**Constitutional Law I**

**Professor Mike Ramsey**

**Spring 2022**

**Supplemental Reading #5: Standing**

Supreme Court of the United States

**MASSACHUSETTS et al., Petitioners,**

**v.**

**ENVIRONMENTAL PROTECTION AGENCY et al.**

No. 05–1120.

Argued Nov. 29, 2006. Decided April 2, 2007.

### 127 S.Ct. 1438, 549 U.S. 497

[STEVENS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0156277701&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), J., delivered the opinion of the Court, in which [KENNEDY](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243105201&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), [SOUTER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0263202201&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), and [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), JJ., joined. [ROBERTS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), C.J., filed a dissenting opinion, in which SCALIA, [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), and [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), JJ., joined. [SCALIA](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254763301&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), J., filed a dissenting opinion, in which [ROBERTS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), C.J., and [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), JJ., joined.

Justice STEVENS delivered the opinion of the Court.

…

Calling global warming “the most pressing environmental challenge of our time,” a group of States, local governments, and private organizations alleged in a petition for certiorari that the Environmental Protection Agency (EPA) has abdicated its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases, including carbon dioxide. Specifically, petitioners asked us to answer two questions concerning the meaning of § 202(a)(1) of the Act: whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the statute.

In response, EPA, supported by 10 intervening States and six trade associations, correctly argued that we may not address those two questions unless at least one petitioner has standing to invoke our jurisdiction under Article III of the Constitution. …

Article III of the Constitution limits federal-court jurisdiction to “Cases” and “Controversies.” Those two words confine “the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.” *Flast v. Cohen,* 392 U.S. 83, 95 (1968). It is therefore familiar learning that no justiciable “controversy” exists when parties seek adjudication of a political question, when they ask for an advisory opinion, or when the question sought to be adjudicated has been mooted by subsequent developments. This case suffers from none of these defects.

The parties' dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court. Congress has moreover authorized this type of challenge to EPA action. See 42 U.S.C. § 7607(b)(1). That authorization is of critical importance to the standing inquiry: “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” [*Lujan,* 504 U.S., at 580](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992106162&pubNum=708&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))  (KENNEDY, J., concurring in part and concurring in judgment). “In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.” [*Ibid.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992106162&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) We will not, therefore, “entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws.” [*Id.,* at 581.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992106162&pubNum=708&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))

EPA maintains that because greenhouse gas emissions inflict widespread harm, the doctrine of standing presents an insuperable jurisdictional obstacle. We do not agree. At bottom, the gist of the question of standing is whether petitioners have such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination. … As Justice KENNEDY explained in his [*Lujan*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992106162&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) concurrence:

While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that the legal questions presented ... will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.

To ensure the proper adversarial presentation, *Lujan* holds that a litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury. However, a litigant to whom Congress has “accorded a procedural right to protect his concrete interests”—here, the right to challenge agency action unlawfully withheld —“can assert that right without meeting all the normal standards for redressability and immediacy,” [*ibid.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992106162&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant. …

… We stress here … the special position and interest of Massachusetts. It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan,* a private individual.

Well before the creation of the modern administrative state, we recognized that States are not normal litigants for the purposes of invoking federal jurisdiction. As Justice Holmes explained in *Georgia v. Tennessee Copper Co.,* 206 U.S. 230 (1907), a case in which Georgia sought to protect its citizens from air pollution originating outside its borders:

“The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of *quasi-*sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.”

Just as Georgia's independent interest “in all the earth and air within its domain” supported federal jurisdiction a century ago, so too does Massachusetts' well-founded desire to preserve its sovereign territory today. … That Massachusetts does in fact own a great deal of the “territory alleged to be affected” only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power.

…

***The Injury***

The harms associated with climate change are serious and well recognized. Indeed, the [National Research Council] Report itself—which EPA regards as an “objective and independent assessment of the relevant science,” —identifies a number of environmental changes that have already inflicted significant harms, including “the global retreat of mountain glaciers, reduction in snow-cover extent, the earlier spring melting of ice on rivers and lakes, [and] the accelerated rate of rise of sea levels during the 20th century relative to the past few thousand years ....” NRC Report 16.

Petitioners allege that this only hints at the environmental damage yet to come. According to the climate scientist Michael MacCracken, “qualified scientific experts involved in climate change research” have reached a “strong consensus” that global warming threatens (among other things) a precipitate rise in sea levels by the end of the century, “severe and irreversible changes to natural ecosystems,” a “significant reduction in water storage in winter snowpack in mountainous regions with direct and important economic consequences,” and an increase in the spread of disease. He also observes that rising ocean temperatures may contribute to the ferocity of hurricanes.

That these climate-change risks are “widely shared” does not minimize Massachusetts' interest in the outcome of this litigation. These rising seas have already begun to swallow Massachusetts' coastal land. Because the Commonwealth owns a substantial portion of the state's coastal property, it has alleged a particularized injury in its capacity as a landowner. The severity of that injury will only increase over the course of the next century: If sea levels continue to rise as predicted, one Massachusetts official believes that a significant fraction of coastal property will be either permanently lost through inundation or temporarily lost through periodic storm surge and flooding events. Remediation costs alone, petitioners allege, could run well into the hundreds of millions of dollars.

***Causation***

EPA does not dispute the existence of a causal connection between manmade greenhouse gas emissions and global warming. At a minimum, therefore, EPA's refusal to regulate such emissions “contributes” to Massachusetts' injuries.

EPA nevertheless maintains that its decision not to regulate greenhouse gas emissions from new motor vehicles contributes so insignificantly to petitioners' injuries that the Agency cannot be haled into federal court to answer for them. For the same reason, EPA does not believe that any realistic possibility exists that the relief petitioners seek would mitigate global climate change and remedy their injuries. That is especially so because predicted increases in greenhouse gas emissions from developing nations, particularly China and India, are likely to offset any marginal domestic decrease.

But EPA overstates its case. Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action. Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed. That a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law.

And reducing domestic automobile emissions is hardly a tentative step. Even leaving aside the other greenhouse gases, the United States transportation sector emits an enormous quantity of carbon dioxide into the atmosphere—according to the MacCracken affidavit, more than 1.7 billion metric tons in 1999 alone. That accounts for more than 6% of worldwide carbon dioxide emissions.  To put this in perspective: Considering just emissions from the transportation sector, which represent less than one-third of this country's total carbon dioxide emissions, the United States would still rank as the third-largest emitter of carbon dioxide in the world, outpaced only by the European Union and China. Judged by any standard, U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming.

***The Remedy***

While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce*it. Because of the enormity of the potential consequences associated with manmade climate change, the fact that the effectiveness of a remedy might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevant. Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.

…

In sum—at least according to petitioners' uncontested affidavits—the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek. We therefore hold that petitioners have standing to challenge EPA's denial of their rulemaking petition.

[On the merits, the Court then held that EPA wrongly refused to regulate greenhouse emissions.]

Chief Justice [ROBERTS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom Justice [SCALIA](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254763301&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), and Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) join, dissenting.

Global warming may be a “crisis,” even “the most pressing environmental problem of our time.” Indeed, it may ultimately affect nearly everyone on the planet in some potentially adverse way, and it may be that governments have done too little to address it. It is not a problem, however, that has escaped the attention of policymakers in the Executive and Legislative Branches of our Government, who continue to consider regulatory, legislative, and treaty-based means of addressing global climate change.

Apparently dissatisfied with the pace of progress on this issue in the elected branches, petitioners have come to the courts claiming broad-ranging injury, and attempting to tie that injury to the Government's alleged failure to comply with a rather narrow statutory provision. I would reject these challenges as nonjusticiable. Such a conclusion involves no judgment on whether global warming exists, what causes it, or the extent of the problem. Nor does it render petitioners without recourse. This Court's standing jurisprudence simply recognizes that redress of grievances of the sort at issue here “is the function of Congress and the Chief Executive,” not the federal courts. [*Lujan v. Defenders of Wildlife,* 504 U.S. 555, 576 (1992)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992106162&pubNum=708&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). I would vacate the judgment below and remand for dismissal of the petitions for review.

**I**

Article III, § 2, of the Constitution limits the federal judicial power to the adjudication of “Cases” and “Controversies.” If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so. Standing to sue is part of the common understanding of what it takes to make a justiciable case, and has been described as “an essential and unchanging part of the case-or-controversy requirement of Article III, *Defenders of Wildlife, supra,* at 560.

Our modern framework for addressing standing is familiar: “A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.”  [*Allen v. Wright,* 468 U.S. 737, 751 (1984)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984132352&pubNum=708&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). Applying that standard here, petitioners bear the burden of alleging an injury that is fairly traceable to the Environmental Protection Agency's failure to promulgate new motor vehicle greenhouse gas emission standards, and that is likely to be redressed by the prospective issuance of such standards.

Before determining whether petitioners can meet this familiar test, however, the Court changes the rules. It asserts that “States are not normal litigants for the purposes of invoking federal jurisdiction,” and that given “Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to *special solicitude* in our standing analysis.” *Ante,* at 1454, 1455 (emphasis added). Relaxing Article III standing requirements because asserted injuries are pressed by a State, however, has no basis in our jurisprudence, and support for any such “special solicitude” is conspicuously absent from the Court's opinion. …

The Court has to go back a full century in an attempt to justify its novel standing rule, but even there it comes up short. The Court's analysis hinges on [*Georgia v. Tennessee Copper Co.,* 206 U.S. 230 (1907)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1907100408&pubNum=708&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))—a case that did indeed draw a distinction between a State and private litigants, but solely with respect to available remedies. The case had nothing to do with Article III standing. …

In contrast to the present case, there was no question in [*Tennessee Copper*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1907100408&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))about Article III injury…. [*Tennessee Copper*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1907100408&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) has since stood for nothing more than a State's right, in an original jurisdiction action, to sue in a representative capacity as *parens patriae* [for private landholders]. …

**II**

It is not at all clear how the Court's “special solicitude” for Massachusetts plays out in the standing analysis, except as an implicit concession that petitioners cannot establish standing on traditional terms. But the status of Massachusetts as a State cannot compensate for petitioners' failure to demonstrate injury in fact, causation, and redressability.

When the Court actually applies the three-part test, it focuses … on the Commonwealth's asserted loss of coastal land as the injury in fact. If petitioners rely on loss of land as the Article III injury, however, they must ground the rest of the standing analysis in that specific injury. That alleged injury must be “concrete and particularized,” [*Defenders of Wildlife,* 504 U.S., at 560,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992106162&pubNum=708&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and “distinct and palpable,” [*Allen,* 468 U.S., at 751](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984132352&pubNum=708&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). Central to this concept of “particularized” injury is the requirement that a plaintiff be affected in a “personal and individual way,” [*Defenders of Wildlife,*504 U.S., at 560, n. 1,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992106162&pubNum=708&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and seek relief that “directly and tangibly benefits him” in a manner distinct from its impact on “the public at large,” [*id.,* at 573–574.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992106162&pubNum=708&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))

The very concept of global warming seems inconsistent with this particularization requirement. Global warming is a phenomenon harmful to humanity at large, and concurring in judgment), and the redress petitioners seek is focused no more on them than on the public generally—it is literally to change the atmosphere around the world….

If petitioners' particularized injury is loss of coastal land, it is also that injury that must be “actual or imminent, not conjectural or hypothetical,” “real and immediate,” and “certainly impending.”

As to “actual” injury, the Court observes that “global sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming” and that “[t]hese rising seas have already begun to swallow Massachusetts' coastal land.” *Ante,* at 1456. But none of petitioners' declarations supports that connection. One declaration states that “a rise in sea level due to climate change is occurring on the coast of Massachusetts, in the metropolitan Boston area,” but there is no elaboration. And the declarant goes on to identify a “significan[t]” *non*-global-warming cause of Boston's rising sea level: land subsidence. Thus, aside from a single conclusory statement, there is nothing in petitioners' 43 standing declarations and accompanying exhibits to support an inference of actual loss of Massachusetts coastal land from 20th-century global sea level increases. It is pure conjecture.

The Court's attempts to identify “imminent” or “certainly impending” loss of Massachusetts coastal land fares no better. One of petitioners' declarants predicts global warming will cause sea level to rise by 20 to 70 centimeters *by the year 2100*. Another uses a computer modeling program to map the Commonwealth's coastal land and its current elevation, and calculates that the high-end estimate of sea level rise would result in the loss of significant state-owned coastal land. But the computer modeling program has a conceded average error of about 30 centimeters and a maximum observed error of 70 centimeters.  As an initial matter, if it is possible that the model underrepresents the elevation of coastal land to an extent equal to or in excess of the projected sea level rise, it is difficult to put much stock in the predicted loss of land. But even placing that problem to the side, accepting a century-long time horizon and a series of compounded estimates renders requirements of imminence and immediacy utterly toothless. Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be *certainly impending* to constitute injury in fact.

**III**

Petitioners' reliance on Massachusetts's loss of coastal land as their injury in fact for standing purposes creates insurmountable problems for them with respect to causation and redressability. To establish standing, petitioners must show a causal connection between that specific injury and the lack of new motor vehicle greenhouse gas emission standards, and that the promulgation of such standards would likely redress that injury. As is often the case, the questions of causation and redressability overlap.  …

Petitioners view the relationship between their injuries and EPA's failure to promulgate new motor vehicle greenhouse gas emission standards as simple and direct: Domestic motor vehicles emit carbon dioxide and other greenhouse gases. Worldwide emissions of greenhouse gases contribute to global warming and therefore also to petitioners' alleged injuries. Without the new vehicle standards, greenhouse gas emissions—and therefore global warming and its attendant harms—have been higher than they otherwise would have been; once EPA changes course, the trend will be reversed.

The Court ignores the complexities of global warming, and does so by now disregarding the “particularized” injury it relied on in step one, and using the dire nature of global warming itself as a bootstrap for finding causation and redressability. First, it is important to recognize the extent of the emissions at issue here. Because local greenhouse gas emissions disperse throughout the atmosphere and remain there for anywhere from 50 to 200 years, it is global emissions data that are relevant. According to one of petitioners' declarations, domestic motor vehicles contribute about 6 percent of global carbon dioxide emissions and 4 percent of global greenhouse gas emissions. The amount of global emissions at issue here is smaller still; § 202(a)(1) of the Clean Air Act covers only *new*motor vehicles and *new* motor vehicle engines, so petitioners' desired emission standards might reduce only a fraction of 4 percent of global emissions.

This gets us only to the relevant greenhouse gas emissions; linking them to global warming and ultimately to petitioners' alleged injuries next requires consideration of further complexities. As EPA explained in its denial of petitioners' request for rulemaking,

“predicting future climate change necessarily involves a complex web of economic and physical factors including: our ability to predict future global anthropogenic emissions of [greenhouse gases] and aerosols; the fate of these emissions once they enter the atmosphere (e.g., what percentage are absorbed by vegetation or are taken up by the oceans); the impact of those emissions that remain in the atmosphere on the radiative properties of the atmosphere; changes in critically important climate feedbacks (e.g., changes in cloud cover and ocean circulation); changes in temperature characteristics (e.g., average temperatures, shifts in daytime and evening temperatures); changes in other climatic parameters (e.g., shifts in precipitation, storms); and ultimately the impact of such changes on human health and welfare (e.g., increases or decreases in agricultural productivity, human health impacts).”

Petitioners are never able to trace their alleged injuries back through this complex web to the fractional amount of global emissions that might have been limited with EPA standards. In light of the bit-part domestic new motor vehicle greenhouse gas emissions have played in what petitioners describe as a 150–year global phenomenon, and the myriad additional factors bearing on petitioners' alleged injury—the loss of Massachusetts coastal land—the connection is far too speculative to establish causation.

**IV**

Redressability is even more problematic. To the tenuous link between petitioners' alleged injury and the indeterminate fractional domestic emissions at issue here, add the fact that petitioners cannot meaningfully predict what will come of the 80 percent of global greenhouse gas emissions that originate outside the United States. As the Court acknowledges, “developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century,” *ante,* at 1458, so the domestic emissions at issue here may become an increasingly marginal portion of global emissions, and any decreases produced by petitioners' desired standards are likely to be overwhelmed many times over by emissions increases elsewhere in the world.

Petitioners offer declarations attempting to address this uncertainty, contending that “[i]f the U.S. takes steps to reduce motor vehicle emissions, other countries are very likely to take similar actions regarding their own motor vehicles using technology developed in response to the U.S. program.” In other words, do not worry that other countries will contribute far more to global warming than will U.S. automobile emissions; someone is bound to invent something, and places like the People's Republic of China or India will surely require use of the new technology, regardless of cost. The Court previously has explained that when the existence of an element of standing “depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict,” a party must present facts supporting an assertion that the actor will proceed in such a manner. [*Defenders of Wildlife,* 504 U.S., at 562](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992106162&pubNum=708&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). The declarations' conclusory (not to say fanciful) statements do not even come close.

No matter, the Court reasons, because *any* decrease in domestic emissions will “slow the pace of global emissions increases, no matter what happens elsewhere.” *Ante,* at 1458. Every little bit helps, so Massachusetts can sue over any little bit.

The Court's sleight of hand is in failing to link up the different elements of the three-part standing test. What must be *likely* to be redressed is the particular injury in fact. The injury the Court looks to is the asserted loss of land. The Court contends that regulating domestic motor vehicle emissions will reduce carbon dioxide in the atmosphere, *and therefore* redress Massachusetts's injury. But even if regulation *does* reduce emissions—to some indeterminate degree, given events elsewhere in the world—the Court never explains why that makes it *likely* that the injury in fact—the loss of land—will be redressed. Schoolchildren know that a kingdom might be lost “all for the want of a horseshoe nail,” but “likely” redressability is a different matter. The realities make it pure conjecture to suppose that EPA regulation of new automobile emissions will *likely*prevent the loss of Massachusetts coastal land. …

The good news is that the Court's “special solicitude” for Massachusetts limits the future applicability of the diluted standing requirements applied in this case. The bad news is that the Court's self-professed relaxation of those Article III requirements has caused us to transgress “the proper—and properly limited—role of the courts in a democratic society.” [*Allen,* 468 U.S., at 750](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984132352&pubNum=708&originatingDoc=I2f0e77afe11d11dbaba7d9d29eb57eff&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

I respectfully dissent.

[Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, wrote a separate dissent addressing the merits.]

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Supreme Court of the United States

**James R. CLAPPER, Jr., Director of National Intelligence, et al., Petitioners**

**v.**

**AMNESTY INTERNATIONAL USA et al.**

No. 11–1025.

Argued Oct. 29, 2012. Decided Feb. 26, 2013.

133 S.Ct. 1138, 568 U.S. 398

[ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), J., delivered the opinion of the Court, in which [ROBERTS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), C.J., and SCALIA, [KENNEDY](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243105201&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), and [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), JJ., joined. [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), J., filed a dissenting opinion, in which [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), and [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), JJ., joined.

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) delivered the opinion of the Court.

Section 702 of the Foreign Intelligence Surveillance Act of 1978, [50 U.S.C. § 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), allows the Attorney General and the Director of National Intelligence to acquire foreign intelligence information by jointly authorizing the surveillance of individuals who are not “United States persons” and are reasonably believed to be located outside the United States. Before doing so, the Attorney General and the Director of National Intelligence normally must obtain the Foreign Intelligence Surveillance Court's approval. Respondents are United States persons whose work, they allege, requires them to engage in sensitive international communications with individuals who they believe are likely targets of surveillance under [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). Respondents seek a declaration that [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) is unconstitutional, as well as an injunction against [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))-authorized surveillance. The question before us is whether respondents have Article III standing to seek this prospective relief.

Respondents assert that they can establish injury in fact because there is an objectively reasonable likelihood that their communications will be acquired under [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) at some point in the future. But respondents' theory of *future*injury is too speculative to satisfy the well-established requirement that threatened injury must be “certainly impending.”  And even if respondents could demonstrate that the threatened injury is certainly impending, they still would not be able to establish that this injury is fairly traceable to [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). As an alternative argument, respondents contend that they are suffering *present* injury because the risk of [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))-authorized surveillance already has forced them to take costly and burdensome measures to protect the confidentiality of their international communications. But respondents cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending. We therefore hold that respondents lack [Article III](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOARTIIIS2CL1&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) standing. …

**II**

Article III of the Constitution limits federal courts' jurisdiction to certain “Cases” and “Controversies.” As we have explained, no principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue.

The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches. In keeping with the purpose of this doctrine, our standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional. Relaxation of standing requirements is directly related to the expansion of judicial power, and we have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs.

To establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.  [*Lujan v.*] [*Defenders of Wildlife,* 504 U.S., at 560–561.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992106162&pubNum=708&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending. Thus, we have repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible*future injury are not sufficient.

**III**

**A**

Respondents assert that they can establish injury in fact that is fairly traceable to [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) because there is an objectively reasonable likelihood that their communications with their foreign contacts will be intercepted under [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) at some point in the future. This argument fails. … [R]espondents' argument rests on their highly speculative fear that: (1) the Government will decide to target the communications of non-U.S. persons with whom they communicate; (2) in doing so, the Government will choose to invoke its authority under [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) rather than utilizing another method of surveillance; (3) the Article III judges who serve on the Foreign Intelligence Surveillance Court will conclude that the Government's proposed surveillance procedures satisfy [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))'s many safeguards and are consistent with the Fourth Amendment; (4) the Government will succeed in intercepting the communications of respondents' contacts; and (5) respondents will be parties to the particular communications that the Government intercepts. As discussed below, respondents' theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending. Moreover, even if respondents could demonstrate injury in fact, the second link in the above-described chain of contingencies—which amounts to mere speculation about whether surveillancewould be under [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) or some other authority—shows that respondents cannot satisfy the requirement that any injury in fact must be fairly traceable to [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

First, it is speculative whether the Government will imminently target communications to which respondents are parties. [Section 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) expressly provides that respondents, who are U.S. persons, cannot be targeted for surveillance under [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). Accordingly, it is no surprise that respondents fail to offer any evidence that their communications have been monitored under [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), a failure that substantially undermines their standing theory. …

Instead, respondents merely speculate and make assumptions about whether their communications with their foreign contacts will be acquired under [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). For example, journalist Christopher Hedges states: “I have no choice but to *assume* that any of my international communications *may* be subject to government surveillance, and I have to make decisions ... in light of that *assumption*.” Similarly, attorney Scott McKay asserts that, “[b]ecause of the [FISA Amendments Act], we now have to *assume* that every one of our international communications *may*be monitored by the government.”  “The party invoking federal jurisdiction bears the burden of establishing” standing—and, at the summary judgment stage, such a party “can no longer rest on ... mere allegations, but must set forth by affidavit or other evidence specific facts.” [*Defenders of Wildlife,* 504 U.S., at 561](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992106162&pubNum=708&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). Respondents, however, have set forth no specific facts demonstrating that the communications of their foreign contacts will be targeted. Moreover, because [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) at most *authorizes*—but does not *mandate*or *direct*—the surveillance that respondents fear, respondents' allegations are necessarily conjectural.  Simply put, respondents can only speculate as to how the Attorney General and the Director of National Intelligence will exercise their discretion in determining which communications to target.

Second, even if respondents could demonstrate that the targeting of their foreign contacts is imminent, respondents can only speculate as to whether the Government will seek to use [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))-authorized surveillance (rather than other methods) to do so. The Government has numerous other methods of conducting surveillance, none of which is challenged here. …

Third, even if respondents could show that the Government will seek the Foreign Intelligence Surveillance Court's authorization to acquire the communications ofrespondents' foreign contacts under [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), respondents can only speculate as to whether that court will authorize such surveillance. In the past, we have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment. …

Fourth, even if the Government were to obtain the Foreign Intelligence Surveillance Court's approval to target respondents' foreign contacts under [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), it is unclear whether the Government would succeed in acquiring the communications of respondents' foreign contacts. And fifth, even if the Government were to conduct surveillance of respondents' foreign contacts, respondents can only speculate as to whether *their own communications* with their foreign contacts would be incidentally acquired.

In sum, respondents' speculative chain of possibilities does not establish that injury based on potential future surveillance is certainly impending or is fairly traceable to [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

**B**

Respondents' alternative argument—namely, that they can establish standing based on the measures that they have undertaken to avoid [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))-authorized surveillance—fares no better. Respondents assert that they are suffering ongoing injuries that are fairly traceable to [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) because the risk of surveillance under [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) requires them to take costly and burdensome measures to protect the confidentiality of their communications. Respondents claim, for instance, that the threat of surveillance sometimes compels them to avoid certain e-mail and phone conversations, to “tal[k] in generalities rather than specifics,” or to travel so that they can have in-person conversations. …

Respondents' contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing—because the harm respondents seek to avoid is not certainly impending. In other words, respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending. Any ongoing injuries that respondents are suffering are not fairly traceable to [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

If the law were otherwise, an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear. … Thus, allowing respondents to bring this action based on costs they incurred in response to a speculative threat would be tantamount to accepting a repackaged version of respondents' first failed theory of standing.

Because respondents do not face a threat of certainly impending interception under [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), the costs that they have incurred to avoid surveillance are simply the product of their fear of surveillance … [R]espondents' self-inflicted injuries are not fairly traceable to the Government's purported activities under [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), and their subjective fear of surveillance does not give rise to standing.

**IV**

**A**

…

**B**

Respondents also suggest that they should be held to have standing because otherwise the constitutionality of [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) could not be challenged. It would be wrong, they maintain, to “insulate the government's surveillance activities from meaningful judicial review.” Respondents' suggestion is both legally and factually incorrect. First, the assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.

Second, our holding today by no means insulates [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) from judicial review. As described above, Congress created a comprehensive scheme in which the Foreign Intelligence Surveillance Court evaluates the Government's certifications, targeting procedures, and minimization procedures—including assessing whether the targeting and minimization procedures comport with the Fourth Amendment.  Any dissatisfaction that respondents may have about the Foreign Intelligence Surveillance Court's rulings—or the congressional delineation of that court's role—is irrelevant to our standing analysis.

Additionally, if the Government intends to use or disclose information obtained or derived from a [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) acquisition in judicial or administrative proceedings, it must provide advance notice of its intent, and the affected person may challenge the lawfulness of the acquisition. Thus, if the Government were to prosecute one of respondent-attorney's foreign clients using [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))-authorized surveillance, the Government would be required to make a disclosure. … In such a situation, unlike in the present case, it would at least be clear that the Government had acquired the foreign client's communications using [§ 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))-authorized surveillance.

…

We hold that respondents lack Article III standing because they cannot demonstrate that the future injury they purportedly fear is certainly impending and because they cannot manufacture standing by incurring costs in anticipation of non-imminent harm. We therefore reverse the judgment of the Second Circuit and remand the case for further proceedings consistent with this opinion.

Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), and Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) join, dissenting.

The plaintiffs' standing depends upon the likelihood that the Government, acting under the authority of [50 U.S.C. § 1881a](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), will harm them by intercepting at least some of their private, foreign, telephone, or e-mail conversations. In my view, this harm is not “speculative.” Indeed it is as likely to take place as are most future events that commonsense inference and ordinary knowledge of human nature tell us will happen. This Court has often found the occurrence of similar future events sufficiently certain to support standing. I dissent from the Court's contrary conclusion.

**I**

Article III specifies that the “judicial Power” of the United States extends only to actual “Cases” and “Controversies.” It thereby helps to ensure that the legal questions presented to the federal courts will not take the form of abstract intellectual problems resolved in the “rarified atmosphere of a debating society” but instead those questions will be presented in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.

The Court has recognized that the precise boundaries of the “case or controversy” requirement are matters of degree not discernible by any precise test. At the same time, the Court has developed a subsidiary set of legal rules that help to determine when the Constitution's requirement is met. Thus, a plaintiff must have “standing” to bring a legal claim. And a plaintiff has that standing, the Court has said, only if the action or omission that the plaintiff challenges has caused, or will cause, the plaintiff to suffer an injury that is “concrete and particularized,” “actual or imminent,” and “redress[able] by a favorable decision.” [*Lujan*].

No one here denies that the Government's interception of a private telephone or e-mail conversation amounts to an injury that is “concrete and particularized.” Moreover, the plaintiffs, respondents here, seek as relief a judgment declaring unconstitutional (and enjoining enforcement of) a statutory provision authorizing those interceptions; and, such a judgment would redress the injury by preventing it. Thus, the basic question is whether the injury, *i.e.,*the interception, is “actual or imminent.” …

**III**

Several considerations, based upon the record along with commonsense inferences, convince me that there is a very high likelihood that Government, *acting under the authority of*[*§ 1881a*](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=50USCAS1881A&originatingDoc=I4b728737801d11e28a21ccb9036b2470&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))*,* will intercept at least some of the communications just described. First, the plaintiffs have engaged, and continue to engage, in electronic communications of a kind that the 2008 amendment, but not the prior Act, authorizes the Government to intercept. These communications include discussions with family members of those detained at Guantanamo, friends and acquaintances of those persons, and investigators, experts and others with knowledge of circumstances related to terrorist activities. These persons are foreigners located outside the United States. … And the plaintiffs state that they exchange with these persons “foreign intelligence information,” defined to include information that “relates to” “international terrorism” and “the national defense or the security of the United States.”

Second, the plaintiffs have a strong *motive*to engage in, and the Government has a strong *motive* to listen to, conversations of the kind described. A lawyer representing a client normally seeks to learn the circumstances surrounding the crime (or the civil wrong) of which the client is accused. A fair reading of the affidavit of Scott McKay, for example, taken together with elementary considerations of a lawyer's obligation to his client, indicates that McKay will engage in conversations that concern what suspected foreign terrorists, such as his client, have done; in conversations that concern his clients' families, colleagues, and contacts; in conversations that concern what those persons (or those connected to them) have said and done, at least in relation to terrorist activities; in conversations that concern the political, social, and commercial environments in which the suspected terrorists have lived and worked; and so forth. Journalists and human rights workers have strong similar motives to conduct conversations of this kind. …

At the same time, the Government has a strong motive to conduct surveillance of conversations that contain material of this kind. The Government, after all, seeks to learn as much as it can reasonably learn about suspected terrorists (such as those detained at Guantanamo), as well as about their contacts and activities, along with those of friends and family members. …

Third, the Government's *past behavior* shows that it has sought, and hence will in all likelihood continue to seek, information about alleged terrorists and detainees through means that include surveillance of electronic communications. As just pointed out, plaintiff Scott McKay states that the Government (under the authority of the pre–2008 law) “intercepted some 10,000 telephone calls and 20,000 email communications involving [his client] Mr. Al–Hussayen.”

Fourth, the Government has the *capacity* to conduct electronic surveillance of the kind at issue. …

Consequently, we need only assume that the Government is doing its job (to find out about, and combat, terrorism) in order to conclude that there is a high probability that the Government will intercept at least some electronic communication to which at least some of the plaintiffs are parties. The majority is wrong when it describes the harm threatened plaintiffs as “speculative.”

**IV**

**A**

The majority more plausibly says that the plaintiffs have failed to show that the threatened harm is “*certainly impending*.”  But, as the majority appears to concede, *certainty*is not, and never has been, the touchstone of standing. The future is inherently uncertain. Yet federal courts frequently entertain actions for injunctions and for declaratory relief aimed at preventing future activities that are reasonably likely or highly likely, but not absolutely certain, to take place. And that degree of certainty is all that is needed to support standing here. …

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_