No. 11-1200

In the Supreme Court of the United States

TASH HEPTING, ET AL., PETITIONERS

v.

AT&T CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly upheld the constitutionality of Section 802 of the Foreign Intelligence Surveillance Act of 1978, as amended, 50 U.S.C. 1885a (Supp. II 2008), which provides that, in specified circumstances, the Attorney General may certify the existence of certain facts that, upon judicial review for substantial evidence, require the dismissal of civil actions against telecommunications carriers and other persons who are alleged to have assisted an element of the intelligence community of the United States.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1-56) is reported at 671 F.3d 881. The decision of the district court (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.[1] The petition for a writ of certiorari was filed on March 28, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Petitioners note (Pet. 1) that a petition for rehearing was filed by other plaintiffs-appellants on March 26, 2012. That petition was denied on April 19, 2012. No. 09-16720 Docket entry (9th Cir.).

STATEMENT

1. After the September 11, 2001 attacks on the United States, President Bush established the Terrorist Surveillance Program (TSP), which authorized the National Security Agency (NSA) to intercept communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations. Under the TSP, a communication could be intercepted if one party to it was located outside the United States and there was a reasonable basis to conclude that a party was a member of or affiliated with al Qaeda. Pet. App. 23, 116-117.

President Bush publicly acknowledged the TSP's existence in December 2005. See The President's Radio Address, 2 *Pub. Papers* 1870-1871 (Dec. 17, 2005). Thirteen months later, on January 17, 2007, Attorney General Gonzales informed Congress that the President had determined not to reauthorize the TSP and that any electronic surveillance that had been conducted under the TSP would thereafter be conducted subject to the approval of the Foreign Intelligence Surveillance Court (FISC). S. Rep. No. 209, 110th Cong., 1st Sess. 4 (2007) (*Senate Report*). The TSP is thus no longer operative, and has been defunct for more than five years.

2. In 2006, petitioners filed various suits in federal and state courts alleging that AT&T and other telecommunications companies had provided unlawful assistance in connection with the NSA's intelligence activities, in violation of the Constitution and specified provisions of federal and state law. Pet. App. 58-59; Pet. 6 n.3. Petitioners alleged the existence of a communications "dragnet" that was far broader in scope than the publicly acknowledged TSP, and they sought damages and injunctive relief. Pet. App. 116-117; Pet. 5. The United

States intervened in those suits and moved for dismissal, formally asserting the state-secrets privilege on the ground that litigation of petitioners' claims would risk the disclosure of sensitive and highly classified intelligence information, including intelligence sources and methods. Pet. App. 59; *Senate Report* 7.

In July 2006, the district court denied the government's motion to dismiss the lead petitioner's case. The court of appeals granted petitions for interlocutory appeal under 28 U.S.C. 1292(b) filed by AT&T and the government. Pet. App. 59. In August 2006, the Judicial Panel on Multidistrict Litigation ordered all cases arising from the NSA's alleged warrantless wiretapping program to be transferred to and consolidated in the Northern District of California before the judge who had decided the lead petitioner's case. *Id.* at 24, 59-60.

3. In July 2008, Congress enacted the FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436. In partial response to these then-pending cases, that Act provides a mechanism for granting immunity from civil suits to telecommunications companies and other persons who may have furnished assistance to elements of the intelligence community. *Id.* § 201, 122 Stat. 2468-2470. That mechanism is contained in Section 802 of the Foreign Intelligence Surveillance Act of 1978 (FISA), as amended. See 50 U.S.C. 1885a (Supp. II 2008).

Section 1885a[2] applies "to a civil action pending on or filed after July 10, 2008." 50 U.S.C. 1885a(i) (Supp. II 2008). In principal part, it provides as follows:

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[2] Although the petition and the courts below generally refer to the relevant provision as "Section 802" of FISA, this brief refers to its United States Code citation (50 U.S.C. 1885a). See Sup. Ct. R. 34.5.

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 [FISC];

(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;[3]

(3) any assistance by that person was provided pursuant to a directive under section 1802(a)(4), 1805b(e), * * * or 1881a(h) of this title directing such assistance;[4]

(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—

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[3] The cross-referenced provisions authorize the Attorney General and the FBI Director to obtain assistance from electronic communication service providers and others. See 18 U.S.C. 2511(2)(a)(ii)(B), 2709(b).

[4] The cross-referenced provisions authorize (or authorized) the Attorney General or the Director of National Intelligence to direct the furnishing of necessary assistance in connection with electronic surveillance. See 50 U.S.C. 1802(a)(4); 50 U.S.C. 1805b(e) (Supp. I 2007); 50 U.S.C. 1881a(h) (Supp. II 2008). Section 1805b was repealed by the FISA Amendments Act of 2008, with the proviso that it continued to apply to certain pre-2008 orders and cases. See §§ 403(a)(1)(A), 404(a), 122 Stat. 2473-2476.

> (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 * * * 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.

50 U.S.C. 1885a(a) (Supp. II 2008).[5]

With respect to judicial review, Section 1885a provides that a certification by the Attorney General "shall be given effect unless the court finds that [it] is not supported by substantial evidence provided to the court." 50 U.S.C. 1885a(b)(1) (Supp. II 2008). The statute permits "[a]ny plaintiff or defendant in a civil action" to "submit any relevant court order, certification, written request, or directive to the district court * * * for review" and to "participate in the briefing or argument of any legal issue in a judicial proceeding conducted pursuant to this section, but only to the extent that such participation does not require the disclosure of classified

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[5] Various terms used in Section 1885a—including "assistance," "covered civil action," and "intelligence community"—are defined in 50 U.S.C. 1885 (Supp. II 2008).

information to such party." 50 U.S.C. 1885a(d) (Supp. II 2008).

In further protection of classified information, the statute specifies that "the court shall review [classified] information in camera and ex parte, and shall issue any part of the court's written order that would reveal classified information in camera and ex parte and maintain such part under seal." 50 U.S.C. 1885a(d) (Supp. II 2008). It also provides as follows:

> If the Attorney General files a declaration * * * that disclosure of a certification * * * or supplemental materials * * * 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 * * * , including any public order * * * , to a statement as to whether the case is dismissed * * * , without disclosing the paragraph of subsection (a) that is the basis for the certification.

50 U.S.C. 1885a(c) (Supp. II 2008).

4. A few weeks after the FISA Amendments Act of 2008 was enacted, the court of appeals remanded the lead petitioner's case to the district court for further proceedings in light of the new statute. No. 06-17132 Docket entry (9th Cir. Aug. 21, 2008).

5. On September 19, 2008, Attorney General Mukasey made certifications pursuant to Section 1885a —in both public and classified forms—stating "that the claims asserted in the civil actions pending in these consolidated proceedings brought against electronic communication service providers fall within at least one provision contained in Section [1885a](a)." Pet. App. 112-

113. In light of those certifications, the government moved to dismiss "all claims against telecommunications company defendants in these cases." *Id.* at 60.

On June 3, 2009, the district court granted the government's motion, explaining that dismissal was statutorily compelled and that petitioners' constitutional objections to Section 1885a were without merit. Pet. App. 57-109. Addressing petitioners' contentions that the statute is inconsistent with *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), the court invoked the settled "principle that a statute that amends applicable law, even if it is meant to determine the outcome of pending litigation, does not violate the separation-of-powers principle" in *Klein*. Pet. App. 76-77. The court explained that, "[i]n enacting section [1885a], Congress created a new, narrowly-drawn and 'focused' immunity," thus "changing the underlying law," and that Congress expressly "provide[d] a judicial role" for "determining whether the Attorney General's certifications meet the criteria for the new immunity." *Id.* at 79-80. Thus, the court held that Section 1885a "does not violate the separation-of-powers principle examined in *Klein*." *Id.* at 80.

The district court also rejected petitioners' contention that the statute violates the nondelegation doctrine. Pet. App. 80-95. It concluded that the Attorney General's discretion about whether to submit a certification in a given case is to be informed by Congress's evident concern for protecting national-security information and the government's intelligence-gathering abilities, and that principle, which is embodied in the statute's text and legislative history, is sufficient to defeat a nondele-

gation challenge, especially given the limited scope of the Attorney General's discretion. *Id.* at 94-95.[6]

Having determined that Section 1885a is constitutional, the district court confirmed that it had "examined the Attorney General's submissions and ha[d] determined that he has met his burden under [the statute]," and it therefore granted the United States' motion to dismiss. Pet. App. 108.

6. The court of appeals affirmed. Pet. App. 1-56. With respect to petitioners' separation-of-powers argument, it explained that, "in enacting [Section 1885a], Congress did not give the Executive the power to enact, amend, or repeal a statute." *Id.* at 32. Although petitioners invoked *Clinton* v. *City of New York*, 524 U.S. 417 (1998), the court of appeals distinguished that case on the ground that, unlike the unconstitutional line-item-veto device, "the Attorney General's certification implements the law as written and does not frustrate or change the law as enacted by Congress." Pet. App. 33. "The ultimate legislative judgment regarding immunity for the telecommunications companies was made by Congress, not the Attorney General, and falls to the courts, not the Attorney General, to review." *Id.* at 46.

The court of appeals also rejected petitioners' non-delegation argument, noting that "[t]he Supreme Court has only twice invalidated legislation under this doctrine, the last time being seventy-five years ago." Pet. App. 35. The court of appeals explained that "Section [1885a] authorizes the Attorney General to act only in

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[6] The district court also rejected several other arguments—relating to due process, the statute's provisions for *in camera, ex parte* review, the scope of review of the Attorney General's certification, and the validity of that certification—which are not within the scope of the questions presented in this Court. Pet. App. 96-108.

narrow, definable situations, subject to review by the courts," and that "the text, structure, history, and context of [Section 1885a] contain an intelligible principle consistent with the Constitution's nondelegation doctrine"—that of "protecting intelligence gathering and national security information." *Id.* at 39-40.

The court of appeals emphasized that Section 1885a applies only to suits against persons alleged to have provided assistance to the government, not to claims against government actors and entities. Pet. App. 42, 56. It noted that such suits by some of the petitioners were already pending (*id.* at 42 n.3), and it remanded the claims of two of the petitioners for further consideration because they had alleged "illegal conduct on the part of the government," *id.* at 55-56.[7]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Petitioners concede that there is no circuit conflict, see Pet. 13, and the court of appeals properly explained that petitioners' constitutional attacks on 50 U.S.C. 1885a (Supp. II 2008) are meritless. Further review is accordingly unwarranted.

1. Petitioners contend (Pet. 12-13) that this case represents "the only opportunity [this Court] will ever have to decide the constitutionality of [Section 1885a] as ap-

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[7] The court of appeals also rejected other arguments that are beyond the scope of the questions presented in this Court, including the contentions that Section 1885a violates due process and separation-of-powers principles by "foreclos[ing] a challenge to the government's wiretapping program," Pet. App. 42-43, that it violates due process by allowing the Attorney General to act as an adjudicator, *id.* at 45-46, and that it violates due process because its provisions for *ex parte* and *in camera* review deprive petitioners of notice, *id.* at 46-55.

plied to the President's Surveillance Program between 2001 and 2007," and that "there will be no circuit split as to the application of [Section 1885a] to lawsuits against telecommunications carriers arising out of the President's Surveillance Program" because such cases have all been consolidated in one district by the Judicial Panel on Multidistrict Litigation. Those aspects of this case furnish no reason for review by this Court.

To the extent that petitioners ask this Court to evaluate certworthiness by considering only the category of suits pertaining to the TSP, they address a program that began after September 11, 2001 and ended more than five years ago, in early 2007. Cases involving the TSP constitute a finite, and relatively small, category of cases that is necessarily time-bound and will not recur. It is therefore far from what this Court typically considers to be sufficient to warrant review in the absence of a disagreement in the lower courts.

Moreover, the court of appeals' decision does not even control the resolution of all claims about the TSP, or even all of petitioners' claims about the TSP. To the contrary, as that court specifically noted, rejecting petitioners' constitutional challenges to Section 1885a, and thus terminating their suits against private telecommunications companies, will not deprive petitioners of their claims that *the government* engaged in illegal surveillance. Pet. App. 42 ("Although Congress granted immunity to private parties that assisted the government, [Section 1885a] does not foreclose relief against government actors and entities who are the primary players in the alleged wiretapping."); *Senate Report* 8 ("The Committee does not intend for this section to apply to, or in any way affect, pending or future suits against the

Government as to the legality of the President's program.").

In any event, there is no basis for petitioners' assumption that Section 1885a could be reviewed only in the context of allegations involving the TSP. Although Section 1885a(a)(4) specifically addresses the TSP as it existed for a period of less than five and one-half years, both the statutory mechanism and the Attorney General certification that they challenge are applicable whether the underlying conduct is covered by Paragraph (1), (2), (3), (4), *or* (5) of Section 1885a(a). Indeed, as contemplated by the statute's terms, the Attorney General's public certification did not specify which "paragraph of subsection (a) [was] the basis for the certification," 50 U.S.C. 1885a(c) (Supp. II 2008), except to the extent that the Attorney General certified that Paragraph (5) was applicable to petitioners' allegations of a "content-dragnet." Pet. App. 112-113, 117.

In addition, the legal questions that petitioners ask this Court to resolve do not turn on the applicability of Section 1885a(a)(4) rather than one of the other paragraphs of Section 1885a(a). Petitioners mention Paragraph (4) only three times when articulating their underlying arguments, and each of those references makes clear that petitioners believe their constitutional objections also apply to the other paragraphs in Section 1885a(a). See Pet. 14, 15, 23-24.

Accordingly, although TSP-related litigation has been consolidated in one judicial district, separate allegations brought by other plaintiffs in future cases about different intelligence activities could relate to the other paragraphs of Section 1885a(a), and there is nothing to prevent those cases from being filed outside of the Ninth Circuit. Petitioners thus err in implying (Pet. 13) that

no other court will be able to address the constitutional issues they raise if certiorari is denied in this case.

2. On the merits, petitioners' first three questions contend (Pet. i-ii, 13-33) that Congress simply cannot delegate certain decisions to the Attorney General because those decisions are the prerogative of lawmakers, not Executive Branch officials.[8] That contention lacks merit.

a. Petitioners' first three questions depend in part on erroneous assumptions (Pet. 19-30) that certain legal consequences—the preclusion of certain federal statutory claims, the preemption of state law, and the exclusion of federal constitutional claims from the jurisdiction of federal or state courts—must result directly from the enactment of a federal statute pursuant to Article I, Section 7 of the Constitution, without any intervening action by the Executive Branch.

In fact, it is not true, as petitioners contend (Pet. 28, 29), that Executive Branch actions cannot have the effect of preempting state law or of altering the extent of federal courts' jurisdiction. See, *e.g.*, *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes."); *Republic of Iraq* v. *Beaty*, 556 U.S. 848 (2009) (President's determination rendered

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[8] With respect to the first question presented, petitioners contend (Pet. i, 19-26) that Section 1885a impermissibly allows the Attorney General "to nullify preexisting law" recognizing a federal statutory claim "and replace it with the legal regime of [Section 1885a]," Pet. 14. With respect to the second and third questions presented, petitioners contend (Pet. i-ii, 27-33) that Section 1885a impermissibly allows the Attorney General (rather than Congress) to decide whether to "[p]reempt [s]tate [l]aw," Pet. 27, and whether to "exclude [petitioners' federal constitutional claims] from the jurisdiction of [state and federal] courts," Pet. 29.

inapplicable to Iraq a statutory provision that had abrogated immunity for foreign sovereigns in certain circumstances); *Jones* v. *United States*; 137 U.S. 202, 209-211 (1890) (recognizing that scope of federal courts' admiralty jurisdiction depended on President's determination that island contained guano and was outside the jurisdiction of another government); *Owens* v. *Republic of Sudan*, 531 F.3d 884, 892 (D.C. Cir. 2008) ("The Supreme Court has also upheld statutes that predicate the courts' subject matter jurisdiction upon an Executive Branch factfinding.").

And, to the extent petitioners complain that the statute here limits their ability to pursue their "federal constitutional claims" in *state* courts (see Pet. 30), that consequence need not flow from any certification by the Attorney General under Section 1885a(a), because it is independently supported by Congress's own determination that suits like petitioners' "shall be deemed to arise under the Constitution and laws of the United States and shall be removable under [28 U.S.C. 1441]." 50 U.S.C. 1885a(g) (Supp. II 2008); see also Pet. 6 n.3 (explaining that the eight suits that petitioners filed in state court were each removed to federal court). Petitioners question (Pet. 30) whether Congress may "limit the jurisdiction of state courts to decide federal constitutional claims." But "[t]he constitutional right of Congress to authorize the removal" by defendants, from state to federal court, "of civil cases arising under the laws of the United States has long since passed beyond doubt." *Tennessee* v. *Davis*, 100 U.S. 257, 265 (1880).

There is, accordingly, no basis for petitioners' underlying assumption that the legal consequences of certification cannot follow, in part, from Executive Branch determinations.

b. The first three questions presented in the petition (Pet. i-ii) are also based on a further faulty premise: that Congress did not change the law by enacting Section 1885a, but rather delegated to the Attorney General a discretionary power to change federal law. As petitioners see it (Pet. 14), Section 1885a creates a "new statutory regime" that, while enacted by Congress, "has no legal force or effect of its own" unless "the Attorney General chooses" to invoke it by making a certification under the statute.

In fact, Congress itself changed the law by describing—in a statute duly enacted under Article I, Section 7 of the Constitution—the specific and limited set of circumstances in which civil actions against electronic communication service providers (and others) "for providing assistance to an element of the intelligence community" may not be maintained and should be dismissed. 50 U.S.C. 1885(8), 1885a(a) (Supp. II 2008).[9]

Petitioners analogize (Pet. 19-24) Section 1885a to the Line Item Veto Act that this Court found to be unconstitutional in *Clinton* v. *City of New York*, 524 U.S. 417 (1998). The court of appeals, however, correctly rejected petitioners' comparison. Pet. App. 32-34.

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[9] There is no basis for petitioners' suggestion that Section 1885a is unconstitutional because it altered their ability to pursue claims they had already brought pursuant to "previously-enacted statutes creating federal causes of action." Pet. 19 (capitalization modified). Congress clearly stated that the new provision would apply to civil actions that were "pending on or filed after July 10, 2008," 50 U.S.C. 1885a(i) (Supp. II 2008), and it is well established that Congress may change the law that applies to suits (such as those here) in which there is not yet a final judgment. See, *e.g.*, *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218-219 (1995); *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 437-441 (1992).

The Attorney General's role under Section 1885a bears no meaningful resemblance to the power at issue in the line-item-veto case, which permitted "the President himself to effect the repeal of laws, for his own policy reasons, without observing the procedures set forth in Article I, § 7." *City of New York*, 524 U.S. at 445. "Unlike the line item veto, the Attorney General's certification [under Section 1885a] implements the law as written and does not frustrate or change the law as enacted by Congress." Pet. App. 33. The authority granted by Section 1885a is also limited in any particular case to a certification of whether any of five factual conditions specified by Congress exists. See 50 U.S.C. 1885a(a)(1)-(5) (Supp. II 2008). Then, even if the Attorney General finds and certifies that one of those specified conditions is present, the Attorney General cannot himself compel the dismissal of *any* case against *any* party. Instead, a court must determine whether to give the factual certification "effect" by evaluating whether it is "supported by substantial evidence provided to the court." 50 U.S.C. 1885a(b)(1) (Supp. II 2008).

Those authorities are consistent with this Court's longstanding recognition that "[t]he legislature cannot delegate its power to make a law; but it can * * * delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." *Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 694 (1892) (citation omitted). The Court has thus reiterated that the Constitution "does not require that Congress find for itself every fact upon which it desires to base legislative action, or that it make for itself detailed determinations which it has declared to be prerequisite to the application of [its] legislative policy." *Yakus* v. *United States*, 321 U.S. 414, 424 (1944). And

Congress has commonly "predicate[d] the operation of a statute upon some Executive Branch factfinding." *Owens*, 531 F.3d at 891; see, *e.g.*, 28 U.S.C. 2679(d) (under the Westfall Act, the Attorney General may certify government employee's scope of employment in tort case, thereby triggering substitution of the United States as the defendant); 28 U.S.C. 1605(g)(1)(A) (Supp. IV 2010) (the Attorney General may certify that discovery in a suit against a foreign state would interfere with a criminal case or a national-security operation, thereby triggering a stay of discovery); 18 U.S.C. 5032 (the Attorney General may certify that one or more statutory conditions exists regarding a juvenile offender, thereby triggering district court jurisdiction); see also *Touby* v. *United States*, 500 U.S. 160, 162-166 (1991) (upholding statute permitting the Attorney General to add a substance, on a temporary basis, to a list of those regulated under the Controlled Substances Act, upon making certain findings after considering statutorily specified factors).

c. Petitioners attempt (Pet. 17, 25-26) to distinguish Section 1885a from the foregoing statutes on the ground that Section 1885a does not *compel* the Attorney General "to undertake * * * a determination of whether a civil action falls within one of the five statutory categories," does not *compel* him "to file a certification," and does not independently authorize private parties to "obtain a court-issued certification" if the Attorney General refuses to provide one.

Of course, as an initial matter, the Attorney General made the relevant certification in this case, and did not avail himself of his statutory authority to refrain from determining or certifying that petitioners' suits fell within the statutory criteria. Thus, this case would be a

poor vehicle for considering whether Congress is precluded from granting that form of authority to the Attorney General.

In any event, petitioners err in maintaining (Pet. 32) that Congress cannot incorporate a factual determination by the Executive if Congress has not affirmatively "require[d] the Executive to perform fact-finding." In *J.W. Hampton Jr. & Co.* v. *United States*, 276 U.S. 394 (1928), the statute at issue authorized the President to make findings that would have the consequence of amending tariff rates previously imposed by statute, *id.* at 401. The Court expressly recognized that the statute contained "no specific provision by which action by the President might be invoked." *Id.* at 405. In other words, the statute did not require the President to begin the investigations that could produce the findings that would cause tariff rates to change, and it did not permit a private party to compel the initiation of such an investigation. See *United States ex rel. Norwegian Nitrogen Prods. Co.* v. *United States Tariff Comm'n*, 274 U.S. 106, 110-111 (1927) (explaining that the President could require the Tariff Commission to conduct an investigation, but it was otherwise "discretionary" whether the Commission would "employ its resources for investigations sought by an interested party"). Notwithstanding Congress's failure to impose an affirmative duty upon the President (or the Tariff Commission) to investigate the relevant facts and then act accordingly, this Court sustained the statute's constitutionality, reaffirming the principle that Congress may choose to allow an Executive Branch official to "determine exactly when its exercise of the legislative power should become effective" by determining whether certain "future conditions" specified by Congress had come to pass. *J.W. Hampton*, 276

U.S. at 407. And other statutes sustained by this Court have left the Executive with discretion whether to take certain actions. See, *e.g.*, *Republic of Iraq* v. *Beaty*, *supra* (discretion to suspend or render various statutory provisions inapplicable to Iraq); *Loving* v. *United States*, 517 U.S. 748, 758-771 (1996) (discretion to prescribe aggravating factors for capital sentencing in courts martial); *Touby*, 500 U.S. at 162-167 (discretion to add new drugs to criminal drug schedule); *Yakus*, 321 U.S. at 424-427 (discretion to set commodity prices); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 312, 320-322 (1936) (discretion to declare an arms embargo against a foreign country).

Accordingly, it does not matter whether Section 1885a can be accurately characterized as "an immunity statute" that "unconditionally remove[s] the threat of litigation from the telecommunications carrier respondents," Pet. 31-32. The statute does not constitute an improper delegation of legislative power to the Executive Branch because Congress itself has specified what certifications will trigger the dismissal of certain civil actions (if, upon judicial review, those certifications are found to be "supported by substantial evidence provided to the court," 50 U.S.C. 1885a(b)(1) (Supp. II 2008)).[10]

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[10] Although Section 1885a provides for judicial review of the determination that the Executive Branch is authorized to make, that is not a constitutional necessity. This Court has repeatedly upheld statutory schemes that depend upon Executive determinations that are not subject to judicial review for compliance with the statute. See, *e.g.*, *Dalton* v. *Specter*, 511 U.S. 462, 476 (1994) (no review of President's decision to approve or disapprove a list of military bases to be closed); *Lincoln* v. *Vigil*, 508 U.S. 182, 185, 193-194 (1993) (no review under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, of Indian Health Service's decisions regarding what programs to fund "for the benefit, care, and assistance of the Indians"); *Franklin* v.

3. With respect to their fourth question presented, petitioners contend in the alternative (Pet. 33-40) that—even if Congress could grant the power to make determinations that have the effects that petitioners ascribe to the Attorney General's certification here—Congress violated the nondelegation doctrine by failing to provide an "intelligible principle" to guide the Attorney General's exercise of discretion about whether to file a certification. The court of appeals properly rejected that proposition, because it found, after employing typical tools of statutory construction (*i.e.*, the "text, structure, history, and context" of Section 1885a), that the Attorney General's certification is guided by an intelligible principle: the need to "protect[] intelligence gathering and national security information." Pet. App. 36, 39.

a. This Court's decisions recognize that nondelegation principles are satisfied when Congress sets forth an "intelligible principle" that "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta* v. *United States*, 488 U.S. 361, 372-373 (1989) (citation omitted). As this Court has repeatedly observed, it has found only two statutes that lacked the necessary "intelligible principle"—and it has not found any in the last 75 years. *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 474 (2001) (referring to *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), and *Panama Ref. Co.* v. *Ryan*, 293 U.S. 388 (1935)); see *Loving*, 517 U.S. at 771 (same); *Mistretta*, 488 U.S. at 373 (same); *id.* at 416 (Scalia, J., dissenting) (explaining that the Court has "almost never felt qualified to second-

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Massachusetts, 505 U.S. 788, 801 (1992) (no review under the APA of President's determination of state populations in light of the decennial census).

guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law").

Here, there is no doubt about which public agency is to apply the certification authority: "the Attorney General (or Acting Attorney General) or the Deputy Attorney General." 50 U.S.C. 1885a(e) (Supp. II 2008). Nor is there doubt about the boundaries of the official's authority: he may certify that one of five factual predicates is present, 50 U.S.C. 1885a(a)(1)-(5) (Supp. II 2008).

Petitioners assert (Pet. 34-36) that Section 1885a is nonetheless constitutionally defective because, to use *Mistretta*'s terms, the text of the statute does not itself "clearly delineate[] the general policy." 488 U.S. at 372-373 (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)). In other words, petitioners say, "'*Congress* must lay down by legislative act an intelligible principle,'" Pet. 34 (quoting *Whitman*, 531 U.S. at 472), and they claim that "the text of a statute" is the only thing that can constitute the relevant legislative act, Pet. 35. As explained below, petitioners err in contending that the text of Section 1885a does not itself embody a focus on the protection of intelligence gathering and national-security information.

But petitioners' blinkered focus on the text of Section 1885a in isolation is inconsistent with general principles of statutory construction, which routinely take account of the other factors considered by the court of appeals here (*i.e.*, the statutory structure and context and the legislative history, Pet. App. 36). Petitioners' unwillingness to look beyond the text of Section 1885a alone is also inconsistent with this Court's nondelegation cases. *Whitman* itself recognized that a previous case had

found a sufficiently intelligible principle "because the customary practices in the area" were "*implicitly* incorporated into the statute." 531 U.S. at 472-473 (discussing *Fahey* v. *Mallonee*, 332 U.S. 245 (1947)) (emphasis added). And the Court has recognized that, for purposes of finding an intelligible principle, ambiguous phrases in the statutory text can "derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." *American Power & Light Co.*, 329 U.S. at 104; see also *Owens*, 531 F.3d at 890 ("[W]hen we review statutes for an intelligible principle * * * , we do not confine ourselves to the isolated phrase in question, but utilize all the tools of statutory construction, including the statutory context and, when appropriate, the factual background of the statute[.]").[11]

b. Applying those principles (on which petitioners do not suggest there is any circuit split), the court of appeals correctly concluded that the intelligible principle governing the certification authority under Section 1885a is to "protect[] intelligence gathering and national security information." Pet. App. 39. The manifest purpose of Section 1885a is to provide "protection of persons assisting the government" (50 U.S.C. Ch. 36, Subch. VII) (Supp. II 2008) (capitalization modified), by creating "Statutory Defenses" (50 U.S.C. 1885a (Supp. II 2008)) for persons who are alleged to have assisted "an element of the intelligence community" pursuant to "a directive" or "written request" by the Attorney Gen-

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[11] *Shivwits Band of Paiute Indians* v. *Utah*, 428 F.3d 966, 973 (10th Cir. 2005) (the proposition "that the 'intelligible principle' must be derived solely from the statutory text, rather than the legislative history, is nowhere to be found in *Whitman*."), cert. denied, 549 U.S. 809 (2006).

eral, the Director of National Intelligence, the Director of the FBI, or a head or deputy head "of an element of the intelligence community." 50 U.S.C. 1885a(a)(1)-(4) (Supp. II 2008). The statute specifically provides that, when filing a certification, the Attorney General may limit public disclosure if he determines that disclosure "would harm the national security of the United States," 50 U.S.C. 1885a(c) (Supp. II 2008), and the district court is required to review information *in camera* and *ex parte* if "classified information" would otherwise "be revealed," 50 U.S.C. 1885a(d) (Supp. II 2008). Petitioners thus err in asserting (Pet. 36) that the intention of protecting intelligence gathering and national-security information is "entirely absent from the statute."

As the court of appeals recognized (Pet. App. 39), the legislative history strongly buttresses the statutory text, structure, and context. The Senate Select Committee on Intelligence explained 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," *Senate Report* 9, and, if litigation were allowed to proceed against those who allegedly assisted in such activities, "the private sector might be unwilling to cooperate with lawful Government requests in the future," and the "possible reduction in intelligence that might result * * * is simply unacceptable for the safety of our Nation," *id.* at 10.

In furthering those ends, Section 1885a builds upon, and is consistent with, several provisions in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the Stored Communications Act of 1986, and the Foreign Intelligence Surveillance Act of 1978; those provisions are expressly mentioned in Section

1885a(a)(1)-(3), and they recognize that telecommunications companies that assist law enforcement or the United States intelligence community should be protected from legal claims arising from that assistance. See 18 U.S.C. 2511(2)(a)(ii)(B), 2703(e); 50 U.S.C. 1805(h) (Supp. II 2008); 50 U.S.C. 1881a(h)(3) (Supp. II 2008).

Although petitioners dispute whether that principle is sufficiently established by the statutory text taken in isolation, they cannot dispute that it is sufficiently intelligible to satisfy the nondelegation doctrine, given the other standards that have passed muster. See, *e.g.*, *Yakus*, 321 U.S. at 426-427 (setting "fair and equitable prices"); *Lichter* v. *United States*, 334 U.S. 742, 785-786 (1948) (preventing "excessive profits"); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225-226 (1943) (regulating as required by "public interest, convenience, or necessity").

Moreover, the legitimacy of the statutory grant of authority here is bolstered by its narrow scope. See *Whitman*, 531 U.S. at 475 ("the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred"). Here, the Attorney General is simply authorized to make certain factual determinations about circumstances that Congress itself has made relevant—a much more limited power than others that this Court has upheld, including, for example, the powers to "set[] air standards that affect the entire national economy," to fix commodity prices during wartime, and to regulate broadcast licensing. *Id.* at 474-475. Here, too, Congress's decision to involve the Attorney General in applying the statutory framework is strengthened because it arises in the context of intelligence activities, where the Executive Branch possesses inherent powers "quite apart from any explicit congres-

sional grant." *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988). As this Court has recognized, when the Executive Branch is acting in an area where it has independent authority, there is less need for "explicit guidance" from Congress. *Loving*, 517 U.S. at 772 (rejecting constitutional challenge predicated on Congress's "fail[ure] to provide guiding principles" to limit the President's discretion to define aggravating factors for capital crimes under the Uniform Code of Military Justice); see also *Owens*, 531 F.3d at 893 ("the shared responsibilities of the Legislative and Executive Branches in foreign relations may permit a wider range of delegations than in other areas").

c. Section 1885a reflects Congress's fundamental policy judgment that burdensome litigation should not proceed against persons for allegedly assisting the intelligence community in the unique historical circumstances after the attacks of September 11, 2001, in detecting and preventing further attacks on the United States, and that such litigation could pose a serious threat to national security. The Attorney General is limited to gathering specified facts and certifying them to a court, which must determine whether the Attorney General's certification is sufficiently supported (by substantial evidence) to require dismissal of the civil action. 50 U.S.C. 1885a(a) and (b)(1) (Supp. II 2008). Under that carefully calibrated statutory framework, the separate spheres of each of the Branches are appropriately preserved. See *Loving*, 517 U.S. at 773 ("Separation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes.").

There is accordingly no need for further review of the court of appeals' decision sustaining the statute's application here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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