No. 15-2560

In the
United States Court of Appeals for the Fourth Circuit

WIKIMEDIA FOUNDATION, *ET AL.*,
Plaintiffs-Appellants,
v.
NATIONAL SECURITY AGENCY, *ET AL.*,
Defendants-Appellees.

On Appeal from the
United States District Court for
the District of Maryland, Baltimore Division

Brief *Amicus Curiae* of United States Justice Foundation, Free Speech Defense and Education Fund, Free Speech Coalition, Western Journalism Center, Gun Owners of America, Gun Owners Foundation, Downsize DC Foundation, DownsizeDC.org, Conservative Legal Defense and Education Fund, Institute on the Constitution, and Policy Analysis Center in Support of Plaintiffs-Appellants and Reversal

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February 24, 2016

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

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If yes, identify all parent corporations, including all generations of parent corporations:

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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Robert J. Olson Date: February 24, 2016

Counsel for: U.S. Justice Foundation, et al.

CERTIFICATE OF SERVICE

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I certify that on February 24, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Robert J. Olson (signature) February 24, 2016 (date)

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INTEREST OF *AMICI CURIAE*

United States Justice Foundation, Free Speech Defense and Education Fund, Free Speech Coalition, Western Journalism Center, Gun Owners of America, Gun Owners Foundation, Downsize DC Foundation, DownsizeDC.org, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Institute on the Constitution is an educational organization. Each is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law.[1]

Some of these *amici* filed *amicus curiae* briefs in other challenges to NSA surveillance programs:

- *Amicus Curiae* Brief of Gun Owners Foundation, *et al*., Clapper v. Amnesty International USA, U.S. Supreme Court, No. 11-1025 (Sept. 24, 2012).
- *Amicus Curiae* Brief of U.S. Justice Foundation, *et al*., Jewel v. NSA, 9th Circuit, No. 15-16133 (Aug. 17, 2015).

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[1] *Amici* requested and received the consent of the parties to the filing of this brief *amicus curiae*, pursuant to Rule 29(a), Federal Rules of Appellate Procedure. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

STATEMENT OF THE CASE

This case presents a constitutional challenge to what must be the largest, most egregious, and ongoing series of unconstitutional searches and seizures of private communications since the Fourth Amendment was ratified. In the name of national security, justified by an undeclared yet perpetual war,[2] not against a nation state, but against a vague and amorphous enemy named "terrorism," various federal agencies are and have been engaged in a truly Orwellian surveillance[3] and monitoring of "text-based" Upstream communications that transit the Internet.

Even if the National Security Agency's ("NSA") surveillance program works exactly the way the government describes minimizing surveillance of ordinary, innocent persons, it is **still** the case that the electronic communications

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[2] *See* George Orwell, 1984, p. 43 ("Oceania had always been at war with Eurasia.").

[3] "Any sound that Winston made, above the level of a very low whisper, would be picked up by [the telescreen], moreover, so long as he remained within the field of vision which the metal plaque commanded, he could be seen as well as heard. There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time. But at any rate they could plug in your wire whenever they wanted to. You had to live — did live, from habit that became instinct — in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized." Orwell, 1984, p. 5.

of untold numbers of American citizens are being intercepted,[4] monitored, and reviewed by NSA and its agents, dwarfing the scope of the general warrants that our forefathers fought a Revolution to end.[5] These modern general warrants in no way comply with the Fourth Amendment's probable cause and particularity requirements as "describing the place to be searched, and the persons or things to be seized." *See* Plaintiffs' Brief at 8.

Over time, the American people have learned much about the framework of the government's surveillance programs, so that only the details remain "classified." But the government takes full advantage of the lack of complete disclosure of information as to how the program works, to support its current effort to dismiss the complaint here for lack of standing. At least one other court has succumbed to the swan song that the national security itself (*i.e.*, "state secrets") prohibits it from uncovering the extent of the federal government's constitutional violations — as if there is some national interest more important

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[4] A report released earlier this month recognizes that, even applying the government's theory of the case, the NSA's Upstream collection continues improperly to seize domestic communications: "The government acknowledges ... that the technical methods used to prevent the acquisition of domestic communications do not completely prevent them from being acquired." Privacy & Civil Liberties Oversight Board, Recommendations Assessment Report (Feb. 5, 2016) at 21.

[5] *See* Sources of our Liberties at 276, 304-06, 312, 330, 339, 348, 355, 366, 376, 384, 423, 427 (R. Perry & J. Cooper, eds. ABA Foundation Rev. Ed. 1978).

than the preservation of this nation's founding charter.[6]

The essence of this case can be reduced to a simple Sesame Street lesson: some, none, or all.[7] The Plaintiffs in this case have alleged that the NSA's vast surveillance program is seizing and searching **some** of their text-based Internet communications — which is all they need to allege. The district court apparently disagrees, believing the government's contention that **none** of Plaintiffs' communications reasonably have been alleged to be seized and searched. In reality, and according to its own admission, the government and its agents in the private sector are actually seizing and searching the substance of virtually **all** text-based communications which transit the Internet backbone.

ARGUMENT

The district court operated under the belief that the Supreme Court's decision in Clapper v. Amnesty International USA, 568 U.S. ___, 133 S.Ct. 1138 (2013) is on all fours with this case and therefore controlling. However, the claims of the Clapper plaintiffs were different, the program being challenged is

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[6] For example, the U.S. District Court for the Northern District of California, denied standing to plaintiffs in that case, even after reporting that "the Government has acknowledged the existence of the Upstream collection process.... However, the technical details of the collections process remain classified." Jewel v. NSA, 2015 U.S. Dist. LEXIS 16200, *12 (N.Dist. Cal. 2015).

[7] https://www.youtube.com/watch?v=fNJy8S9C178; https://www.youtube.com/watch?v=eGeAD_JEUrg.

different, and much more is known about NSA surveillance. In a book released on February 23, 2016, former Director of the NSA (1999-2005) and Director of the Central Intelligence Agency (2006-2009) Air Force General Michael V. Hayden (ret.) described the current practices of the NSA: "With little debate, we went from a world of letting radio waves serendipitously hit our antennas to what became a **digital form of breaking and entering**." M. Hayden, Playing to the Edge (Penguin Press 2016) at 141 (emphasis added). Yet in this and other federal challenges to NSA surveillance, the Department of Justice has done everything possible to avoid a judicial review of the constitutionality of what even General Hayden recognizes to be NSA's "breaking and entering" into the digital communications of Americans.

The Fourth Amendment protects each person's "papers," whether in physical or digital form. Both constitute property owned by the individual, and are of great constitutional import. Indeed, George Washington described the fight for independence as a fight for "Life, Liberty, **Property**, and our Country."[8] Thomas Fleming, one of the most respected historians of our time, explained how property was viewed by Washington, and by the rich and poor alike, at that time:

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[8] J. Fitzpatrick, ed., The Writings of George Washington from the Original Manuscript Sources, 1745-1799 (Washington, D.C., 1931-44), vol. 4, p. 207 (emphasis added).

> This direct formulation of American goals, with its unabashed use of the word "**property**," may make twentieth-century [and twenty-first-century] Americans uncomfortable. But the word meant to Washington and to thousands of Americans who owned far less land something much different form mere possession, self-aggrandizement. It meant **control over their own lives**.... They also saw with an acuity which twentieth-century Americans have to some extent lost that the **liberty** of a man who did not control some property was a tenuous thing at best. [T. Fleming, 1776: Year of Illusions at 34-35 (W.W. Norton & Co. 1975) (emphasis added).]

Should the government be able to manipulate rules of standing to avoid a review of the constitutionality of its Upstream surveillance program, the liberty of Americans will be seriously damaged and the continued existence of America as a free State be put at risk.

I. THE DISTRICT COURT REJECTED PLAINTIFFS' CLAIM OF STANDING ON THE THEORY THAT IT IS IMPOSSIBLE TO KNOW FOR CERTAIN THAT THE GOVERNMENT IS DOING SOMETHING THE GOVERNMENT HAS PUBLICLY ANNOUNCED IT IS DOING.

The district court in this case concluded that Plaintiffs do not have standing because it is impossible for Plaintiffs to demonstrate "whether Upstream surveillance *actually* intercepts all or substantially all international text-based Internet communications...." Wikimedia v. NSA, 2015 U.S. Dist. LEXIS 144059 at 32 (D.Md. 2015). "[B]ecause the scope and scale of Upstream surveillance remain classified," the district court concluded that Plaintiffs can only "assume that the NSA must be intercepting communications at all 49 chokepoints...." *Id.* at

30-31. The district court's focus on "scope" and "scale" misses the mark. Plaintiffs may not know exactly how the government is seizing and searching "text-based" communications transiting the Internet backbone, but it should not be required to prove the details, for the government has admitted that it or its agents are seizing and searching such private digital communications, as discussed below.

A. The PCLOB Report Supports Standing.

The district court relied on the government's own July 2014 PCLOB Report[9] to establish that in searching Internet communications "'the government has no ability to examine or otherwise make use of this larger body of communications, except to promptly determine whether any of them contain a tasked selector.'"[10] *Id.* at 35 (emphasis added). Second, the district court then found that "[i]ndeed, '[o]nly those communications ... that contain a tasked selector go into government databases.'" *Id.* But the district court does not appear to grasp the significance of these twin findings — that, in order to determine

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[9] Privacy and Civil Liberties Oversight Board, Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act (July 2, 2014).

[10] The government describes a "selector" as "a specific means by which the target communicates, such as an e-mail address or a telephone number...." Memorandum in Support of Defendant's Motion to Dismiss the First Amended Complaint at 9.

"whether any [communications] contain a tasked selector," the government or its agents must first seize and then search all available Internet communications. The PCLOB Report describes this process in greater detail: "The [private sector] provider is compelled to assist the government in **acquiring** communications across these circuits.... Internet transactions are first **filtered** to eliminate potential domestic transactions, and then are **screened** to capture only transactions containing a tasked selector." PCLOB Report at 37. *See also* Memorandum in Support of Defendant's Motion to Dismiss the First Amended Complaint at 10. Viewed from the vantage point of the Fourth Amendment, "acquired" means "seized," and "filtered" and "screened" mean "searched."

The PCLOB Report of July 2, 2014, issued 17 months after the Clapper decision, confirmed to the American people many details of the NSA's Upstream collection program. The Report is certainly not a model of clarity, giving rise to some ambiguity which the Department of Justice now seeks to use to full advantage, but in that Report, sufficient facts were revealed for the plaintiffs to demonstrate standing:

- The NSA's acquisition of data occurs "with the compelled assistance ... of the providers that control the telecommunications backbone over which communications transit." *Id*. at 35.

- Raw upstream collection[11] resides in NSA systems, where it is "subject to NSA's minimization procedures." *Id*. (NSA conducts similar upstream collection of "telephone communications," which appear not to be at issue in this case. *Id*. at 36.)

- NSA instructs private companies providing the "Internet background" to search for "to," "from," and "about" a tasked selector. *Id*. "An about communication is one in which the tasked selector is referenced within the acquired Internet transaction, but the target is not necessarily a participant in the communication...." *Id*. According to a "still-classified September 2008 opinion, the FISC agreed with the government's conclusion that such searches are authorized by statute because the government's target when it acquires an 'about' communication is not the sender or recipients [based] upon language in a congressional report." *Id*.

Thus, the NSA's initial search of all communications is not limited simply to the "to" and "from" of a communication — which the government has argued are the equivalent of just looking at the addresses on a piece of mail, but leaving "the body of the message" intact. PCLOB Report at 37. On the contrary, the NSA also searches the **content** of all communications for what it calls "about" communications — *i.e.*, not simply communications "from" John Doe or "to" John Doe, but also communications that talk "about" John Doe. *See id.* at 37, 119-24. In other words, at NSA's direction, computers are reading **every word of every**

[11] In a recently declassified report, the government defines what it means by "raw data." "Raw data is data that has not been evaluated for foreign intelligence or processed to handle [U.S. person's] identities pursuant to the minimization procedures." NSA Inspector General, "Implementation of §215 of the USA PATRIOT Act and §702 of the FISA Amendments Act of 2008," (Feb. 20, 2015) at 75 n.52.

communication. Indeed, Plaintiffs note, "[a]s the government's own disclosures make clear, the NSA is searching through the *contents* of international internet communications for information relating to its surveillance targets." Plaintiffs' Brief at 1. The district court simply fails to acknowledge these intrusive activities.

The PCLOB Report denies that the FBI or CIA have access to certain raw upstream data that is collected, with the NSA maintaining control over that data. However, for Fourth Amendment purposes, it should make no difference if the seizure of data and its search is performed by one alphabet agency or another — both are part of the same federal government.

B. The Actions of the Government and Its Agents Support Standing.

And, similarly, it makes no difference if the seizure and search of data is performed in the first instance by a private company "compelled" to assist the NSA and operating at the direction of the NSA, because that private company is operating as the agent of the federal government. The federal government may not immunize an unconstitutional search and seizure by outsourcing it to a private contractor. Indeed, in his treatise on Criminal Procedure, Professor Charles H. Whitebread explains the application of the Fourth Amendment "when governmental officials encourage or direct private individuals to use unlawful means to acquire evidence."

> The general rule is that when it can be shown that a private citizen is acting upon the order, instruction, or request of a government officer, or when it can be shown that a government officer and a private citizen are in joint participation, the exclusionary rule will be applied to illegally obtained evidence. [C.H. Whitebread, Criminal Procedure: An Analysis of Constitutional Cases and Concepts, (The Foundation Press: 1980) at 89.]

Professor Whitebread cites Coolidge v. New Hampshire, 403 U.S. 443 (1971) as defining the key issue in such cases to be: "whether [the private citizen] in light of all the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the state...." *Id*. at 487. In the present case, there could be no doubt that this test is met.

The PCLOB Report actually admits that the government's actions would not be lawful if undertaken with respect to traditional means of communication:

> **[n]othing comparable is permitted as a legal matter** or possible as a practical matter with respect to analogous but more **traditional forms of communication**. From a **legal** standpoint, under the Fourth Amendment the government may not, without a warrant, open and read **letters** sent through the mail in order to acquire those that contain particular information. Likewise, the government cannot listen to **telephone conversations**, without probable cause about one of the callers or about the telephone, in order to keep recordings of those conversations that contain particular content. And without the ability to engage in inspection of this sort, nothing akin to 'about' collection could feasibly occur with respect to such traditional forms of communication. **Digital communications like email, however, enable one, as a technological matter, to examine the contents of all transmissions** passing through collection devices and **acquire** those, for instance, that contain a tasked selector anywhere within them. [*Id.* at 122 (emphasis added).]

Plaintiffs correctly described this preliminary seizure and search of all communications as the "'digital analogue of having a government agent open every piece of mail that comes through the post to determine whether it mentions a particular word or phrase.'" Plaintiffs' Brief at 34. Indeed, the PCLOB Report quotation set out *supra* fully supports that statement. Nonetheless, the district court found the analogy to the physical U.S. mail flawed because "[u]nlike the hypothetical government agent **reading** every word of every communication **and retaining the information**, [the NSA] **makes use of only those communications that contain information matching the tasked selectors**." Wikimedia at 35 (emphasis added). How valid was the district court's analysis of distinguishing features? First, Plaintiffs' analogy to the U.S. mail never said anything about reading **and retaining** the mail — the court made the latter part up. Second, the court (again) chose to ignore the part about the NSA's directing its agent to perform the initial seizing and searching of every communication in order to determine which ones contain the information it seeks.

Instead, the district court operated on the flawed assumption that the Fourth Amendment protects only the information the NSA eventually keeps and analyzes — as if the initial search of all communications had no Fourth Amendment relevance. The district court position is similar to arguing that the police do not

violate the Fourth Amendment when they arrest only those drivers who have drugs — even after they stop and search every car on the road.

The district court takes its determination even further, stating that Plaintiffs cannot prove that so-called "'about surveillance' involves examining *every* portion of *every* copied communication." *Id.* at 34-35. Apparently, for the district court, no Fourth Amendment search occurs unless the police search 100 percent of each communication. Would there be no Fourth Amendment violation if the police randomly stop and search every nth person in the city for contraband — so long as they do not search them all?

The government essentially has admitted that it or its agents are seizing and searching vast amounts of "text-based" data transiting the Internet, but rather than decide standing based on that admission, the district court responds "the Plaintiffs have no proof!" This is the type of logic that would appeal only to a lawyer.

II. THE DISTRICT COURT'S FOURTH AMENDMENT STANDING DECISION APPEARS TO BE BASED UPON AN UNSPOKEN — AND UNCONSTITUTIONAL — ASSUMPTION.

A. The District Court Appears to Assume the NSA's Search Is an Insignificant Intrusion on Privacy Rights.

The district court appears to ignore the fact that in order to isolate the foreign intelligence it seeks, NSA must — and in fact does — seize and search the content of all "text-based" communications that come across the backbone of the

Internet. At best, the district court minimizes these intrusions and, at worst, pretends they are not occurring. *See* Wikimedia at 34-35. The unspoken premise seems to be that the NSA's initial copying and searching of communications is not a Fourth Amendment violation because it is not a **substantial** seizure and search.

The district court goes into great detail on the NSA's "minimization procedures," whereby certain steps allegedly are taken to ensure that the NSA does not "acquire" and "retain" communications that it is not seeking. Wikimedia at 7-8. And, although couched in terms of standing, the district court's opinion can really be viewed as a decision on the merits — that the NSA's Upstream surveillance data seizure is insignificant because a high-speed computer quickly scans and discards unwanted communications. *See id.* at 20-21.

B. Plaintiffs Have Alleged Not Only a Privacy Violation, but also a Violation of Property Rights.

The district court opinion that the parties have no Fourth Amendment standing is predicated on the erroneous assumption that the Plaintiffs have made only a privacy claim — that the Upstream surveillance process was an invasion of "their privacy – as well as the privacy of their staffs, Wikimedia's users, and NACDL's members." Wikimedia at *12. Completely missing in the district court's jurisdictional analysis is a companion Fourth Amendment property rights analysis.

However, in their amended complaint, plaintiffs alleged not only a violation of a "reasonable expectation of privacy in [their] communications," but also a "violation of [their] right to control those communications and the information they reveal and contain." First Amended Complaint for Declaratory and Injunctive Relief ("Amended Complaint") at ¶¶ 70, 72. Indeed, property claims are asserted throughout the body of the complaint, for example:

> Because of ongoing government surveillance, including Upstream surveillance, Plaintiffs are not able to gather and relay information, represent their clients, and engage in domestic and international advocacy as they would in the absence of the surveillance. Upstream surveillance reduces the likelihood that clients, users, journalists, witnesses, experts, civil society organizations, foreign government officials, victims of human rights abuses, and other individuals will share sensitive information with Plaintiffs. [Amended Complaint ¶ 76.]

In its assessment of the standing question, the district court gives primary and specific reference to plaintiffs' privacy concerns, making only cursory reference to the primary proprietary interests that plaintiffs have in engaging in communication of information free from unwarranted intrusions by NSA. *Compare* Wikimedia at 7-8 *with* Amended Complaint ¶ 75. The Amended Complaint is, for example, replete with allegations that "[u]pstream surveillance undermines Wikimedia's ability to conduct its work":

> Wikimedia depends on its ability to ensure anonymity for individuals abroad who view, edit, or otherwise use Wikimedia Projects and

> related webpages. The ability to read, research, and write anonymously is essential to the freedoms of expression and inquiry. In addition, Wikimedia's staff depend on the confidentiality of their communications, including in some cases their ability to ensure that their contacts' identities will not be revealed. Because of these twin needs for anonymity and confidentiality, Upstream surveillance harms the ability of Wikimedia's staff to engage in communications essential to their work and compromises Wikimedia's organizational mission by making online access to knowledge a vehicle for U.S. government monitoring. [Amended Complaint ¶ 108.]

Only by treating the Plaintiffs' claim solely as a privacy one, and then minimizing — or ignoring — the NSA's intrusion into Plaintiffs' property interests by seizing and searching all their communications — was the district court able to determine that there was no standing. Yet, the Supreme Court has recently held that **foremost** the Fourth Amendment protects the **property** rights that one has in his "person[], house[], papers, and effects." United States v. Jones, 565 U.S. ___, 132 S.Ct. 945, 949 (2012). Whatever **privacy** interest that the Fourth Amendment also protects is secondary — in addition to, not in substitution for, the amendment's primary object — to protect against unreasonable searches and seizures of the property rights specified in the constitutional text. *See* Florida v. Jardines, 569 U.S. 1, 133 S.Ct. 1409, 1417 (2013). According to Jones and Jardines, a Fourth Amendment violation is to be detected by applying a common-law trespassory test. *See* Jones at 952; *see also* Jardines at 1417. In Jones, the Supreme Court has made clear that a trespass occurs whenever the government

unlawfully interferes with a person's property for the purpose of obtaining information. *See* Jones at 959.

The government in this case no doubt would argue, if the merits were ever reached, that it has made only a *de minimis* intrusion by having a computer anonymously scan Internet communications.[12] The government made a similar argument in Jones — that the warrantless placement and use of a GPS tracking device was at most a "technical trespass." U.S. v. Jones, Oral Argument (Nov. 8, 2011), p. 7. The Supreme Court, however, rejected that argument, noting clearly that even a "technical trespass" was still a trespass — and thus a Fourth Amendment violation. Jones at 949.

C. The NSA Upstream Surveillance Program Violates the Property Principle.

While it is true that the government is not "physically occup[ing] [the] private property" of the Plaintiffs, as was the case in United States v. Jones, it is nonetheless trespassing upon Plaintiffs' license by surreptitiously intercepting and copying Plaintiffs' Internet communications. While the seizure and search of Plaintiffs' property may not be visible to the naked eye, the government's invasion

[12] The reason the district court views the government's surveillance to be acceptable is unclear, but it may be because mass copying and filtering of all communications (*see* PCLOB Report at 122) is reportedly not done by a human being, but by a computer. If a communication does not contain information that NSA seeks, then no set of human eyes ever sees it.

is no less a trespass[13] on Plaintiffs' "papers." Actually, as the Supreme Court ruled in Kyllo v. United States, 533 U.S. 27 (2001), "use [of] a device ... to explore details of the home that would previously have been unknowable **without physical intrusion**, the **surveillance** is a 'search.'" *Id.* at 40. Although the Kyllo ruling itself was based upon privacy principles, the Jones Court affirmed that the Fourth Amendment protection afforded Kyllo was commensurate with the Amendment's original property principle. *See* Jones at 949-50.

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[13] *See* Martin v. Reynolds Metals Co., 342 P.2d 790 (Ore. 1959), for a thoughtful analysis of electronic communications as property:

> The view recognizing a **trespassory** invasion where there is no "**thing**" which can be seen with the naked eye undoubtedly runs counter to the definition of trespass expressed in some quarters.... It is quite possible that in an earlier day when science had not yet peered into the molecular and atomic world of small particles, the courts could not fit an invasion through unseen physical instrumentalities into the requirement that a trespass can result only from a *direct* invasion. But in this atomic age even the uneducated know the great and awful force contained in the atom and what it can do to a man's property if it is released.... [W]e must look to the character of the instrumentality which is used in making an intrusion upon another's land we prefer to emphasize the object's **energy** or force rather than its size. Viewed in this way we may define **trespass** as any intrusion which **invades** the **possessor's protected interest in exclusive possession**, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist. [*Id.* at 793-94 (emphasis added).]

III. THIS COURT HAS A DUTY TO PROTECT FOURTH AMENDMENT RIGHTS IN A CASE PROPERLY BROUGHT BEFORE IT.

A. The District Court Failed to Exercise Its Judicial Power.

In rejecting all of the allegations on which plaintiff asserts standing, the district court repeatedly erected and vanquished straw men. It faulted plaintiffs for failing to explain "how the NSA implements Upstream surveillance." Wikimedia at 29. It dismissed plaintiffs for not knowing whether "the NSA is using its surveillance equipment at full throttle...." *Id*. at 30. And it discarded plaintiffs' allegations of "how Upstream surveillance *must* operate in order to achieve the government's 'stated goals.'" *Id.* at 31-32. Thus, the court ruled against plaintiffs because they did not know "whether Upstream surveillance *actually* intercepts all or substantially all international text-based Internet communications...." *Id*. at 32.

However, complete and perfect knowledge about exactly how plaintiffs' rights have been violated should never have been required. By setting the bar above the level that could be reached by any American, the district court made certain that these plaintiffs did not clear it. The Department of Justice does not appear to actually deny its seizure and search of plaintiffs' data, but only that plaintiffs do not know the details of how the NSA is doing it. Indeed, if the district court were to allow the plaintiffs to pose just one request for admission to

the government — "Do you intercept plaintiffs' text-based Internet traffic through your Upstream Collection Program" — any honest government would have been remiss if it failed to admit that the plaintiffs had standing and the court had jurisdiction.

Standing must be viewed as a two-edged sword. While it is undeniably true that no Article III court has jurisdiction in the absence of a "case" or "controversy," it is equally true that once a proper "case" or "controversy" has been brought before it, every federal court has an unavoidable duty to resolve the matter before it. As Justice Black observed:

> The power and duty of the judiciary to declare laws unconstitutional [are] ... derived from its responsibility for resolving concrete disputes [wherein] a statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution. *Marbury* v. *Madison*, 1 Cranch 137 (1803). [Younger v. Harris, 401 U.S. 37, 52 (1971).]

In its rush to label every allegation by plaintiff as "suppositions and speculation, with no basis in fact," Wikimedia at 29, the district court reveals its haste to ignore the reality of the surveillance controversy presented to it based on factors that are wholly unpersuasive.

First, the district court appeared to assume that if there were a Fourth Amendment problem with the Upstream surveillance program, that it would have been remedied by the Foreign Intelligence Surveillance Court ("FISC"):

> the fact that all NSA surveillance practices must survive FISC review — *i.e.,* must comport with the Fourth Amendment — suggests that the NSA is not using its surveillance equipment to its full potential. [Wikimedia at 30.][14]

Putting aside the district court's gratuitous assumption that FISC clearance must mean that the NSA Upstream surveillance program is not operating at 100 percent of capacity, the Article III district judge is presuming that the FISC operates as an Article III court. Although that court is staffed with Article III judges, the composition of the panel does not make it a court. Indeed, its operations in no way resemble an Article III court. Rather, operating in secret without the benefit of the adversarial process and procedural protections, it resembles the Court of Star Chamber, a prerogative court implementing federal policy, not adjudicating

[14] The district court also asserted that "Upstream surveillance" programs are not immunized "from judicial scrutiny" because, *inter alia*, "the FISC reviews targeting and minimization procedures of general surveillance practices to ensure ... 'the targeting and minimization procedures comport with the Fourth Amendment." Wikimedia at 50.

cases and controversies arising out of the implementation of that policy.[15] *See* P. Hamburger, Is Administrative Law Unlawful? at 55-57 (Univ. Chi. Press 2014).

Second, the district court apparently read Clapper to require a heightened level of pleading and proof to establish standing when the federal government is the defendant and the domestic surveillance is linked to foreign intelligence, requiring more certainty in evaluating "**the standing of litigants who seek to challenge the constitutionality of government action** in the field of foreign intelligence. *Clapper*, 133 S.Ct. at 1147-50." Wikimedia at 33 (emphasis added).

Third, the district court, again relying on Clapper, proposed that it should be of less concern to the court that a decision would result in "closing the courthouse doors to a plaintiff who suffers an actual injury fairly traceable to the defendant" in a case, such as this one:

> where "reaching the merits of the dispute would force [a court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional," particularly "in the fields of intelligence gathering and foreign affairs." *Clapper*, 133 S.Ct. at 1147. [Wikimedia at 47.]

And lastly, the district court pointed out that a constitutional correction need not await the courts, because:

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[15] *See* Rules of Procedure of the United States Foreign Intelligence Surveillance Court (Nov. 11, 2010). http://www.fisc.uscourts.gov/sites/default/files/FISC%20Rules%20of %20Procedure.pdf.

> [s]hould society's suspicions about surveillance programs rise to a level sufficient to cause citizens to suspect Orwellian harms that outweigh the benefits to national security, surveillance programs can be revised or eliminated the same way they were authorized, namely through the legislative process. [Wikimedia at 51, n.28.]

It is impossible to read the district court's opinion and not come away with the impression that the district court failed to exercise its power of judgment, because Upstream surveillance implicates only relatively insignificant constitutional rights, which could be infringed until someone else — the FISC, the Congress, or perhaps the People — take action. Should this indeed be the state of the law, it would constitute an abdication by the federal judiciary of its "province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. 137, 177 (1803).

B. The District Court's Failure to Reach the Merits Puts Our Liberties at Great Risk.

From time to time, federal courts have allowed the political branches to abuse the Fourth Amendment. Dissenting from the Court's determination that a particular search and seizure was reasonable, Associate Justice and former Attorney General Robert Jackson charged that the Supreme Court had been treating Fourth Amendment rights as "secondary." Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting). Based on his experience, Justice

Jackson knew, and asserted, that Fourth Amendment rights could not be disregarded, but rather:

> belong in the catalog of **indispensable freedoms**. Among deprivations of rights, none is so effective in **cowing a population, crushing the spirit of the individual and putting terror in every heart**. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every **arbitrary** government. And one need only briefly to have **dwelt and worked among a people possessed of many admirable qualities but deprived of these rights** to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police. [*Id*. at 180-81 (emphasis added).]

No doubt, the object of Justice Jackson's 1949 specific reference to his having "dwelt and worked among a people possessed of many admirable qualities" yet living under "arbitrary government" is unmistakable. Justice Jackson had returned just three years previously from several months of service as U.S. Chief Counsel for the prosecution of Nazi war criminals. From that experience in Germany, he brought back with him a fresh understanding of the significance of the Fourth Amendment to the preservation of a free people. He had studied the loss of freedom by the German people, and wrote his Brinegar dissent to reveal the corrosive effect of a government which does not respect the property rights of the people.

Whitney Harris, Executive Trial Counsel to Justice Jackson at Nuremberg, later explained how liberties were lost in Germany: "[t]he Weimar Constitution contained positive guarantees of basic civil rights. Chief among these were personal freedom ... inviolability of the home [and] secrecy of letters and other communications...."[16] However, Harris continued, the Weimar Constitution also contained:

> a special provision ... under which the Reich President was authorized to **suspend basic civil rights** "if the **public safety** and order in the German Reich are considerably disturbed or endangered...."
>
> The morning after the [burning of the Reichstag] Hitler obtained from [President] Von Hindenburg the decree of the Reich President **suspending the bill of rights** of the Weimar Constitution...:
>
> "[personal freedom ... inviolability of the home [and] secrecy of letters and other communications] are suspended until further notice [and] **violations** of the privacy of postal, **telegraphic, and telephonic communications**, and warrants for house-searchers, orders for **confiscations as well as restrictions on property**, are also **permissible** beyond the legal limits otherwise prescribed."
>
> This decree made possible the seizure of political opponents without danger of judicial interference. It was utilized to destroy all effective political opposition.... The voice of the people had been stilled. Neither constitutional liberties nor power of government would be returned to them under Hitler. [Tyranny on Trial, pp. 45-47 (emphasis added).]

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[16] W. Harris, Tyranny on Trial: The Trial of the Major German War Criminals at the End of World War II At Nuremberg, Germany, 1945-1946, Southern Methodist University Press (1954), p. 45.

While the district court would hide behind a judicial smokescreen of standing, Justice Jackson urged the courts not to defer to the Executive Branch:

> [T]he right to be secure against **searches and seizures** is **one of the most difficult to protects** since the **officers are themselves the chief invaders**, there is **no enforcement outside of court**. [Brinegar, 338 U.S. at 181 (Jackson, J., dissenting) (emphasis added).]

As guardians of the rights of the People, courts should never assume that someone else could substitute for them. "[W]ho knoweth whether [the judges of this court] art come to the kingdom for such a time as this." Esther 4:14.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* complies with the word count limitation set forth by Rule 29(d) because this brief contains 6,122 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 14.0.0.756 in 14-point Times New Roman.

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Dated: February 24, 2016

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of United States Justice Foundation, *et al.*, in Support of Plaintiffs-Appellants and Reversal, was made, this 24th day of February, 2016, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

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