No. 09-1561

In the Supreme Court of the United States

BRANDON MAYFIELD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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 correctly held that petitioners lack Article III standing to seek a declaratory judgment regarding the constitutionality of provisions of the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. 1801 *et seq.*, where petitioners' only asserted injury is the government's possession of materials derived from the fruits of FISA surveillance and searches, a declaratory judgment would not require the government to divest itself of those derivative materials, and petitioners have released any claim to any other relief as part of a settlement agreement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 58a-74a) is reported at 599 F.3d 964. The opinion of the district court (Pet. App. 1a-40a) is reported at 504 F. Supp. 2d 1023.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 2010. A petition for rehearing was denied on that date (Pet. App. 58a-59a). The petition for a writ of certiorari was filed on June 22, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In March 2004, terrorists detonated bombs in Madrid, Spain, killing nearly 200 people. Spanish investigators sent the Federal Bureau of Investigation (FBI)

fingerprints found on items connected to the bombers. The FBI erroneously concluded that one of the fingerprints belonged to petitioner Brandon Mayfield (Mayfield), an American citizen who lives in Oregon. In subsequent proceedings, an independent fingerprint expert selected by Mayfield and appointed by the district court handling the matter made the same erroneous identification. Pet. App. 61a-63a.

The FBI sought and obtained judicial orders authorizing electronic surveillance and physical searches of Mayfield's home and office. Pet. App. 62a. The orders were issued under the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. 1801 *et seq*. FISA establishes a number of prerequisites that must be satisfied before the Foreign Intelligence Surveillance Court may authorize electronic surveillance and physical searches. Among other things, the court must find probable cause to believe that the target of the surveillance or search is a foreign power or agent of a foreign power, and that the foreign power or agent is using any facilities or places to be surveilled and owns, uses, or possesses any property to be searched. 50 U.S.C. 1805(a)(2), 1824(a)(2) (Supp. II 2008). In addition, the government must certify, *inter alia*, that the collection of foreign intelligence information is a "significant purpose" of the surveillance or search. See 50 U.S.C. 1804(a)(6)(B), 1823(a)(6)(B) (Supp. II 2008). The significant-purpose standard was added to FISA in 2001 by the USA PATRIOT Act. See Pub. L. No. 107-56, § 218, 115 Stat. 291.

After the execution of the FISA orders, Mayfield was arrested and held in federal custody for two weeks as a material witness in a grand jury investigation. While Mayfield was being held, the Spanish investigators de-

termined that the fingerprint in question belonged to an Algerian terrorist. Mayfield was thereupon released from custody. Mayfield was not charged with a criminal offense. Pet. App. 63a.

2. Mayfield, his wife, and children (collectively, petitioners) filed suit against the United States and several FBI officials in the District of Oregon. Petitioners sought damages for unlawful arrest and imprisonment and unlawful searches and seizures. They also sought declaratory and injunctive relief against the Department of Justice and the FBI regarding the court-authorized surveillance and physical searches under FISA. Pet. App. 63a-64a.

a. The parties eventually negotiated (and the district court approved) a settlement agreement which resolved all but one of the issues in this case. Pet. App. 75a-83a. The government agreed to: (1) pay petitioners two million dollars; (2) apologize to petitioners; (3) return copies of "material witness materials"; and (4) destroy the "FISA take"—*i.e.,* the intercepts and materials obtained by the FBI pursuant to the FISA-authorized surveillance and searches targeting Mayfield. *Id.* at 76a-77a.[1] The agreement specifically defined the government's obligation to destroy or otherwise dispose of such materials as not extending to any "derivative FISA materials"—*i.e.*, materials derived directly or indirectly

[1] For purposes of the settlement agreement, "FISA take" is specifically defined as: (1) "the communications intercepts that were acquired by the FBI pursuant to the FISA electronic surveillance authority targeting Brandon Mayfield" and (2) "the materials that were seized or reproduced by the FBI pursuant to the FISA physical search authority targeting Brandon Mayfield." Pet. App. 78a. The "material witness materials" related to non-FISA searches conducted in connection with the material witness proceeding. *Ibid.*

from the FISA take. *Id.* at 78a.[2] It is undisputed that the government has performed all of its obligations under the settlement agreement.

In return for these undertakings, petitioners released all but one specified claim: the claim that "50 U.S.C. 1804 (relating to electronic surveillance under the Foreign Intelligence Surveillance Act) and 50 U.S.C. 1823 (relating to physical searches under such Act) violate the Fourth Amendment on their face." Pet. App. 79a-80a. The settlement agreement stated that that is "the sole claim that is not released as part of th[e] settlement and that is in issue in [the] Amended Complaint." *Id.* at 79a.

Under the court-approved agreement, the only relief that petitioners may seek on that remaining claim is a declaratory judgment that the challenged provisions violate the Fourth Amendment. Pet. App. 80a. The agreement thus expressly precludes the entry of any injunctive relief or damages against the government. *Id.* at 76a. The government agreed that, if the district court were to enter an adverse declaratory judgment with respect to the constitutionality of Section 1804 or Section 1823, and that judgment were to become final and not subject to further review, the government would "not use such provision(s) with respect to" petitioners—*i.e.*, it would not subject petitioners to any further electronic surveillance or physical searches on the basis of those statutory provisions. *Id.* at 80a.

The settlement agreement provided that petitioners would file their amended complaint to litigate their re-

[2] The agreement defines "derivative FISA materials" as "[a]ny materials, in whatever form or place, derived directly or indirectly from or related to the FISA take * * * that are not included within the * * * definition" of "FISA take." Pet. App. 78a.

maining Fourth Amendment claim. Pet. App. 80a. That complaint (*id.* at 84a-93a) does not allege that petitioners are at risk of being subjected to electronic surveillance or physical searches in the future. The settlement agreement further provided that the United States could raise any defenses and arguments in its opposition to petitioners' claim, including, but not limited to, lack of jurisdiction. *Id.* at 80a.

b. After the district court approved the settlement agreement, petitioners filed the agreed-upon amended complaint. Pet. App. 84a-93a. In accordance with the settlement, the amended complaint claimed only that 50 U.S.C. 1804 and 1823 violate the Fourth Amendment "on their face" and disavowed any challenge to the provisions "as applied in respect to [petitioners]." Pet. App. 85a, 91a-92a. More specifically, petitioners argued that FISA's significant-purpose standard is facially unconstitutional in the absence of a showing of probable cause to believe that a FISA-authorized surveillance or search will produce evidence of a crime.

The United States moved to dismiss the amended complaint for want of Article III jurisdiction, arguing that petitioners lacked standing and that their claim was not ripe. Both parties also filed cross-motions for summary judgment.

c. The district court denied the government's motion to dismiss and granted summary judgment to petitioners. Pet. App. 1a-40a.

Before reaching the merits, the district court held that petitioners possessed Article III standing to pursue their facial Fourth Amendment claim. Pet. App. 19a-23a. The court concluded that the government's ongoing possession of derivative FISA materials constituted a cognizable Article III injury-in-fact. *Id.* at 20a-21a. The

court also concluded that petitioners' claim for declaratory relief satisfies Article III's redressibility requirement because "it is reasonable to assume that the Executive Branch of the government will act lawfully and make all reasonable efforts to destroy the derivative materials when a final declaration of the unconstitutionality of the challenged provisions is issued." *Id.* at 21a.

The district court proceeded to declare 50 U.S.C. 1804 and 1823 facially unconstitutional under the Fourth Amendment. Pet. App. 39a.[3] As contemplated by the settlement agreement, the court did not enter any injunctive relief.

3. The court of appeals reversed. Pet. App. 58a-74a. The court of appeals held that petitioners lacked the Article III standing necessary to pursue their claim. *Id.* at 66a-74a.

The court of appeals agreed with the district court that the government's ongoing possession of the derivative FISA materials constituted a cognizable Article III injury. Pet. App. 69a-70a. However, the court of appeals concluded that a declaratory judgment regarding the facial constitutionality of 50 U.S.C. 1804 and 1823—the only relief available to petitioners under the terms of the settlement agreement—would not redress that injury. Pet. App. 71a-74a.

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[3] Every other court to decide the issue, including the FISA Court of Review, has sustained the facial constitutionality of the provisions at issue in this case. See, *e.g.*, *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002); *In re Directives Pursuant to Section 105B of the FISA*, 551 F.3d 1004 (FISA Ct. Rev. 2008); *United States* v. *Wen*, 477 F.3d 896, 898-899 (7th Cir. 2007); *United States* v. *Damrah*, 412 F.3d 618, 625 (6th Cir. 2005); *United States* v. *Abu-Jihaad*, 531 F. Supp. 2d 299, 304 (D. Conn. 2008); *United States* v. *Mubayyid*, 521 F. Supp. 2d 125, 139-141 (D. Mass. 2007); *United States* v. *Holy Land Found. for Relief & Dev.*, No. 3:04-CR-240-G, 2007 WL 2011319 (N.D. Tex. July 11, 2007).

The court of appeals explained that the use of material seized in violation of the Fourth Amendment "does not *per se* violate the Constitution." Pet. App. 71a (citing, *inter alia*, *Pennsylvania Bd. of Probation & Parole* v. *Scott*, 524 U.S. 357, 362 (1998)). The court thus reasoned that a declaratory judgment that FISA's significant-purpose standard violates the Fourth Amendment "would [not] make it unlawful for the government to continue to retain the derivative materials" and would not require the government "to destroy or otherwise abandon the materials." *Id.* at 71a-72a. In other words, "[t]he government will not be required [by a declaratory judgment] to act in any way that will redress [petitioners'] past injuries or prevent likely future injuries." *Id.* at 72a. The court therefore held that, "in light of the unique circumstances of this case"—where petitioners have "bargained away all * * * forms of relief" other than a declaratory judgment and any available declaration would place the government "under no legal obligation" to turn over or destroy the derivative materials—petitioners failed to satisfy the redressibility prong of Article III's standing test. *Id.* at 73a-74a.

ARGUMENT

The court of appeals' conclusion that petitioners lack Article III standing is correct and does not conflict with any decision of this Court or any other court of appeals. That jurisdictional ruling is, by its very terms, a *sui generis* one that rests on "the unique circumstances of this case." Pet. App. 73a. No further review of that fact-bound ruling is warranted.

1. A plaintiff must establish his Article III standing to sue by carrying the burden of showing that: (1) he has suffered a "concrete and particularized" injury;

(2) there is "a causal connection between the injury" and the defendant's conduct; and (3) the injury likely will be redressed by his requested relief. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). With respect to the last prong of this inquiry, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (citation omitted). Moreover, because "standing is not dispensed in gross," a plaintiff "must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) (citation and brackets omitted). That principle has particular salience when a plaintiff who has suffered an injury in the past seeks prospective relief such as an injunction or a declaratory judgment. The existence of a past injury can confer standing to seek money damages, but it does not follow that the plaintiff will therefore have standing to seek prospective relief as well. See, *e.g.*, *City of L.A.* v. *Lyons*, 461 U.S. 95, 102-105, 109 (1983).

In this case, the court of appeals correctly held that petitioners failed to establish that their alleged injury would be redressed by a declaratory judgment. In their settlement agreement with the United States, petitioners released all claims other than their challenge to the facial constitutionality of 50 U.S.C. 1804 and 1823. And, with respect to that claim, petitioners bargained away their right to any relief other than a declaratory judgment regarding the facial constitutionality of those provisions. The district court therefore could not (and did not) issue an injunction requiring the United States to turn over or destroy the derivative FISA materials, nor could it (or did it) issue a declaratory judgment regarding the legality of the government's retention of those

materials. The only possible remedy available was a declaration that 50 U.S.C. 1804 and 1823 are unconstitutional on their face. And as the court of appeals recognized, such a declaration would do nothing to redress petitioners' only asserted Article III injury: the government's continued possession of derivative FISA materials.

The district court assumed that if it declared the significant-purpose standard of 50 U.S.C. 1804 and 1823 to be facially unconstitutional, the government would have to divest itself of the derivative FISA materials in order to conform to the declaration. But as the court of appeals explained, that assumption is incorrect. Pet. App. 71a-73a. This Court has repeatedly made clear that, outside of the context of criminal trials, the government is generally free to use evidence obtained in an unlawful search. See, *e.g.*, *Pennsylvania Bd. of Probation & Parole* v. *Scott*, 524 U.S. 357, 362 (1998) (explaining that the Court has continually declined to extend the exclusionary rule to proceedings other than criminal trials); *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1034, 1050 (1984) (unlawfully obtained materials generally may be used against an alien in civil immigration proceedings); *United States* v. *Calandra*, 414 U.S. 338, 347-452 (1974) (explaining that exclusionary rule "has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons" and refusing to extend exclusionary rule to grand jury proceedings). That principle applies with particular force to materials merely *derived* from such evidence. Accordingly, even if the statutory provisions at issue in this case were held to violate the Fourth Amendment, the government could still retain the derivative materials and would not have

to destroy them in order to—in the district court's words—"act lawfully," Pet. App. 21a.

The point is not that the government was unwilling to abide by the terms of the declaratory judgment sought by petitioners, or that petitioners lack standing because the district court is without power to compel compliance with such a declaration. The court of appeals did not hold, and the government has not argued in this case, that an Article III injury generally cannot be redressed by a declaratory judgment unless injunctive relief is available to enforce the declaration. The critical point is, rather, that compliance with the declaration simply will not redress petitioners' injury in this case. Because it is not unlawful for the government to retain and use materials obtained through unconstitutional searches (or, in the case of derivative materials, as a result of such searches), the government would not have to destroy the derivative FISA materials in order to conform to the declaration. Accordingly, as the court of appeals recognized, it is not "likely, as opposed to merely speculative, that [petitioners'] injury will be redressed" (*Lujan*, 504 U.S. at 561 (internal quotation marks omitted)) by a declaratory judgment, and petitioners therefore lack standing under Article III.

2. a. Petitioners assert that the court of appeals erroneously required them to show that a declaratory judgment "would *guarantee* redress." Pet. 24 (emphasis added). That assertion is incorrect. The court of appeals explicitly framed its redressibility inquiry in terms of whether declaratory relief "will *likely* redress [petitioners'] injury"—the standard adopted by this Court in *Lujan* and other cases, and the same standard on which

petitioners themselves rely. Pet. App. 71a (emphasis added).[4]

b. Petitioners argue (Pet. 28-36) that the Declaratory Judgment Act, 28 U.S.C. 2201, explicitly contemplates that declaratory relief may be awarded "whether or not further relief is or could be sought." 28 U.S.C. 2201(a). The court of appeals' Article III holding is fully consistent with that statutory provision.

The potential availability of relief under the Declaratory Judgment Act where injunctive relief "is [not] or could [not] be sought" reflects the fact that declaratory relief may suffice to redress a plaintiff's injuries in a particular case. In many cases, a declaratory judgment may reasonably be expected to alter the defendant's future conduct without the entry of an injunction to enforce the declaratory judgment. In such cases, even if injunctive relief is unavailable for one reason or another, Article III is no obstacle to the entry of a declaratory judgment—provided, that is, that voluntary compliance with the declaration will redress the plaintiff's injury in whole or in part.

The outcome here is different because, for the reasons discussed above, the particular injury in this case will not be redressed even if the government *does* comply with the declaratory judgment left open by the set-

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[4] Petitioners alternatively suggest (Pet. 6) that this Court's decision in *Rakas* v. *Illinois*, 439 U.S. 128 (1978), entirely discarded reliance on concepts of "standing" in the Fourth Amendment context. *Rakas*, however, simply concluded that what has been called a criminal defendant's "standing" to assert Fourth Amendment rights as a means of seeking the suppression of inculpatory evidence is "more properly subsumed under substantive Fourth Amendment doctrine." *Id.* at 138-139. That conclusion does not affect the analysis in this civil case where the suppression of evidence is not at issue.

tlement agreement. As a result, the decision below is consistent both with the Declaratory Judgment Act itself and with the cases cited by petitioners (Pet. 29-32) that have awarded declaratory relief against the government and other defendants while withholding injunctive relief. And because the court of appeals' decision is tied to the particular facts, claims, and settlement terms in this case, it provides no basis for petitioners' professed fear (Pet. 33) that defendants will be able to obtain dismissal of declaratory judgment actions for lack of standing simply because no injunction has been obtained.

Alternatively, petitioners suggest (Pet. 35-36) that the district court actually had the power to issue an injunction against retention of the derivative FISA materials. That suggestion is contrary to the understanding of the court of appeals and the district court itself.[5] Moreover, it is inconsistent with the express terms of the settlement agreement. That agreement provides that "the s[o]le[6] relief that will be awarded should [petitioners] prevail on [their constitutional] claim is a declaratory judgment" that 50 U.S.C. 1804 and 1823 are facially unconstitutional. Pet. App. 80a. In return for the payment of two million dollars and other specified

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[5] Petitioners assert (Pet. 28) that "[t]he Court of Appeals conceded that the district court had the authority to issue an injunction against the government." But far from "conceding" that point, the court of appeals took precisely the opposite view: "Having bargained away all other forms of relief, [petitioners are] now entitled only to a declaratory judgment." Pet. App. 73a.

[6] The reproduction of the settlement agreement in the appendix to the petition includes a few typographical errors not present in the original. Compare, *e.g.*, C.A. E.R. 53 (photocopy of settlement agreement discussing the "sole relief" available) with Pet. App. 80a ("sale relief").

actions by the government (*id.* at 76a-77a), petitioners explicitly released the United States from "all [other] claims, demands, rights, and causes of action of whatsoever kind and nature for monetary, *injunctive*, declaratory, or any other form of relief." *Id.* at 76a (emphasis added). Petitioners cite no authority, and we know of none, for the proposition that the district court retained the power to enter an injunction after petitioners themselves bargained away that relief. Accordingly, while a declaratory judgment may serve as the predicate for subsequent injunctive relief in other cases (*id.* at 35a), it cannot do so in "the unique circumstances of this case" (*id.* at 73a).

c. Petitioners assert (Pet. 10-18) that if the government seizes an individual's property in violation of the Fourth Amendment, its continued possession of the seized property is itself a violation of the Fourth Amendment, and hence a declaration that 50 U.S.C. 1804 and 1823 are unconstitutional would implicitly render the government's retention of the derivative FISA materials unconstitutional as well. As noted above, however, see p. 9, *supra*, a determination that material was unlawfully seized from petitioners would not provide a basis for ordering the destruction or return of derivative materials that were not seized from petitioners.

The materials that were seized—what the settlement agreement refers to as the "FISA take"—were destroyed by the government, in accordance with the agreed-upon terms of the settlement agreement. See Pet. App. 76a, 78a. The petitioners instead want the government to destroy or turn over the derivative FISA materials. Those materials are derived from the FISA take (*id.* at 78a), and by definition exclude any materials

actually taken from petitioners. Thus, even if the Fourth Amendment categorically obligated the government to return unlawfully seized materials, that principle would not obligate the government to return the derivative materials at issue here.[7]

d. Finally, petitioners advance an entirely different theory of Article III injury and redressibility. They profess to fear that the government may in the future subject Mayfield to electronic surveillance or physical searches under FISA. Petitioners assert that this subjective fear constitutes an injury for purposes of Article III. And they reason that a declaratory judgment that 18 U.S.C. 1804 and 1823 are unconstitutional will redress that supposed injury. Pet. 19-23.

That Article III theory is misconceived on its own terms.[8] But it is in any event irrelevant here, because petitioners never presented it to the court of appeals. The only injury that petitioners asserted was the govern-

[7] Rule 41(g) of the Federal Rules of Criminal Procedure (see Pet. 16), which permits persons aggrieved by the seizure of property to move for "the property's return," is irrelevant for the same reason.

[8] Although the amended complaint states that petitioners "fear future uses of FISA" (Pet. App. 91a), the complaint does not allege that the government is likely to subject petitioners to searches or surveillance under FISA in the future. Moreover, the agreement provides that the facial constitutional claim will be litigated on the basis of stipulated facts, and the factual stipulation here does not suggest that it is likely that petitioners will be subject to future FISA surveillance or searches. See C.A. E.R. 64-66. Given the statutory prerequisites for a FISA order, including probable cause to believe that the subject of the surveillance is an agent of a foreign power (see p. 2, *supra*), any suggestion that petitioners likely will be targeted under FISA in the future is highly speculative. For that reason, petitioners cannot predicate standing on the theory that a declaratory judgment would protect them from a "real and immediate threat" of future surveillance or searches. *Lyons*, 461 U.S. at 105.

ment's possession of the derivative FISA materials, and the only theory of redressibility that they advanced was the theory that a declaratory judgment would lead the government to destroy or otherwise divest itself of the materials. See Pet. C.A. Br. 39-45 (identifying "[t]he continued retention by government agencies of this material" as the only asserted Article III injury); *id.* at 45-50 (arguing that declaratory judgment would lead to destruction of the derivative materials). The court of appeals' decision therefore does not address whether petitioners' subjective fear of future surveillance is a cognizable injury under Article III and, if so, whether a declaratory judgment would redress that asserted injury. Because petitioners' fear-of-surveillance theory of standing was neither pressed nor passed upon below, review is not warranted. See *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001); *United States* v. *Williams*, 504 U.S. 36, 41-43 (1992); see also *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) ("This Court * * * is one of final review, 'not of first view.'") (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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