Petitioners opposed the government's motion. Among other grounds, petitioners contended that section 802 was unconstitutional because it gave the Attorney General the power to choose whether petitioners' claims should be decided by applying preexisting state and federal law or by applying the quite different legal standards and procedures of section 802, thereby changing the legal force and effect of preexisting law without observing the requirements of bicameralism and presentment required by Article I, section 7 of the Constitution. Petitioners also contended that because Congress provided no standard whatsoever to govern the Attorney General's decision whether to file a section 802 certification, the statute violated the nondelegation doctrine. The respondent telecommunications carriers supported the government's motion. The district court granted the government's motion and entered judgment against petitioners. Pet. App. 57; ER 535-67.

On appeal, the Ninth Circuit affirmed. Pet. App. 1, 22, 56. It rejected petitioners' argument that section 802 was unconstitutional because it permitted

the Attorney General to choose between inconsistent legal standards. The Ninth Circuit rejected this argument on the ground that section 802 did not literally enact, amend, or repeal a statute. Pet. App. 32-34. It also rejected petitioners' argument that section 802 was unconstitutional because it sets forth no intelligible principle to govern the Attorney General's discretion whether to file a certification. Pet. App. 34-40.

REASONS WHY THE PETITION SHOULD BE GRANTED

Section 802 is an unprecedented and unconstitutional violation of the separation of powers. The underlying subject of these lawsuits – the President's Surveillance Program – is a secret Executive Branch usurpation of power that violates well-established constitutional and statutory prohibitions on warrantless, suspicionless domestic surveillance. Section 802 compounds the problem of undue Executive power by tendering to the Executive what is essentially legislative power: Congress gave the Attorney General the power to choose in his sole discretion which of two inconsistent legal standards should apply to a civil lawsuit, allowing him to negate federal statutes, preempt state law, and oust the jurisdiction of federal and state courts. This power extends not only to the present lawsuits but also to future lawsuits challenging unlawful surveillance.

This Court has a unique and essential constitutional role as arbiter of the divisions of power the Constitution creates among the three branches of government. It is charged with ensuring that no branch intrudes upon the powers reserved to another. *United States v. Nixon*, 418 U.S. 683, 704 (1974) ("'Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.'"). By upholding the separation of powers, the Court safeguards individual liberty and preserves the structures that guarantee the rule of law. *Stern v. Marshall*, 564 U.S. ___, 131 S. Ct. 2594, 2609 (2011) ("'The structural principles secured by the separation of powers protect the individual as well.'"); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.").

The Court regularly reviews decisions raising substantial questions about the distribution of powers among the three branches, even where the lower courts are not divided on the issue. *E.g.*, *Stern v. Marshall*, 131 S. Ct. 2594; *Free Enterprise Fund v. Public Company Accounting Oversight Board*, ___ U.S. ___, 130 S. Ct. 3138, 3151 (2010); *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252 (1991).

Particularly deserving of review by this Court are cases in which Congress has devised a novel allocation of power among the branches. *See*, *e.g.*, *Stern v. Marshall*, 131 S. Ct. 2594; *Free Enterprise Fund*, 130 S. Ct. 3138; *Clinton v. New York*, 524 U.S. 417; *Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995); *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252; *Mistretta v. United States*, 488 U.S. 361 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988); *I.N.S. v. Chadha*, 462 U.S. 919 (1983).

Section 802 is such an instance and deserves this Court's review; it is an unprecedented statute in which Congress made a novel allocation of power raising separation-of-powers issues of exceptional importance. In it, Congress has allocated to the Executive the legislative choice of which laws should govern petitioners' lawsuits: the statutes that Congress has passed since 1934 that protect petitioners against unlawful government surveillance, the federal constitutional protections of the Bill of Rights, and state laws, on the one hand, or the entirely new legal standards of section 802 on the other. In doing so, Congress both avoided democratic accountability and set up a dangerous precedent in which the Attorney General and not Congress determines what law applies to claims arising from illegal surveillance, both now and in the future.

Section 802 is anathema to representative democracy. If it remains viable, it will serve as a model on any occasion in which both Congress and the

Executive seek to diminish their own political accountability for any decision that undermines the rule of law. Our system of representative democracy is premised on the notion that elected officials are accountable to the electorate for their decisions. Section 802 represents a new species of statute in which Congress assured that no branch would be fully accountable:

- Congress is not accountable to the electorate because the ultimate policy decision whether to relieve the respondent telecommunications carriers of liability is left to the Attorney General;
- The Attorney General is not accountable because his policy decision only needs to be supportable by "substantial evidence" – he need not make any effort to find facts or respond to any facts marshaled in response – and he may unilaterally cloak any evidence that he proffers under a veil of secrecy; and
- The Judiciary is not accountable because its review is both secret and circumscribed by the highly deferential substantial-evidence standard.

The result is Congress' abdication of responsibility to the Attorney General for a policy decision involving an illegal program in a way that avoids oversight by either the Judiciary or the electorate.

Moreover, review should be granted because this petition presents the Court with the only opportunity

it will ever have to decide the constitutionality of section 802 as applied to the President's Surveillance Program between 2001 and 2007, the sole subject of subsection (a)(4) of section 802.[4] That is a question of great national importance. The unlawful and unconstitutional surveillance covered under subsection (a)(4) was nationwide in scope, involved the telecommunications services essential to modern life, and intercepted the domestic communications of millions of Americans for a period of six years.

Finally, there will be no circuit split as to the application of section 802 to lawsuits against telecommunications carriers arising out of the President's Surveillance Program because the Judicial Panel on Multidistrict Litigation consolidated all such pending lawsuits before the district court below, which dismissed them all pursuant to section 802. The dismissals of all of those lawsuits were affirmed in the Ninth Circuit opinion that is the subject of this petition.

I. The Powers Granted By Congress To The Attorney General In Section 802

Section 802 creates a new statutory regime addressing unlawful surveillance claims arising under federal statutory law, state law, or federal

[4] Plaintiffs' claims are not limited to surveillance occurring during the 2001 to 2007 period, but encompass ongoing unlawful surveillance as well.

constitutional law. This new statutory regime, however, although enacted by Congress, has no legal force or effect of its own. Preexisting federal and state law continues to govern unless and until the Attorney General chooses to nullify preexisting law and replace it with the legal regime of section 802.

A. Section 802's New Legal Standards

The changes set forth in the legal standards of section 802 are both substantive and procedural. Subsection (a)(4) of section 802, when triggered by the Attorney General, creates a new bar to adjudication of unlawful surveillance claims arising under state or federal law. By filing a certification invoking subsection (a)(4), the Attorney General makes warrantless, suspicionless surveillance of American citizens within the United States that violates the Constitution, federal law, or state law no longer actionable, so long as the carrier was told that the surveillance was authorized by the President sometime between 2001 and 2007 and had been determined (by anyone at all in the government) to be "lawful."

Subsection (a)(5) of section 802 also creates new procedures the Attorney General can trigger for determining the merits issues of whether the alleged surveillance occurred and, if so, whether the defendant participated in it. No longer are courts, or any other adjudicator, permitted to adjudicate these elements of the plaintiff's claim. There is no trier of

fact at all and no adjudication. Instead, the Attorney General unilaterally certifies his conclusions on these issues to the district court without any notice or process, and the court must dismiss the case so long as the Attorney General submits "substantial evidence" in support of the certification.[5] § 802(b) ("A certification under subsection (a) shall be given effect unless the court finds that such certification is not supported by substantial evidence. . . ."). Likewise, the facts on which the preclusive bars of subsections (a)(1) through (a)(4) are based are no longer subject to trial or other adjudication. They, too, are subject to the Attorney General's unilateral certification.

Section 802 also empowers the Attorney General to require the district court to keep secret from the plaintiff the evidence the Attorney General has submitted in support of his certification, whether or not the court agrees that secrecy is required. The Attorney General invoked this provision against petitioners here, and the dismissal of their actions was based on secret evidence they never saw.

Finally, section 802 limits the evidence on which the district court's substantial evidence determination is based to "court order[s], certification[s],

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[5] This is not the familiar use of the substantial-evidence standard of review to review an agency determination made after an adjudication that comports with due process. *See*, *e.g.*, 5 U.S.C. § 706(2)(E). Under section 802, the Attorney General conducts no adjudication and provides no process at all before filing a certification.

written request[s], or directive[s]" authorizing surveillance. § 802(b)(2), (d).

B. The Attorney General's Power To Decide Whether Section 802 Applies

Section 802's new bar to liability and new procedures do not apply to any lawsuit of their own force. Only if the Attorney General files a certification do those provisions come into force and supersede preexisting law. Subsection (a) gives the Attorney General unlimited discretion to cause, or not to cause, the dismissal of any action falling within one of the five categories set forth in subsections (a)(1) through (a)(5). That subsection provides that "a civil action may not lie or be maintained in a Federal or State court against any person for providing assistance to an element of the intelligence community, and shall be promptly dismissed, *if* the Attorney General certifies to the district court" that one of the five statutory categories is satisfied. § 802(a) (emphasis added).

In the proceedings in the district court, the United States and the respondent telecommunications carriers agreed that the Attorney General's discretion under section 802 was unlimited: "Congress left the issue of whether and when to file a certification to the discretion of the Attorney General." District Ct. Dkt. No. 466 at 21:3-5. "Nothing in the Act requires the Attorney General to exercise his discretion to make the authorized certifications, and until he actually

decides to invoke the procedures authorized by Congress, the Act would have no impact on this litigation." *Id*. at 22 n.16.

Section 802 confers two types of standardless discretion on the Attorney General. First, the Attorney General has unlimited discretion to undertake, or not, a determination of whether a civil action falls within one of the five statutory categories set forth in section 802(a). If the Attorney General declines to undertake a determination of whether a particular lawsuit falls within section 802(a), neither the defendant nor the court can compel the Attorney General to do so. Nothing in the statute triggers any obligation for the Attorney General to take any action.

Second, if the Attorney General does determine that the action falls within one of the five statutory categories, it is also entirely up to his discretion whether to file a certification and thereby switch the law governing the action. If the Attorney General chooses not to file a certification in an action falling within one of the five statutory categories, the existing federal and state law creating liability for unlawful surveillance and establishing the procedures for resolving such claims by trial continues to govern the plaintiff's causes of action. Here, for example, if the Attorney General had chosen not to file a certification, these lawsuits would have continued to be governed by existing law, section 802 would not apply to the lawsuits, and no dismissal under section 802 would have been possible. Indeed, even if in that case the respondent telecommunications carriers could

and did prove the relevant facts under section 802(a), it would not matter: only the Attorney General can trigger the new rules.

If the Attorney General chooses to file a certification, his unilateral determination that a lawsuit falls within one of the statutory categories is reviewable by the district court under the deferential "substantial evidence" standard of review. § 802(b)(1). However, the Attorney General's separate decision to exercise, or not to exercise, his power to file a certification in any particular lawsuit falling within one of the five statutory categories is completely unreviewable.

II. Review Should Be Granted Because Section 802 Violates The Lawmaking Procedures Of Article I, Section 7 Of The Constitution

Although the procedure and standards of section 802 are the same regardless of whether the source of the plaintiff's claim is federal statutory law, state law, or federal constitutional law, the effect of the Attorney General's choice to substitute section 802 for preexisting law differs in each case. For a federal statutory claim, the Attorney General's decision to invoke section 802 replaces the legal standards of the statutes creating the claim with the legal standards of section 802; for a state-law claim, invoking section 802 preempts the state-law claim and imposes the legal standards of section 802 instead; for a federal constitutional claim, invoking section 802 excludes

that claim from the jurisdiction of the federal or state courts.

A. Only Congress Can Nullify Previously-Enacted Statutes Creating Federal Causes Of Action

Section 802 is unconstitutional because it gives to the Attorney General the power to choose whether petitioners' federal statutory causes of action should be governed by the statutes that created them or by the conflicting provisions of section 802, which effectively eliminate them. The Constitution requires that any change to the legal force and effect of previously-enacted statutes must be chosen by Congress in accordance with Article I, section 7's mandatory procedures for the enactment, amendment, and repeal of statutes, which include bicameral passage and presentment. *Clinton v. City of New York*, 524 U.S. 417, 437-41, 444-45 (1998).

As *Clinton* demonstrates, Article I, section 7 bars Congress from giving the Executive the power to choose which of two competing and inconsistent enactments applying to the same subject should have the force of law and which should be nullified. In *Clinton*, Congress had previously enacted a general capital-gains tax. It then amended this law by enacting a special deferral of the capital-gains tax applicable only to a single category of transactions. In yet a third statute (the so-called "Line Item Veto Act"), however, Congress gave the President the power to

nullify ("cancel") the special tax deferral and thereby subject the transactions to the preexisting capital-gains law. The Line Item Veto Act thus gave the President the power to choose, post-enactment, which of the two inconsistent tax statutes would apply to the designated category of transactions. The President chose to cancel the special capital-gains tax deferral, depriving it of any "'legal force or effect'" (524 U.S. at 438) and subjecting the transactions to the preexisting capital-gains law. This cancellation violated Article I, section 7 of the Constitution because it amounted to the functional equivalent of a partial repeal of the statute containing the tax deferral. *Id.* at 441, 444 ("cancellations pursuant to the Line Item Veto Act are the functional equivalent of partial repeals of Acts of Congress that fail to satisfy Article I, § 7"). The Court reached the same conclusion with respect to a second cancellation at issue in *Clinton*: the cancellation of a provision forgiving an indebtedness owed by New York to the United States. *Id*. at 422-23, 438, 441, 444.

Section 802 parallels the arrangement found unconstitutional in *Clinton*. In each case, Congress enacted two conflicting statutes addressing the same subject. By their terms, one statute prevails over the other, so long as the Executive does not act. But Congress also gives the Executive the power to nullify the statute that would otherwise prevail. In *Clinton*, the special capital-gains deferral would have applied to the plaintiff's transaction, but the Executive acted and caused the general capital-gains tax to apply

instead. Here, as in *Clinton*, Congress granted rights to private parties and then granted the Executive the power to change those rights by giving legal force and effect to a statute that otherwise would not apply. Petitioners' federal statutory claims would have gone forward under the preexisting statutory regime created by 18 U.S.C. §§ 2702, 2707, 2511, 2520; 47 U.S.C. § 605; and 50 U.S.C. §§ 1809, 1810, but the Executive acted and caused them instead to be subject to the substantive and procedural legal standards of section 802. That choice is inherently legislative in nature.

The court of appeals, in rejecting this conclusion, misapprehended the nature of section 802 as well as the nature of the statutes at issue in *Clinton*. It took the position that: "Under § 802 the Executive does not *change or repeal* legislatively enacted law, as was the case with the Line Item Veto [in *Clinton*]. The law remains as it was when Congress approved it and the President signed it." Pet. App. 33 (emphasis original).

The court of appeals was mistaken in thinking that the Line Item Veto Act in *Clinton* permitted the President to literally change or repeal the text of the special tax-deferral provision as opposed to changing the legal force or effect of the law. The Line Item Veto Act is not a true line-item veto, in which the President could strike a provision from a bill *before* signing the bill and turning it into law. Instead, the President first signed the bill, turning it into enacted law, and only then made a unilateral post-enactment statement cancelling the provision, i.e., depriving it of "any

legal force and effect" and causing a different statute to apply instead. The cancellation could not and did not alter a single word of the enacted statutes containing the cancelled provisions.[6] *Clinton*, 524 U.S. at 423-25, 436 ("each of those provisions had been signed into law . . . before it was canceled"), 439 ("the statutory cancellation occurs *after* the bill becomes law" (emphasis original)). Because the statutes were already enacted law, the President's post-enactment cancellation did not alter the literal text of the statutes. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4722(c), 111 Stat. 251, 515; Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 968, 111 Stat. 788, 895-96; *see Clinton*, 524 U.S. at 421. The President's cancellation altered only the legal force and effect of the cancelled provisions; the words of the cancelled provision remained in the statute book.

Indeed, the court of appeals here took the same position as Justice Breyer did in his dissent in *Clinton*, in which he concluded that "[b]ecause one cannot say that the President's exercise of the power the Act grants is, literally speaking, a 'repeal' or

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[6] There were two enrolled appropriations bills at issue in *Clinton*, the Balanced Budget Act of 1997 and the Taxpayer Relief Act of 1997. These became Public Laws 105-33 and 105-34, respectively, when the President signed them on August 5, 1997. 33 Weekly Comp. Pres. Docs. 1221 (Aug. 8, 1997).

After both bills became laws, the President signed statements on August 11, 1997, cancelling the legal force and effect of two specific provisions in the enacted statutes. 62 Fed. Reg. 43262; 62 Fed. Reg. 43265.

'amendment,'" there could be no Article I, section 7 violation. 524 U.S. at 479-80. The Court's majority agreed that the cancellation was not a literal repeal of the statutory language, but held nonetheless that the cancellation amounted to "the functional equivalent" of a partial repeal because it deprived the cancelled provision of the legal force or effect it would otherwise have had, making it "entirely inoperative as to appellees." *Id*. at 441.

Both in *Clinton* and here, the Executive's action deprived the words in the statute book of legal force and effect that they would otherwise have. The court of appeals' cryptic and unexplained conclusion that "nothing effected by the Attorney General 'prevent[s] the item from having legal force or effect'" is entirely mistaken. Pet. App. 33 (quoting *Clinton*, 524 U.S. at 437). It was only because of the Attorney General's certification that these actions were dismissed. His certification prevents 18 U.S.C. §§ 2702, 2707, 2511, 2520; 47 U.S.C. § 605; and 50 U.S.C. §§ 1809, 1810 from having the legal force and effect they would have otherwise had with respect to petitioners' claims. Had the Attorney General not chosen to file a certification invoking section 802, petitioners' federal statutory claims would have continued under preexisting law. Under preexisting law, petitioners' federal statutory claims could *not* be dismissed on the ground that the President had authorized the surveillance and some unnamed person in the government thought it was legal (section 802(a)(4)), could not be dismissed on the ground that the Attorney General believed that the

defendant had not participated in the alleged surveillance (section 802(a)(5)), and could not be dismissed, whatever the ground, by use of section 802's certification procedure, which forecloses any adjudication of fact and requires the court to defer to the factual determinations of the Attorney General. Absent the Attorney General's certification, the legal force and effect of the statutes governing petitioners' federal statutory claims would have controlled the possible defenses to petitioners' claims and would have required that adjudication of the facts material to petitioners' complaints occur by the ordinary procedures of summary judgment or trial.

The court of appeals also drew mistaken analogies between section 802 and four other statutes. Pet. App. 34. First, it erroneously asserted that the Westfall Act, 28 U.S.C. § 2679, permits the Attorney General to decide whether or not to bar lawsuits against federal employees for actions within the scope of their employment. *Id*. The Attorney General does not have that power. Congress has unconditionally barred the lawsuits by operation of law. 28 U.S.C. § 2679(b)(1) ("The remedy against the United States . . . is exclusive of any other civil action. . . . Any other civil action . . . against the employee . . . is precluded. . . . "); *see also* 28 U.S.C. §§ 1346(b)(1), 2672, 2674. The Attorney General may use a certification to confirm that the employee was acting within the scope of his or her employment and to effect a substitution of parties, but the bar to liability exists regardless of the Attorney General's actions or inactions. *See*

Hui v. Castaneda, 559 U.S. ___, 130 S. Ct. 1845, 1851 (2010) ("The Westfall Act amended the FTCA [Federal Tort Claims Act] to make its remedy against the United States the exclusive remedy for most claims against Government employees arising out of their official conduct. In providing this official immunity, Congress . . . stat[ed] that the remedy against the United States is 'exclusive of any other civil action or proceeding,' § 2679(b)(1)."); *Osborn v. Haley*, 549 U.S. 225, 229 (2007) ("[T]he Westfall Act[ ] accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties. *See* 28 U.S.C. § 2679(b)(1).")

The court of appeals ignored the Westfall Act's unconditional preclusion in subsection (b) of 28 U.S.C. § 2679 and focused only on the statutory mechanisms in subsection (d)(1) and (d)(2) permitting the Attorney General to certify that the employee was acting within the scope of his or her employment and thereby substitute the United States for the employee as defendant. Pet. App. 34. Yet, in addition to being completely separate from the liability preclusion effected by subsection (b), the mechanisms of subsections (d)(1) and (d)(2) provide only two of the three methods by which substitution can occur. Even if the Attorney General fails to certify, under subsection (d)(3) the employee can petition the court and obtain a court-issued certification and substitution. Thus, unlike section 802, which provides no mechanism for the telecommunications carrier respondents to obtain

immunity absent an Attorney General certification, federal employees are *categorically* immune from suit for actions within the scope of their employment and the Westfall Act sets forth a procedure for employees to assert that immunity without the Attorney General's involvement.

The court of appeals also analogized section 802 to statutes authorizing the Executive to grant immunity from prosecution and authorizing it to grant a discretionary suspension of deportation. Pet. App. 34. In each of these instances, however, the Executive forbears from pursuing its own claim against someone; it does not extinguish a claim one private party possesses against another private party. Such Executive forbearance is no different from the right of any party to decline to pursue a claim it possesses. Executive forbearance deprives no private party of any right and works no injury to anyone.

Finally, the court of appeals made an equally misplaced analogy to Congress' grant to the President of the power to restore sovereign immunity to post-invasion Iraq, addressed in *Republic of Iraq v. Beaty*, 556 U.S. 848, 129 S. Ct. 2183, 2189 (2009). Pet. App. 34. Foreign sovereign immunity is a "*sui generis* context" of historical deference to the Executive. *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004). "Throughout history, courts have resolved questions of foreign sovereign immunity by deferring to the 'decisions of the political branches . . . on whether to take jurisdiction.'" *Id*. The power granted in *Beaty* is within that tradition: "The granting of

Presidential waiver authority is particularly apt . . . since the granting or denial of that immunity was historically the case-by-case prerogative of the Executive Branch." *Beaty*, 129 S. Ct. at 2189. Section 802, which addresses claims of illegal surveillance in the United States against ordinary United States persons, lies far outside the unique Executive authority over foreign sovereign immunity at issue in *Beaty*.[7]

B. Only Congress May Preempt State Law

The Attorney General's preemption by fiat of petitioners' state constitutional, state statutory, and state common-law causes of action is unconstitutional because it, too, occurs without bicameral passage and presentment. The Supremacy Clause provides that state law is preempted only by "[t]his Constitution, and the Laws of the United States which shall be

[7] Nor is section 802 remotely like statutes, alluded to by the court of appeals (Pet. App. & n.2), in which Congress permits the Executive to waive a condition or duty that Congress has imposed on a task Congress has instructed the Executive to perform, e.g., the waivable condition that if the Executive determines a person to be a foreign narcotics trafficker, it must impose sanctions on that person, 21 U.S.C. § 1903(g)(1). In a waivable-condition statute, the Executive is waiving its own statutory duties, and whether exercised or not, the waiver has no impact on any legal obligations owed by one private party to another. Congress, of course, has the right to control how the Executive performs a task Congress has assigned it. Waiver provisions exist when Congress has decided not to make the condition it has imposed on the assigned task mandatory in all circumstances.

made in Pursuance thereof." U.S. Const., art. VI, cl. 2; *Printz v. United States*, 521 U.S. 898, 924 (1997) ("The Supremacy Clause, however, makes 'Law of the Land' only 'Laws of the United States which shall be made in Pursuance [of the Constitution]' " (alterations original)). "Laws of the United States" are only "made in Pursuance" of the Constitution if they are made in conformance with Article I, section 7. Thus, state law is preempted only if the decision to preempt is enacted by a majority vote of each house of Congress in accordance with Article I, section 7. *Wyeth v. Levine*, 555 U.S. 555, 586 (2009) (Thomas, J., concurring) ("The Supremacy Clause thus requires that pre-emptive effect be given only to those federal standards and policies that are set forth in, or necessarily follow from, the statutory text that was produced through the constitutionally required bicameral and presentment procedures.").

Here, Congress did not enact a decision to preempt petitioners' state-law causes of action, including those alleged in the eight cases brought in the state courts of California, Florida, Indiana, Maryland, Minnesota, Missouri, and New Jersey. Instead, Congress enacted a statute giving the Attorney General the power to preempt. Because it is the Attorney General, and not Congress, who chose to preempt petitioners' state-law causes of action, there has been no compliance with Article I, section 7, and no valid preemption.

C. Only Congress May Alter The Jurisdiction Of The Federal And State Courts

Petitioners' federal constitutional claims for equitable relief arise directly under the Constitution. *Free Enterprise Fund*, 130 S. Ct. at 3151 n.2. They are not created by Congress and cannot be abolished by Congress. *City of Boerne v. Flores*, 521 U.S. 507, 519, 529 (1997). All Congress can do to prevent them from being heard and decided in the inferior federal courts is to exclude them from the jurisdiction of those courts. Whatever the extent to which Congress' Article I, section 8 power "[t]o constitute Tribunals inferior to the supreme Court" and its Article III, section 1 power to "ordain and establish" "inferior courts" allows it to deny any forum whatsoever for petitioners' constitutional claims, Congress cannot give that choice to the Attorney General.

The general federal-question statute, 28 U.S.C. § 1331, gives the district courts jurisdiction to hear and decide petitioners' federal constitutional claims. The effect of the Attorney General invoking section 802 is to exclude those claims from the jurisdiction of the district courts, for that is the only mechanism by which section 802 can cause constitutional claims to "not lie or be maintained in any Federal or State court." § 802(a). Section 802 thus gives the Attorney General the choice whether or not petitioners' claims should fall within section 1331's grant of jurisdiction.

Nothing in the Constitution permits Congress to give this power to the Attorney General. Control of the jurisdiction of the inferior federal courts over claims arising under the federal Constitution is a power that belongs exclusively to Congress.

Section 802 does more than just exclude petitioners' federal constitutional claims from federal court jurisdiction. It also excludes petitioners' constitutional claims from state court jurisdiction; thus, petitioners may not refile their constitutional claims in state court. Whatever power Congress possesses to limit the jurisdiction of state courts to decide federal constitutional claims or to bar the adjudication of a plaintiff's constitutional claim in every court, whether federal or state, must be exercised by Congress directly. Congress cannot give those powers to the Attorney General to exercise on a case-by-case basis, picking and choosing which plaintiffs get to adjudicate their constitutional claims.

D. Section 802 Is Unlike Other Statutes Abolishing Causes Of Action Or Changing The Governing Legal Standard

The Court should grant the petition to review section 802's unparalleled grant of power to the Executive. There is no established tradition of giving the Executive the power to choose in a pending civil action which of two inconsistent laws should be applied and which should be ignored. Section 802 is unlike other statutes in which Congress has

unconditionally abolished causes of action or unconditionally changed the governing legal standard, either in particular lawsuits or in all lawsuits, without giving the Executive any choice in the matter. For example, 15 U.S.C. § 7902 unconditionally preempts an entire category of lawsuits against gun manufacturers, without giving the Executive any power to control whether the suits should be preempted. 15 U.S.C. § 7902 ("A qualified civil liability action may not be brought in any Federal or State court."); *Ileto v. Glock*, 565 F.3d 1126, 1139 (9th Cir. 2009) (in 15 U.S.C. § 7902, Congress "set[ ] forth a new legal standard . . . to be applied to all cases"); *City of New York v. Beretta*, 524 F.3d 384, 395 (2d Cir. 2008) (statute "sets forth a new legal standard to be applied to all actions"). And in *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 438-41 (1992), the Court addressed a statute in which Congress had unconditionally "replaced the legal standards" (*id.* at 437) governing certain pending lawsuits it identified by name and case number; no action by the Executive was necessary to trigger the change in the governing legal standards, and the Executive had no power to choose whether the new legal standards or the preexisting legal standards would apply. *Id.* at 439 (noting "the imperative tone of the provision, by which Congress 'determined and directed' that compliance with two new provisions would constitute compliance with five old ones").

The court of appeals repeatedly characterized section 802 as an immunity statute. As the examples

of 15 U.S.C. § 7902, the Westfall Act, and the *Robertson* statute show, it is not. Because, unlike them, section 802 does not unconditionally remove the threat of litigation from the telecommunications carrier respondents but instead empowers the Attorney General to remove that threat of litigation or not at his sole discretion, section 802 does not confer immunity.

Section 802 also is not an Executive fact-finding statute like the ones in *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892) and *Owens v. Republic of the Sudan*, 531 F.3d 884 (D.C. Cir. 2008). *See* Pet. App. 37-38. In those statutes, Congress imposes a mandatory consequence upon the occurrence of certain triggering facts that do not yet exist at the time of enactment, and asks the Executive to determine whether the facts have come into existence: "[W]hen enacting the statutes discussed in *Field*, Congress itself made the decision to suspend or repeal the particular provisions at issue upon the occurrence of particular events subsequent to enactment, and it left only the determination of whether such events occurred up to the President." *Clinton*, 524 U.S. at 445; *accord*, *Owens*, 531 F.3d at 891-92.

Congress can repeal laws, change legal standards, preempt state law and create an immunity where no immunity existed before. It can require the Executive to perform fact-finding. What Congress may not do is to provide two incompatible sets of statutes to govern a single subject and delegate to the Executive the option to "choose one."

Ultimately, in enacting section 802 Congress unconstitutionally gave to the Attorney General the fundamental legislative choice of whether or not to change the federal statutes and preempt the state laws creating petitioners' claims, a choice that under the Constitution it alone is empowered to make. Certiorari should be granted to review this unprecedented transfer of legislative power to the Executive Branch.

III. Section 802 Violates The Nondelegation Doctrine Because It Delegates Power To The Executive Without Any "Intelligible Principle"

The nondelegation doctrine enforces a fundamental constitutional requirement: "'The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government.'" *Touby v. United States*, 500 U.S. 160, 165 (1991). "It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature." *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting). While most statutes have no trouble passing constitutional muster under the nondelegation doctrine, the doctrine continues to serve as an outer boundary limiting Congress' transfer of power. Section 802, which

completely lacks meaningful guidance for the Attorney General's discretion, falls outside that expansive boundary.

"[T]he delegation doctrine[ ] has developed to prevent Congress from forsaking its duties." *Loving v. United States*, 517 U.S. 748, 758 (1996). One of its requirements is that "when Congress confers decisionmaking authority upon agencies *Congress* must lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (emphasis original, internal quotation marks and brackets omitted).

A statute states an intelligible principle only if the asserted principle is sufficiently definite that it can be used to determine whether the Executive's action conforms to Congress's will: Congress fails to provide an intelligible principle if "there is an absence of standards for the guidance of the [Executive's] action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus v. United States*, 321 U.S. 414, 426 (1944). The test is not particularly demanding, but it does require that Congress actually state a principle, however general its terms, in the statutory text.

Section 802 lies outside these generous boundaries. In section 802, Congress defined the five categories of lawsuits in which the Attorney General could file a certification. But Congress did not lay down any

principle at all "'by legislative act,'" i.e., in the text of a statute, for the Attorney General to apply in choosing whether to file a certification. *Whitman*, 531 U.S. at 472. In doing so, Congress abdicated even the broadest interpretation of its constitutional duty.

Section 802 does not require any action by the Attorney General. He is not required to examine any lawsuit to determine whether it falls within one of the five statutory categories in which certification is permitted. Even if the Attorney General does decide to examine a lawsuit and determines that certification is permitted, he is not required to take any further action. He is not required to consider any factors, apply any criteria, undertake any investigation, or engage in any analysis. He can exercise, or refuse to exercise, his discretion to file a certification for any reason or for no reason at all.

The court of appeals attempted to circumvent this defect by asserting that the five categories of lawsuits delineated in section 802 amounted to an intelligible principle governing the Attorney General's discretion. Pet. App. 36. This was error. The statutory categories merely define the class of lawsuits in which the Attorney General *may* nullify the preexisting law governing petitioner's causes of action; they provide no standard or principle for when he should exercise that power. They set the boundaries within which he may act, but give no principle for him to apply in deciding whether to act.

Whitman also makes clear that the principle of decision must be found in the "legislative act" and not in the legislative history. Legislative history is used in delegation cases only to elucidate the meaning of an intelligible principle that exists in the statutory text; it cannot supply a principle that is entirely absent from the statute. For example, in *Mistretta* (a decision relied upon by the court of appeals), Congress set forth detailed standards in the text of the statute. 488 U.S. at 374-75. The Court used legislative history only to "provide[ ] additional guidance for the Commission's consideration of the *statutory factors*," not to create standards where Congress had created none. *Id*. at 376 n.10 (emphasis added). The use of legislative history in nondelegation analysis is only to put flesh on the bones of standards already stated in the statutory text. This is in accord with the general rule that "'courts have no authority to enforce [a] principle gleaned solely from legislative history that has no statutory reference point.'" *Shannon v. United States*, 512 U.S. 573, 584 (1994).

Despite this clear limitation, the court of appeals improperly looked to the report of the Senate Select Committee on Intelligence (S. Rep. No. 110-209, ER 383) in its attempt to derive an intelligible principle. Pet. App. 39. Yet even were that examination proper, the legislative history provides no intelligible principle. The court of appeal's analysis was as follows:

> The Senate Select Committee Report goes far in explaining the congressional concerns that motivated the passage of the immunity

> provision. When considering how to respond to lawsuits like this one, the Committee 'recogniz[ed] the importance of the private sector in assisting law enforcement and intelligence officials in critical criminal justice and national security activities.' S. Rep. 110-209 at 5. The Report further states that 'electronic surveillance for law enforcement and intelligence purposes depends in great part on the cooperation of the private companies that operate the Nation's telecommunication system.' *Id*. at 9. The intelligible principle that comes through in the legislative history is one of protecting intelligence gathering and national security information.

Pet. App. 39.

But the Committee Report's observation that the private sector is important in assisting law enforcement simply is not a principle for decisionmaking by the Attorney General. Certification decisions concerning electronic surveillance under section 802 will always involve private persons and entities by definition. 50 U.S.C. § 1885(8) (section 801(8) of FISA) (defining "person" for purposes of section 802). Observing their importance gives no principle for the Attorney General to follow in deciding whether to file a certification in a particular case and no way to tell if Congress' will has been obeyed. To the contrary, the committee report's section-by-section analysis of the bill acknowledges the Attorney General's unbounded discretion, noting that dismissal occurs only "*if* the Attorney General makes a certification," and suggests

no standard or principle limiting the Attorney General's discretion. ER 404-05 (S. Rep. No. 110-209 at 22-23) (emphasis added).

The court of appeals also erred in suggesting that the Executive has inherent power under Article II over the domestic surveillance at issue here and therefore the intelligible-principle requirement is relaxed in this case. Section 802 addresses claims arising out of the search and seizure within the United States of the communications of United States citizens who are not agents of foreign powers. The Executive has no inherent power to conduct domestic searches and seizures of ordinary Americans, a subject far removed from its inherent powers in the fields of foreign affairs and military command. *United States v. United States District Court (Keith)*, 407 U.S. 297, 320 (1972); *Halperin v. Kissinger*, 807 F.2d 180, 185 (D.C. Cir. 1986) (per Scalia, Circuit Justice; the Fourth Amendment warrant "requirement attaches to national security wiretaps that are not directed against foreign powers or suspected agents of foreign powers").

Nor is there any historical tradition of the Executive exercising standardless discretion to choose which of two competing legal standards enacted by Congress should govern litigation between private parties that would lessen or excuse the requirement for an intelligible principle here. In *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935), the Court stated: "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its

function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply." Most statutes challenged under the nondelegation doctrine have passed muster because they involve either the making of subordinate rules by the Executive (as in *Whitman*) or Executive fact-finding that carries a mandatory consequence (as in *Field* and *Owens*). Section 802 neither involves the making of subordinate rules nor a policy that must be applied if a particular fact is found to exist. Instead, it delegates to the Attorney General the discretion to grant a civil amnesty for pending litigation, unguided by any intelligible principle.

That unlimited discretion is an invitation for mischief. Separation of powers is a bedrock principle of our system of government because the aggregation of power in any single branch is so vulnerable to abuse.[8] The absence of any intelligible principle in section 802 does more than just deprive telecommunications customers like petitioners of any means to test the Attorney General's discretion against the will

[8] "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elected may justly be pronounced the very definition of tyranny." James Madison, "Federalist No. 47," in The Federalist Papers, ed. I. Kramnick (Penguin Books, 1987) p. 303.

of Congress; it equally deprives telecommunications carriers of any means to constrain the Attorney General's discretion. Both may eventually suffer: the Attorney General may use this power, which in this instance included relief from significant liability, to pressure telecommunications carriers to refrain from advocating the privacy rights of their customers.

Because section 802 is only a naked delegation lacking any intelligible principle, it is unconstitutional. Congress "failed to articulate any policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power." *Mistretta*, 488 U.S. at 373 n.7. Section 802 "provide[s] literally no guidance for the exercise of discretion" by the Attorney General. *Whitman*, 531 U.S. at 474. Instead, "Congress left the matter to the [Attorney General] without standard or rule, to be dealt with as he pleased." *Panama Refining*, 293 U.S. at 418. The "absence of standards" governing the Attorney General's discretion to file or not to file a certification makes it "impossible . . . to ascertain whether the will of Congress has been obeyed." *Yakus*, 321 U.S. at 426.

The Court should grant certiorari because of the national importance of the subject matter of this litigation and to resolve whether the nondelegation doctrine permits Congress to grant power to the Executive without stating any intelligible principle. If the Court does not strike down the standardless delegation of section 802, then the nondelegation doctrine will be a dead letter.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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