No. 11-1200

IN THE
Supreme Court of the United States

TASH HEPTING, ET AL.,
Petitioners,
v.

AT&T CORP., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR CARRIER RESPONDENTS

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QUESTIONS PRESENTED

Section 802 of the Foreign Intelligence Surveillance Act of 1978, as added by § 201 of the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 and codified at 50 U.S.C. § 1885a, applies to any "civil action . . . against any person for providing assistance to an element of the intelligence community." In such an action, § 802 authorizes the Attorney General to certify publicly or under seal that the alleged assistance was provided pursuant to one of several kinds of statutory, judicial, or administrative authorization, or was not in fact provided at all. The district court reviews the certification to determine whether it is supported by substantial evidence. If so, the case must be dismissed.

The questions presented are:

1. Whether this certification procedure violates Article I, § 7 of the Constitution by authorizing the Attorney General to amend or repeal federal statutes, or to preempt state laws.

2. Whether this certification procedure violates the nondelegation doctrine.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents AT&T, Verizon, and Sprint state the following:

AT&T. Respondent AT&T Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock. The following additional respondents are wholly owned subsidiaries, either directly or indirectly, of AT&T Inc., and therefore are corporations whose shares are not publicly held or publicly traded:

AT&T Corp.
American Telephone and Telegraph Co.
AT&T Communications of California, Inc.
AT&T Communications of the Southwest, Inc.
AT&T Mobility LLC
AT&T Teleholdings, Inc.
BellSouth Corp.
BellSouth Communication Systems, LLC
BellSouth Telecommunications, 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

Some AT&T subsidiaries named in the petition as respondents no longer exist or have changed names:

AT&T Communications – East, Inc. longer exists because it merged into AT&T Corp. on October 31, 2010.

AT&T Operations, Inc. no longer exists because it merged into AT&T Services, Inc. on December 31, 2011.

BellSouth Telecommunications, Inc. is now known as BellSouth Telecommunications, LLC.

Cingular Wireless LLC is now known as AT&T Mobility LLC.

Sprint. Respondent Sprint Nextel Corporation has no parent corporation, and no publicly held corporation owns 10% or more of its stock. Sprint Nextel Corporation is the indirect, ultimate parent corporation of respondents Sprint Communications Company L.P., Nextel West Corp., and Sprint Spectrum L.P. No other publicly held corporation owns 10% or more of the stock of these subsidiaries.

Verizon. Respondent Verizon Communications Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock. Verizon Communications Inc. is the indirect, ultimate parent corporation of respondents Verizon Florida LLC, Verizon Global Networks Inc., Verizon Maryland Inc., Verizon Business Global LLC, and MCI Communications Services, Inc. No other publicly held corporation owns 10% or more of the stock of these subsidiaries.

Respondent Verizon Northwest Inc., a former Verizon subsidiary, was acquired by Frontier Communications Corp. on July 1, 2010; is now named Frontier Communications Northwest Inc.; and is not participating in this response.

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INTRODUCTION

The petition attempts to depict these cases as presenting an important dispute about the separation of powers, but they do nothing of the kind. The cases were part of an effort by many plaintiffs to challenge allegedly unlawful government surveillance by suing telecommunications carriers ("Carriers") that allegedly assisted the government. Congress, however, determined that it was not in the national interest for these or similar cases to proceed. It found such litigation could impede future intelligence collection efforts and risk disclosure of classified information. Accordingly, Congress granted the Carriers and other similarly situated defendants immunity from suit. It left pending suits against the government and its officials undisturbed.

Petitioners do not contest that Congress could constitutionally grant immunity, but contend that Congress chose an unconstitutional means to do so. That means is a certification by the Attorney General, filed with the district court, stating under the penalty of perjury that certain factual criteria are met. Petitioners contend that the immunity statute leaves too much discretion to the Attorney General concerning whether to certify, and so grants him legislative power in violation of Article I, § 7 of the Constitution and of the nondelegation doctrine.

The Ninth Circuit correctly rejected these (and other) arguments. Petitioners do not allege that the court of appeals created a circuit conflict in doing so; they fail to show that its decision conflicts with any decision of this Court; and their arguments that the court of appeals erred lack merit. This Court should deny review and allow litigation against the Carriers to end as Congress directed.

STATEMENT OF THE CASE

1. These consolidated cases are suits against respondent Carriers for allegedly providing assistance to the federal intelligence community in the aftermath of the September 11, 2001 terrorist attacks. Petitioners claim that this alleged assistance violated the Constitution, the Foreign Intelligence Surveillance Act of 1978 ("FISA"), and other federal and state laws. The truth of petitioners' allegations and the merits of their legal arguments about the conduct alleged are not at issue. The sole question decided by the court of appeals was whether Congress could constitutionally enact § 802 of FISA, as added by § 201 of the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 and codified at 50 U.S.C. § 1885a. *See* Pet. App. 22. The district court found, *see id.* at 106-09, and petitioners do not now dispute, that § 802, if constitutional, bars their claims against the Carriers.

Petitioners filed complaints in early 2006 in various district courts. Those cases were consolidated in the Northern District of California by the Judicial Panel on Multidistrict Litigation. Respondent United States, which had intervened as a defendant, moved to dismiss the lead case against respondent AT&T, invoking the state secrets privilege. The district court (Walker, C.J.) denied the motion but certified its order for an interlocutory appeal. *See Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006), *remanded*, 539 F.3d 1157 (9th Cir. 2008). While that appeal was pending, Congress enacted § 802.

2. Section 802 provides that "a civil action may not lie or be maintained in a Federal . . . court against any person for providing assistance to an

element of the intelligence community, and shall be promptly dismissed," if the Attorney General makes one of five listed certifications to the district court. 50 U.S.C. § 1885a(a). Three of those certifications indicate that the defendant acted pursuant to various forms of judicial or statutory authorization. *See id.* § 1885a(a)(1)-(3). The fourth requires a statement by the Attorney General that the defendant provided assistance

> (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
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> (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.

Id. § 1885a(a)(4). The Attorney General may also certify that the alleged assistance was not actually provided. *See id.* § 1885a(a)(5).

The district court must review the certification to determine whether it was supported by substantial evidence and may review certain other materials presented by the parties as well. *See id.* § 1885a(b). If the Attorney General declares that public disclosure of the certification or supplemental materials "would harm the national security of the United

States," then such review must be *ex parte* and *in camera*, and the court may not disclose the type of certification the Attorney General has made. *Id.* § 1885a(c). The district court ruling is immediately appealable. *See id.* § 1885a(f).

By its terms, § 802 provides immunity only to those who provide "assistance to the intelligence community" and not to members of the intelligence community themselves. Its legislative history confirms that it was not "'intend[ed] to apply to, or in any way affect, pending or future suits against the Government.'" Pet. App. 42-43 (quoting S. Rep. No. 110-209, at 8 (2007) ("S. Rep.")).

3. Congress enacted § 802 after thorough investigation and debate concerning a significant national-security problem. Members of the Senate Select Committee on Intelligence (the "Committee") heard evidence that, during the "period following the terrorist attacks of September 11, 2001," some telecommunications carriers had provided assistance to the government as part of a program whose "expressed purpose . . . was to 'detect and prevent the next terrorist attack'" on the United States. S. Rep. at 9.

Based on the evidence it heard, the Committee decided that it "would be inappropriate to disclose" which carriers provided assistance, what assistance they provided, or any details of the government's intelligence activities. *Id.* It further stated that § 802 was not meant as an "assessment about the legality" of those activities. *Id.* The Committee found, however, that some carriers that had cooperated with the government "had a good faith basis for responding to the requests for assistance they received" in the "unique historical circumstances of the aftermath of September 11, 2001," and had

"relied on written representations that high-level Government officials had assessed the program to be legal." *Id.* at 9-10.

The Committee further found that, whether they had assisted the government or not, and whether they had relied on existing statutory procedures or not, carriers would be unable to defend themselves in ensuing litigation because the government's assertion of the state secrets privilege would prevent them from introducing evidence one way or another and from raising defenses available under existing law. *See id.* at 11-12.

Perhaps most importantly, the Committee found that "the intelligence community cannot obtain the intelligence it needs without assistance from" telecommunications carriers and that voluntary cooperation with lawful requests might be more difficult for the government to obtain prospectively because of the "scope of the civil damages suits" with which carriers were threatened. *Id.* at 10. Such difficulties could result in "delay . . . [that would be] simply unacceptable for the safety of our Nation." *Id.* Section 802 was therefore intended to protect carriers "who acted in good faith in the particular set of circumstances at issue," but to provide future "protection from suit . . . [only] if [carriers] ensure that their assistance is conducted in accordance with statutory requirements." *Id.*

4. Taking notice of § 802, the court of appeals remanded the case to the district court. On September 19, 2008, the United States moved to dismiss under § 802(a). In support of that motion, then-Attorney General Mukasey submitted two certifications (one public, one sealed). In the public filing, the Attorney General certified that each of the Carriers

met at least one of the five conditions for immunity under § 802(a) – including the possibility, for each Carrier, that that Carrier had not provided assistance as alleged by petitioners.[1] *See* Pet. App. 112-13, 116-19. He further declared that disclosure of his classified filing, with details about the basis for his determinations, "would cause exceptional harm to the national security of the United States" by revealing "intelligence sources and methods." *Id.* at 119-20. This triggered the requirement that his classified filing be kept under judicial seal.

Petitioners opposed the motion to dismiss, arguing both that § 802 was unconstitutional and that the Attorney General's certification violated the Administrative Procedure Act ("APA") and was not supported by substantial evidence. Petitioners presented the district court with a broad range of constitutional arguments, contending that § 802 violated the Constitution in at least seven different ways.[2] They also

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[1] The Attorney General disclosed the basis of his certification with regard to a single set of allegations: petitioners' allegations that the Carriers had assisted the government in deploying a so-called "telecommunications dragnet." Pet. 5. With regard to these allegations, the Attorney General certified that, "because there was no such alleged content-dragnet, no provider participated in that alleged activity." Pet. App. 117. Although petitioners continue to assert that the alleged dragnet occurred, *see* Pet. 5-6, 7-8, they have not sought review of the district court's ruling that the Attorney General's contrary certification was supported by substantial evidence, *see* Pet. App. 107.

[2] *See* Pet. App. 70-71 (alleged denial of judicial review of colorable constitutional claims); *id.* at 72 (alleged usurpation of judicial power to declare the meaning of the Constitution); *id.* at 73-80 (alleged attempt to direct a specific result in pending cases); *id.* at 80-95 (alleged delegation of legislative power); *id.* at 96-98 (alleged bias of Attorney General as initial adjudicator

presented the court with eight volumes of allegedly relevant evidentiary materials.

The district court found, in a lengthy opinion, that § 802 was constitutional and that the Attorney General's certification met § 802's requirements. *See id.* at 57-109. It therefore granted the motion to dismiss. Petitioners appealed. On appeal, they asserted only a subset of their constitutional challenges to § 802, and also dropped their APA and evidentiary challenges to Attorney General Mukasey's certification in this case.

5. The Ninth Circuit affirmed in an opinion by Judge McKeown, joined in full by Judges Pregerson and Hawkins. The court of appeals first rejected petitioners' argument – relying on *Clinton v. City of New York*, 524 U.S. 417 (1998), and *INS v. Chadha*, 462 U.S. 919 (1983) – that § 802 "effectively amends or negates existing law without going through the constitutionality-mandated legislative process" of "bicameralism and presentment found in Article I, § 7 of the Constitution." Pet. App. 32.

The court disagreed with petitioners' characterization of § 802 as "frustrat[ing] or chang[ing] the law enacted by Congress," finding instead that "the Attorney General's certification implements the law as written." *Id.* at 33. It explained that § 802 merely subjected petitioners' "causes of action . . . to an additional statutory defense" and that the Attorney General's "discretionary decision . . . [to] invoke[] a defense or immunity hardly represents an impermissible statutory repeal." *Id.* In support of this

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in violation of due process); *id.* at 98-100 (alleged denial of opportunity to be heard, in violation of due process, due to *in camera, ex parte* review of classified material); *id.* at 100-04 (alleged denial of access to the courts).

conclusion, it pointed to other instances in which executive officers have discretion to grant immunity or waive the application of a statute. *See id.* at 33-34.

The court of appeals also rejected petitioners' argument that § 802 impermissibly delegates legislative power to the executive branch because it lacks an "'intelligible principle to which the [Attorney General] . . . is directed to conform.'" *Id.* at 35 (quoting *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001)). Observing this Court's admonition in *Whitman* that it had in its "'history . . . found the requisite "intelligible principle" lacking in only two statutes,'" the court of appeals held that such a principle could be found in § 802's "text, structure, history, and context." *Id.* at 36 (quoting 531 U.S. at 474). In reaching this conclusion, the court relied on the "five statutory categories . . . that delineate and circumscribe the Attorney General's certification discretion"; the structure of the statute, which conditions immunity on specific "factual finding[s]"; the legislative history's clear emphasis on "protecting intelligence gathering and national security information"; and the traditional role for expanded executive discretion "within the realm of national security." *Id.* at 36-40 (internal quotation marks omitted).

The court of appeals then disposed of several additional constitutional arguments that the petition does not present for review. These included petitioners' arguments that § 802 violated Article III by infringing on the constitutional role of the judiciary or by denying any judicial forum for colorable constitutional claims. *See id.* at 40-43. In that context, the court observed that petitioners "retain[] an independent judicial avenue to address th[o]se [constitutional]

claims" through suits against "government actors and entities," to whom § 802 does not apply. *Id.* at 42.[3] The court of appeals also held that § 802 is consistent with due process.[4]

Petitioners then sought review in this Court.

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[3] The court of appeals applied that reasoning in this case, reversing and remanding the part of the district court's judgment that had erroneously dismissed several claims against government-official defendants under § 802. *See* Pet. App. 55-56. It also, in another opinion issued the same day, reversed and remanded similar claims against government officials that several petitioners had brought in a parallel proceeding. *See Jewel v. NSA*, 673 F.3d 902, 905 (9th Cir. 2011) (holding that plaintiffs had standing to pursue claims against government defendants); *infra* p. 14 & note 5 (discussing *Jewel*).

[4] *See* Pet. App. 45-46 (holding that Attorney General Mukasey's role as an official in the Bush Administration and public support for § 802 did not disqualify him from making the certification required by § 802 in this case); *id.* at 46-55 (holding that the statute's provisions providing for *in camera* review of classified evidence did not deny a hearing to petitioners or prevent meaningful judicial review).

REASONS FOR DENYING THE PETITION

As this case comes to this Court, petitioners have abandoned the majority of their constitutional arguments; they have also abandoned any argument that the district court erred in upholding the Attorney General's certification. The only questions they now raise concern whether § 802, on its face, violates Article I of the Constitution – which, they say, it does by authorizing the Attorney General to appeal or amend federal statutes, or preempt state laws; or by granting authority to the Attorney General without an intelligible principle to guide its use. This case does not present any question about the legality of government surveillance.

There is no reason for this Court to grant review of the narrow and unremarkable questions that the petition presents. Neither question is the subject of any conflict among the circuits, and there is no conflict between the well-reasoned decision of the court of appeals and any decision of this Court. Petitioners' arguments also lack merit. Certiorari should be denied.

I. PETITIONERS ALLEGE NO CIRCUIT CONFLICT

Petitioners point to nothing about this case that warrants review. As an initial matter, they do not allege any relevant conflict among the courts of appeals. Instead, they attempt to draw analogies to cases where this Court has granted review "even where the lower courts are not divided on the issue." Pet. 10. Such cases are few and far between. Petitioners' arguments about the purported novelty or uniqueness of § 802 are thinly veiled restatements of their merits arguments, which the court of appeals correctly rejected. They fail to show that this case

is unusual enough to justify an exception from this Court's general practice of "permitting several courts of appeals to explore" an issue and "waiting for a conflict to develop" before granting review. *United States v. Mendoza*, 464 U.S. 154, 160 (1984).

Petitioners argue (at 12-13) that immediate review is justified because this case is the Court's "only opportunity . . . ever . . . to decide the constitutionality of [§ 802] as applied to the President's Surveillance Program between 2001 and 2007, the sole subject of [§ 802(a)(4)]." That is not so; as noted, petitioners have challenged § 802 only on its face; their constitutional arguments have nothing to do with the facts of any alleged surveillance program; and they do not assert any challenge specific to § 802(a)(4). Their questions presented – which concern what powers Congress "may grant" to the Attorney General – confirm this. Pet. i-ii; *see also* Pet. App. 31 (recognizing that petitioners "challenge[] only the facial constitutionality of § 802, not its application").

That facial challenge does not call for immediate review. Petitioners admit that § 802 will apply to "future lawsuits" as well as to this litigation. Pet. 9. That contradicts their assertion that this case represents this Court's "only opportunity" to decide anything. If petitioners are right that § 802 will have ongoing relevance to other surveillance cases, then this Court can consider its constitutionality if and when some other plaintiffs succeed in generating a circuit conflict. If they are wrong, then the decision of the court of appeals lacks prospective significance and review should be denied for that reason.

Petitioners' real grievance is not ultimately with § 802 itself but with the fact that it prevented the courts below from reaching the merits of their

claims that the government allegedly "intercepted the domestic communications of millions of Americans for a period of six years" and in doing so violated the Constitution and various other laws. Pet. 13. Those underlying constitutional and statutory claims, however, are separate from the issues raised in the petition, and this Court would have no occasion to reach them even if it were to grant certiorari here. The ongoing cases against the government defendants, moreover, may ultimately present the same constitutional and statutory questions without the barrier created by § 802. *See infra* p. 14 & note 5. Accordingly, this Court would have reason to grant the petition only if it concluded that the constitutionality of § 802 itself was *independently* worthy of review – which it is not.

II. PETITIONERS FAIL TO SHOW ANY CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS AND ANY DECISION OF THIS COURT

Petitioners also fail to show any tension between the decision of the court of appeals upholding § 802 and any decision of this Court – much less the kind of sharp conflict that would justify this Court's immediate attention in the absence of a circuit conflict or some other pressing need for review.

Petitioners focus heavily on this Court's decision in *Clinton*, 524 U.S. 417. The court of appeals distinguished *Clinton* on the reasonable (and correct) ground that the Attorney General's immunity-triggering certification is not the "functional equivalent of a partial repeal," *id.* at 441, of FISA or any of the other statutes giving rise to petitioners' causes of action. On the contrary, striking down § 802 would have been an unprecedented and unjustifiable

extension of *Clinton*'s holding. The court of appeals' refusal to do so does not warrant review.

Clinton considered the constitutionality of the Line Item Veto Act of 1996, which purported to authorize the President to "'cancel in whole'" spending and tax provisions that had been passed by Congress and signed into law, thereby giving "the President the unilateral power to change the text of duly enacted statutes." *Id.* at 436, 447 (quoting 2 U.S.C. § 691(a) (Supp. II 1996)). Congress's attempt to convey that authority, the Court held, was irreconcilable with the Constitution's "'finely wrought' procedure" for enacting laws, which requires that a bill become law only in the same form as passed by Congress and signed by the President. *Id.* at 439-40. The Court was careful to explain that its holding was a "narrow" one. *Id.* at 448. Petitioners cite no case in which any court has applied *Clinton* to invalidate any other statute (and we are aware of none).

As the court of appeals correctly reasoned, § 802 lacks the key feature that rendered the Line Item Veto Act unconstitutional: it does not authorize the executive to "change the text," *id.* at 447, of FISA or any other statute. *See* Pet. App. 33. The provisions of FISA and other federal statutes that petitioners allege the Carriers have violated remain in force, as do the associated statutory causes of action. Those causes of action are now merely subject to "an additional statutory defense." *Id.* The ability to activate a defense or immunity that Congress validly enacted does not enable the Attorney General "to create a different law." *Clinton*, 524 U.S. at 448. It enables him to implement an existing law. Petitioners offer only mere assertion to the contrary.

The obvious difference between repealing a cause of action and activating a particular defendant's immunity is well-illustrated in this very litigation. Several petitioners in this case are also plaintiffs in *Jewel v. NSA*, currently pending before the district court. *Jewel* is one of the cases against former government officials in their official and personal capacities. The *Jewel* complaint relies on several of the same federal statutory causes of action that petitioners assert in this case.[5] Thus, petitioners' assertion that the certification prevents their statutory causes of action "from having the legal force and effect they would have otherwise had with respect to petitioners' claims," Pet. 23,[6] means *only* that the particular defendants in this particular case are immune from petitioners' suit – but the same petitioners may invoke the same statutes to seek redress for the same injuries against other defendants. The court of appeals did not create a conflict with *Clinton* when it rejected petitioners' implausible characterization of this situation as a "repeal" of their statutory causes of action.

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[5] *Compare*, *e.g.*, Am. Compl. ¶¶ 99, 102-105, 109, 125, 132, *Hepting v. AT&T Corp.*, No. C-06-0672-JCS (N.D. Cal. filed Feb. 22, 2006) (citing 18 U.S.C. §§ 2511, 2520, 2707, and 50 U.S.C. §§ 1809, 1810), *with* Compl. ¶¶ 167, 183, 197, 227, 242, 250, *Jewel v. NSA*, No. C 06-1791 VRW (N.D. Cal. filed Sept. 18, 2008) (citing same provisions).

[6] *Clinton* itself stated that the presidential cancellation in that case had prevented the tax provision at issue "'from having legal force or effect'" because that was what the Line Item Veto Act (in its own words) said the cancellation did. 524 U.S. at 437 (quoting former 2 U.S.C. § 691e(4)(B)-(C) (Supp. II 1996)). It did not examine whether and under what circumstances the interaction of other statutory provisions would similarly result in one depriving the other of "legal force or effect," and it certainly did not hold that a defense to a cause of action can be so characterized.

Petitioners make several other constitutional arguments: that § 802 is unconstitutional because it authorizes the Attorney General to preempt state law; that § 802 is unconstitutional because it allegedly authorizes the Attorney General to "repeal" 28 U.S.C. § 1331; and that § 802 violates the nondelegation doctrine. With regard to none of these do they even attempt to show a direct conflict with any decision of this Court. Instead, they simply contend that the court of appeals erred in declining to accept their arguments. Those contentions do not provide a sufficient basis for review.

III. THE DECISION OF THE COURT OF APPEALS WAS CORRECT

A. The Attorney General's Certification Did Not "Repeal" Anything

Certiorari should also be denied because the court of appeals' decision was correct. The Attorney General's certification did not amend or repeal any statute and therefore did not need to be passed by both houses of Congress or presented to the President. Once petitioners' mistaken reliance on *Clinton* is set aside (as it should be for the reasons already stated), it is clear that their contrary position lacks any support in the Constitution's text or structure, or in this Court's precedent.

The Constitution requires that bicameral passage and presentment occur before a "Bill . . . become[s] a Law." U.S. Const. art. I, § 7, cl. 2. Section 802 was a part of a bill that was duly passed by both houses of Congress and signed by the President. Bicameral passage and presentment were not likewise required for the Attorney General's certification because that certification was not a law and did not change the law. Instead, it implemented § 802 by providing the

procedural and factual predicate necessary for § 802 to apply to the Carriers in this case. Accordingly, it was an exercise of executive authority (not legislative authority) by an executive officer. That does not implicate the separation of powers.

Petitioners' arguments fail because they ultimately reduce to contentions that "a law is less than a law, because it is made to depend on a future event or act." *Field v. Clark*, 143 U.S. 649, 694 (1892) (internal quotation marks omitted). That proposition has long been rejected by this Court. *See id.*; *see also Owens v. Republic of Sudan*, 531 F.3d 884, 891 (D.C. Cir. 2008) (noting that this "Court has consistently upheld delegations . . . that predicate the operation of a statute upon some Executive Branch factfinding"). Petitioners deny (at 32) that § 802 is "an Executive fact-finding statute," but the certifications required by § 802 clearly fit within *Field*'s description of a statute that is, "in the alternative, depending on the discretion of some person . . . to whom is confided the duty of determining whether the proper occasion exists for executing [it]." 143 U.S. at 694 (internal quotation marks omitted).[7]

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[7] Petitioners contend that, following *Clinton*, a factfinding statute can be constitutional only if it "'le[aves] only the determination of whether [particular] events occurred up to the President.'" Pet. 32 (quoting *Clinton*, 524 U.S. at 445). Read in context, however, *Clinton* does not preclude Congress from leaving to the executive discretion concerning whether and when to conduct its factfinding activities. The discretion that the Court found fatal in *Clinton* was the discretion given the President to "effect the repeal of laws, for [the President's] own policy reasons." 524 U.S. at 445. Here, § 802 plainly embodies a policy of protecting intelligence sources and methods that Congress expected the Attorney General to implement. *See infra* p. 25.

The constitutionality of § 802 is further confirmed because it operates in an area that this Court has recognized as particularly suited for executive discretion. The principal end served by § 802 is the "protect[ion] . . . [of] sources and methods of intelligence," S. Rep. at 9, which are the "heart of all intelligence operations," *CIA v. Sims*, 471 U.S. 159, 167 (1985). This Court has recognized that "[t]he authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief." *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988). Here, that authority is exercised in connection with "the conduct of litigation in which the United States . . . is interested," 28 U.S.C. § 516, which is the province of the Attorney General. The limited discretion that § 802 conveys to the Attorney General is therefore entirely appropriate.

B. Section 802 Is Far from "Unprecedented"

1. As the court of appeals correctly observed, *see* Pet. App. 34, and contrary to petitioners' exaggerated claims, *see* Pet. 9, 11, 33, it is far from "unprecedented" for Congress to authorize the Attorney General to trigger a statutory defense or immunity that protects a private party. Thus, the government can trigger immunity in civil tort litigation by certifying under the Westfall Act that an individual is acting within the scope of federal employment.[8] The government can also end a civil litigation by advising a court that

[8] *See* 28 U.S.C. § 2679(d) (provision of Federal Tort Claims Act authorizing certification); *see also United States v. Smith*, 499 U.S. 160, 165-69 (1991) (immunity persists even if there is no remedy against the government).

a defendant qualifies as a foreign head of state.[9] It can extinguish claims against a foreign state in favor of an administrative settlement process.[10] It can grant an individual immunity from the use of testimony or its fruits in a criminal prosecution in order to compel that person's testimony.[11] These executive actions do not "repeal" anything and have never been thought to raise any serious question about the separation of powers. They are a constitutionally unremarkable part of the legal landscape. The immunity defense authorized by § 802 is no different.

Similarly, outside the particular context of immunity, many statutes authorize the Attorney General to waive the application of particular statutes to a particular person or entity. Executive waivers are both "routine[]" and "a far cry from the line-item veto at issue in *Clinton*," *Acree v. Republic of Iraq*, 370 F.3d 41, 64 n.3 (D.C. Cir. 2004) (Roberts, J., concurring in the judgment), and courts have rejected the argument that they violate Article I, § 7. *See*, *e.g.*, *Chadha*, 462 U.S. at 953 n.16 (rejecting argument that Attorney General's discretionary authority to suspend deportation laws violates Article I, § 7). Waivers have never been understood as partial statutory repeals; on the contrary, this Court recently held that a statute authorizing the President to

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[9] *See Ye v. Zemin*, 383 F.3d 620, 623-25 (7th Cir. 2004) (applying head-of-state immunity based on submissions by the Departments of Justice and State).

[10] *See Dames & Moore v. Regan*, 453 U.S. 654, 675-88 (1981).

[11] *See* 18 U.S.C. § 6003. Previous federal immunity statutes authorized a grant of immunity from prosecution for the entire transaction to which compelled testimony related, an even closer analogue to § 802 immunity. *See Kastigar v. United States*, 406 U.S. 441, 451-52 (1972).

exempt Iraq from certain laws "did not repeal anything, but merely granted the President authority to waive the application of particular statutes to a single foreign nation." *Republic of Iraq v. Beaty*, 556 U.S. 848, 861 (2009).

2. Petitioners do not argue that any of these other statutes are unconstitutional: instead, they attempt to distinguish each from § 802. *See* Pet. 24-27. Even if the certification procedure of § 802 were unique, that would not prove that it was unconstitutional or warrant this Court's immediate review. But, in any event, petitioners fail to show that § 802 is unique in any constitutionally relevant way.

First, petitioners argue (at 24-26) that the Westfall Act's certification provision, 28 U.S.C. § 2679(d)(1), is distinguishable from § 802 because, even if the Attorney General declines to certify, a federal-employee defendant can independently assert immunity or can petition the court to substitute the United States as a defendant. Petitioners offer no persuasive reason, however, why the existence of this alternate procedural remedy for defendants makes any constitutional difference. The Westfall Act, like § 802, permits the Attorney General to make a certification that presumptively terminates litigation against a private defendant.[12] Congress's use of a similar mechanism here was unremarkable.[13]

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[12] Like a certification under § 802, the Attorney General's certification under the Westfall Act is subject to judicial review. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995).

[13] Petitioners argue (at 31-32) that § 802 is not "an immunity statute" because it "does not unconditionally remove the threat of litigation" against the Carriers. They offer no support for the odd proposition that the Constitution restricts Congress to granting only *unconditional* immunities to private defendants.

Second, petitioners contend (at 26) that "statutes authorizing the Executive to grant immunity from prosecution and authorizing it to grant a discretionary suspension of deportation" are different from § 802 because they involve the United States' decision not to pursue "its own claim," which they say is "no different from the right of any party to decline to pursue a claim it possesses." As for federal grants of testimonial immunity, petitioners are simply wrong: such immunity affects not only the federal government but also the states.[14]

As for the discretionary decision to suspend deportation, petitioners ignore this Court's lengthy analysis of the issue in *Chadha*. *See* 462 U.S. at 953 n.16, *cited in* Pet. App. 34. There, this Court explained that, when the Attorney General exercises discretion delegated by Congress to suspend deportation, he merely engages in the "administration of the laws" and "acts in [a] presumptively Art. II capacity." 462 U.S. at 953 n.16. This Court's reasoning in *Chadha* thus focused on the Attorney General's Article II role, and not (as petitioners suggest) on whether the particular type of executive action at stake involved rights belonging to the United States.

Third, petitioners argue that cases involving foreign sovereign immunity, as to which they admit that the executive branch has historically exercised a "'case-by-case prerogative'" to "'grant[] or den[y] . . . immunity,'" Pet. 27 (quoting *Beaty*, 556 U.S. at 857),

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[14] *See* 18 U.S.C. § 6002 (barring use of compelled testimony "in any criminal case"); *id.* § 6003 (authorizing federal prosecutors to request orders that trigger the provisions of § 6002); *see also*, *e.g.*, *In re Grand Jury Proceedings*, 860 F.2d 11, 14-15 (2d Cir. 1988) (confirming that federal testimonial immunity applies to state cases).

are distinguishable because they took place in a "'*sui generis* context' of historical deference to the Executive," Pet. 26 (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004)). On the contrary, special deference is equally justified here because of § 802's close relationship to the state secrets privilege, an area where the executive receives "utmost deference." *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 402 (D.C. Cir. 1984) (internal quotation marks omitted).

A motion to dismiss under § 802 is different from a motion to dismiss under the state secrets privilege primarily in that the Attorney General's certification (even if sealed) is subject to *greater* judicial scrutiny than would be an assertion of the common-law privilege: § 802 provides for review of the underlying classified material *in camera*, but the state secrets privilege does not necessarily require *any* judicial review of the underlying secret material. *See United States v. Reynolds*, 345 U.S. 1, 10 (1953); S. Rep. at 12. Although § 802 could survive judicial review even if it did not involve the "heart of all intelligence operations," *Sims*, 471 U.S. at 167, the fact that it does involve such sensitive matters makes petitioners' separation-of-powers arguments particularly strained and unworthy of review.

C. Section 802 Properly Applies to State Law and Federal Constitutional Claims

1. Petitioners argue (at 27-28) that bicameral passage and presentment are also required for any "decision to preempt . . . state-law causes of action." The court of appeals had no need to consider this novel argument in light of its correct conclusion that the Attorney General's certification merely implements § 802, a duly enacted statute. For the same

reason, this case would be a poor vehicle to consider any question about preemption: this Court, like the court of appeals, would likely never reach the issue.

Nevertheless, petitioners' position is also foreclosed by this Court's settled preemption jurisprudence. This Court "ha[s] held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes." *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (citing examples); *see also*, *e.g.*, *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1135 (2011) (quoting *Hillsborough County*). That longstanding line of authority forecloses petitioners' contention that only statutes can preempt.[15]

2. Petitioners further argue (at 29-30) that the Attorney General's certification unconstitutionally amended 28 U.S.C. § 1331. They say that, because their "federal constitutional claims for equitable relief arise directly under the Constitution," Congress cannot directly abrogate those claims, so that § 802 must necessarily be read as an attempt "to exclude them from the jurisdiction of th[e] [inferior federal] courts" and of the state courts as well. Pet. 29. They then further argue that the jurisdiction of the federal and state courts can *only* be modified by statute and

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[15] Petitioners cite only two cases in their preemption argument. Neither helps them. They cite (at 28) *Printz v. United States*, 521 U.S. 898 (1997), which was not a preemption case, and certainly not a case about preemption by federal administrative action. They also cite (at 28) Justice Thomas's concurrence in the judgment in *Wyeth v. Levine*, 555 U.S. 555 (2009), but badly mischaracterize it. Justice Thomas stated clearly that he would continue to extend preemptive effect to "federal regulations." *Id.* at 588. His opinion thus conflicts with, rather than supports, petitioners' unfounded contention that Congress itself must make "the decision to preempt." Pet. 28.

not by administrative action. *See id.* As with petitioners' preemption argument, the court of appeals had no occasion to reach this convoluted theory because it correctly concluded that the Attorney General's certification merely implemented an existing statute. And, as with petitioners' preemption argument, the fact that the court of appeals never reached petitioners' theory strongly suggests that this case is a poor vehicle to consider it.

In any event, petitioners are also wrong. It is well-established that constitutional claims, including claims for equitable relief, can be and often are barred by defenses or other barriers that neither themselves arise under the Constitution nor limit the subject-matter jurisdiction of the courts. Examples include prudential standing,[16] certain types of absolute immunity,[17] abstention,[18] laches,[19] and preclu-

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[16] *See generally Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11-12 (2004) (holding that a noncustodial parent lacked prudential standing to bring First Amendment claims).

[17] *See Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U.S. 719, 731-34 (1980) (holding that absolute immunity bars a constitutional claim for injunctive relief against state supreme court justices based on actions taken in a legislative capacity). Technically, *Consumers Union* involved the construction of 42 U.S.C. § 1983 rather than an injunctive action implied directly under the Constitution. *See id.* at 732. Nevertheless, it described the defense it recognized as a "common-law immunity." *Id.* Such immunity would accordingly be available in a nonstatutory injunctive suit as well.

[18] *See*, *e.g.*, *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941) (directing district court to "stay[] its hands" in light of pending state proceedings).

[19] *See*, *e.g.*, *Benedict v. City of New York*, 250 U.S. 321, 325, 327-28 (1919) (holding claims for equitable relief "asserted under the federal Constitution," among other claims, barred by laches).

sion.[20] It is constitutionally unremarkable for Congress to add an additional statutory immunity to this list, whether that immunity is jurisdictional or not.

As the court of appeals noted, it might raise a "serious constitutional question" if Congress, by multiplying immunities, left a plaintiff without "any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988) (internal quotation marks omitted). But Congress preserved any viable claims that petitioners might have against the government and its officers. Accordingly, § 802 raises no serious constitutional question that merits review.

D. Section 802 Does Not Violate the Nondelegation Doctrine

The court of appeals also correctly concluded that § 802 does not violate the nondelegation doctrine because it "authorizes the Attorney General to act only in narrow, definable situations, subject to review by the courts." Pet. App. 40. It therefore "could [not] say that there is an absence of standards for the guidance of the [Attorney General's] action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress ha[d] been obeyed." *Yakus v. United States*, 321 U.S. 414, 426 (1944), *cited in* Pet. App. 35.

Petitioners nevertheless argue that § 802 is unconstitutional because, although it admittedly "set[s] the boundaries within which [the Attorney General] *may* act, [it] give[s] no principle for him to apply in

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[20] *See*, *e.g.*, *Grubb v. Public Utils. Comm'n of Ohio*, 281 U.S. 470, 476-78 (1930) (holding claims for equitable relief on constitutional grounds barred by *res judicata* because they were not raised in a prior action between the same parties concerning the same subject matter).

deciding *whether* to act." Pet. 35 (emphases added). On the contrary, this Court has repeatedly upheld numerous statutes that similarly authorized – but did not compel – a specified executive action if certain criteria were met. *See*, *e.g.*, *Touby v. United States*, 500 U.S. 160, 165 (1991) (rejecting non-delegation challenge to 21 U.S.C. § 811(h)(1), which provides that, "*[i]f* the Attorney General finds" that temporarily adding a drug to the schedule of prohibited substances is "necessary to avoid an imminent hazard to the public safety," he "*may*" do so) (emphases added); *Yakus*, 321 U.S. 414 (upholding discretionary authority to impose price ceilings upon making specified finding); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936) (upholding discretionary authority to ban sale of arms upon making specified finding). The court of appeals did not err in following this precedent.

The court of appeals also did not err in considering, alongside the statutory text, "the purpose of the Act, its factual background and the statutory context." *Lichter v. United States*, 334 U.S. 742, 785 (1948) (internal quotation marks omitted) (considering similar factors in a nondelegation analysis). It correctly observed that the legislative history shows that Congress intended the Attorney General to exercise his discretion to "protect[] intelligence gathering and national security information." Pet. App. 39. That is more legislative guidance than this Court has required in other cases. *See Whitman*, 531 U.S. at 474 (citing cases upholding regulation "in the public interest," among other examples).

Petitioners' nondelegation arguments also fail for three additional reasons. Considered together, these strongly suggest that a grant of certiorari on this

question would lead to a straightforward affirmance that would not meaningfully develop the law.

First, this Court has never applied the nondelegation doctrine to strike down a grant of authority that is executive in character (such as presenting facts and making arguments to a court) as opposed to quasi-legislative (such as rulemaking or some types of administrative adjudication). When granted authority is not legislative or quasi-legislative in character, the Constitution's textual commitment to Congress of "[a]ll legislative powers herein granted," art. I, § 1, is not implicated. *Cf.*, *e.g.*, *Whitman*, 531 U.S. at 472 ("In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency.").

Second, in certain areas of special executive concern, this Court has said that Congress may authorize executive action "without further guidance." *Loving v. United States*, 517 U.S. 748, 773 (1996) (relying on executive authority to prescribe military discipline); *Curtiss-Wright*, 299 U.S. at 324 (stating that, with respect to foreign affairs, Congress may "leave the exercise of the power to [the executive's] unrestricted judgment"). Executive action to protect the national security by keeping classified intelligence information secret falls within just such an area of special executive concern. *See supra* p. 17 (discussing *Sims* and *Egan*).[21]

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[21] Petitioners erroneously characterize this argument as a claim that "the Executive has inherent power under Article II over . . . domestic surveillance." Pet. 38. The court of appeals had no need to reach any such broad constitutional question. Its decision rests comfortably on the narrower ground that the executive branch has a "'compelling interest' in withholding national security information from unauthorized persons in the

Third, § 802 could in the alternative be given a saving construction that makes certification mandatory where one of the criteria is met, thus curing any potential nondelegation problem. Where necessary, this Court has not hesitated to adopt similar constructions of statutes more explicitly permissive than § 802.[22] The availability of a mandatory construction to avoid any possible constitutional doubt (though no such doubt is actually present here) reinforces the lack of any need for review.

* * *

Section 802 represents a policy choice by Congress that the national interest is better served by immunizing private actors who may have helped the government conduct disputed surveillance activities, and channeling litigation about the legality of that surveillance into suits against the government and its officials. Petitioners disagree with that choice and have labored mightily to translate that disagreement into a constitutional argument. As the court of appeals' careful and detailed opinion makes clear, they have failed. Because that decision does not conflict with any decision of any other court of appeals, or with any decision of this Court, this Court should

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course of executive business" and well-recognized "authority to protect such information." *Egan*, 484 U.S. at 527 (quoting *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980)).

[22] *See*, *e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 682, 689 (2001) (construing a statute providing that aliens subject to removal within 90 days "may be detained beyond the removal period" to contain an "implicit limitation" on the time an alien could be held) (internal quotation marks omitted); *United States v. Witkovich*, 353 U.S. 194, 195, 199 (1957) (declining to adopt a "literal[]" reading of the phrase "as the Attorney General may deem fit and proper" because a narrower construction would avoid "constitutional doubts").

deny review and allow this case to end as Congress directed.[23]

CONCLUSION

The petition for a writ of certiorari should be denied.

[23] The Court's grant of certiorari in *Clapper v. Amnesty International, USA*, No. 11-1025, is irrelevant to the present petition. *Clapper* presents a question of certain plaintiffs' Article III standing to challenge the constitutionality of FISA § 702, 50 U.S.C § 1881a. Here, by contrast, petitioners' standing was uncontested before the court of appeals, and FISA § 702 is not relevant to this case.

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