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 OF *AMICI CURIAE* FIRST AMENDMENT LEGAL SCHOLARS IN SUPPORT OF PLAINTIFFS-APPELLANTS AND SUPPORTING REVERSAL

MARGOT E. KAMINSKI*
Assistant Professor of Law
Moritz College of Law
The Ohio State University
55 W. 12th Ave.
Columbus, Ohio 43210
T: (614) 292-2092
kaminski.217@osu.edu

Counsel for Amici Curiae First Amendment Legal Scholars

CHELSEA J. CRAWFORD
JOSHUA R. TREEM
BROWN, GOLDSTEIN & LEVY, LLP
120 E. Baltimore Street, Suite 1700
Baltimore, Maryland 21202
T: (410) 962-1030
F: (410) 385-0869
ccrawford@browngold.com
jtreem@browngold.com

* Not admitted in this Court. This brief has been prepared and joined by individuals affiliated with various law schools, but it does not purport to present any school's institutional views.

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae First Amendment legal scholars submit this brief pursuant to Rule 29 of the Federal Rules of Appellate Procedure. *Amici Curiae* are professors who write in First Amendment law. They teach and publish books and articles on the First Amendment, and their expertise can aid the Court in the resolution of this case. Specifically, *amici* focus this brief on the injury-in-fact element of standing in First Amendment challenges to privacy violations. *Amici*'s employment and titles are listed below for identification purposes only.

- **Marc J. Blitz** is the Alan Joseph Bennett Professor of Law at Oklahoma City University School of Law. His scholarship focuses on First Amendment freedom of speech protection, Fourth Amendment rights against unreasonable search and seizure, and the implications of emerging technologies for each of these areas of the law.
- **A. Michael Froomkin** is the Laurie Silvers & Mitchell Rubenstein Distinguished Professor of Law at University of Miami School of Law. He has written extensively on the First Amendment right to anonymity online.
- **David A. Goldberger** is a Professor Emeritus of Law at The Ohio State University Michael E. Moritz School of Law. He writes on free speech, and has

[1] In accordance with Rule 29(c)(5) of the Federal Rules of Appellate Procedure, no party's counsel authored this brief in whole or part, and no person or persons other than *amici curiae* contributed money intended to fund the preparation or submission of this brief.

twice argued before the Supreme Court, including in *McIntyre v. Ohio Elections Commission*, which invalidated an Ohio statute prohibiting distribution of anonymous campaign literature. 514 U.S. 334 (1995).

- **James Grimmelmann** is a Professor of Law and Director of the Intellectual Property Program at the University of Maryland, and a Visiting Professor at the University of Maryland Institute for Advanced Computer Studies.
- **Margot E. Kaminski** is an Assistant Professor of Law at The Ohio State University Michael E. Moritz College of Law. Her scholarship focuses on emerging technologies and the relationship between privacy and speech rights.
- **Lyrissa Barnett Lidsky** is a Professor & the Associate Dean of International Programs at the University of Florida's Levin College of Law. She has co-authored a First Amendment casebook, and her scholarship on anonymous speech has been widely cited by state and federal appellate courts, and the Supreme Court of Canada.
- **Neil M. Richards** is a Professor of Law at Washington University Law. His work explores the complex relationships between free speech and privacy in cyberspace, and has been published in *Harvard Law Review*, *Columbia Law Review*, *California Law Review*, *Virginia Law Review*, and *Georgetown Law Journal*.
- **Katherine Jo Strandburg** is the Alfred B. Engelberg Professor of Law at New

York University Law School. She is an expert in innovation policy and information privacy law. Her recent scholarship addresses the implications of "big data" for freedom of association.

ARGUMENT

First Amendment challenges are necessary for the very functioning of our democracy. Thus, First Amendment standing analysis is uniquely permissive. The United States Supreme Court, the Fourth Circuit, and numerous other courts have recognized that standing is more permissive when First Amendment harms are alleged. Courts routinely allow third parties to assert First Amendment harms on behalf of others, and recognize that chilling protected expression gives rise to First Amendment injury-in-fact. The district court erred when it applied *Clapper v. Amnesty International* and failed to perform standing analysis under the First Amendment.

A variety of First Amendment injuries can be triggered by privacy harms. *See* part A. *Amici* outline the ways in which courts, including the Fourth Circuit, have relaxed the traditional requirements of standing in the First Amendment context. *See* part B. Finally, *amici* caution that, given the generally permissive nature of First Amendment standing, the Court should exhibit care in extending the holdings of *Laird v. Tatum* and *Clapper v. Amnesty International* beyond their limited procedural and factual contexts. *See* part C. As scholars of the First

Amendment, *amici* counsel this court to avoid potential conflicts with, and unintended consequences for, broader First Amendment case law.

A. Surveillance Can Cause First Amendment Injury-in-Fact.

Surveillance can give rise to First Amendment injuries that confer standing on plaintiffs. There are two categories of First Amendment injuries caused by privacy violations: (1) violations of recognized First Amendment rights, such as the right to anonymous speech, the right to associational privacy, and the right to receive information; and (2) the "chilling effect," where a plaintiff responds to government action by self-censoring. Surveillance of the contents of private Internet communications and of Internet browsing histories can give rise to any number of these related First Amendment injuries.

1. Surveillance Can Violate Recognized First Amendment Rights.

There are three well-recognized First Amendment privacy rights: (1) the right to speak anonymously; (2) the right to associational privacy; and (3) the right to receive information, including the right to receive information in private. A violation of any of these rights can constitute injury-in-fact.

a. The First Amendment Protects Anonymous Speech.

The Supreme Court has for over fifty years recognized that the First Amendment protects the right to speak anonymously. *Talley v. California*, 362 U.S. 60 (1960); *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

Anonymity "protect[s] unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society." *McIntyre*, 514 U.S. at 357; *see also Peterson v. Nat'l Telecomm. & Info. Admin.*, 478 F.3d 626, 632 (4th Cir. 2007) (acknowledging that protection of anonymity should be strongest "where it serves as a catalyst for speech" because revelation of speakers' identities "discourages proponents of controversial viewpoints from speaking"). The Supreme Court has traced current First Amendment protections for anonymous speech to the tradition of anonymous pamphleteering that was essential to the development of our democracy. *Talley*, 362 U.S. at 64; *see also McIntyre*, 514 U.S. at 360.

The First Amendment protects anonymous online speech, which can be as necessary to democratic self-governance as the anonymous pamphlets our Founders wrote. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997); *Taylor v. John Does 1-10*, No. 4:13-CV-218-F, 2014 WL 1870733, at *2 (E.D.N.C. May 8, 2014) ("The First Amendment protects anonymous speech, including anonymous speech on the internet."). As in the tangible world, the right to online anonymity is not absolute. *See, e.g.*, *Watchtower Bible Tract Soc'y of New York v. Vill. of Stratton*, 536 U.S. 150, 168 (2002); *Lefkoe v. Jos. A. Bank Clothiers, Inc.*, 577 F.3d 240, 248 (4th Cir. 2009). The Fourth Circuit has not yet decided what procedural hurdles are appropriate for protecting anonymous online

speakers. *See Taylor*, 2014 WL 1870733, at *2. It has recognized, however, that anonymous speech deserves First Amendment protection.

The Fourth Circuit has found that an individual's right to anonymity, even in the less protective commercial speech context, can be overcome only by "a substantial governmental interest in disclosure so long as disclosure advances that interest and goes no further than reasonably necessary." *Lefkoe,* 577 F.3d at 249. Political speech and noncommercial speech will likely receive higher constitutional protection than commercial speech. Lower courts in the Fourth Circuit have also recognized protection of anonymous speech. *See, e.g., United States v. Cassidy*, 814 F. Supp. 2d 574, 583, 587 (D. Md. 2011) (applying strict scrutiny and holding federal interstate stalking statute unconstitutional as applied to an anonymous online speaker because "the Government's Indictment here is directed squarely at protected speech: anonymous, uncomfortable Internet speech").

Both websites and anonymous online speakers can assert anonymous speech claims. Websites often bring First Amendment anonymous speech claims on behalf of their users. The contemplated First Amendment injury is the unmasking of the anonymous user's identity through the revelation of the user's IP address. The website challenges the subpoena that seeks the user's IP address, prompting courts to protect the anonymous speech right. *See* Nathaniel Gleicher, *John Doe Subpoenas: Toward a Consistent Legal Standard,* 118 Yale L. J. 320, 328 (2008)

("Uncovering [a user's] identity often requires two steps. First, the plaintiff must subpoena the website…for the Internet protocol (IP) address of the user who made the online comments."). Courts around the country have devised a variety of tests for when identifying information about an anonymous online speaker can be revealed, balancing the right to anonymous speech against other important interests. *See* Lyrissa B. Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?*, 50 B.C. L. Rev. 1373, 1377-1379 (2009) (discussing the balancing tests devised by courts to address anonymous speech online).

While an IP address is not a name, it points directly to the user's underlying identity. Unmasking users' IP addresses thus implicates the First Amendment anonymity right. *Id.* at 328 (explaining how an IP address is used to obtain "the address, telephone number, and other contact information associated with the account of the computer whose IP address" was obtained). *See also* Department of Justice, Computer Crime and Intellectual Property Section Criminal Division, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* 65 (2009) (explaining how an IP address may be used to obtain a "user's name, street address, and other identifying information.").

Thus revealing identifying information about anonymous online speakers can constitute a First Amendment injury. *Amici* further discuss the ability of websites to assert third-party standing on behalf of their users in part B.1.a, below.

b. The First Amendment Protects the Right to Privacy in One's Associations.

Surveillance can violate freedom of association. Privacy is often necessary for freedom of association, especially for those espousing minority or dissident viewpoints. The Supreme Court has long held that disclosure of membership lists constitutes First Amendment injury. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 465 (1958) (recognizing that the "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs"); *Shelton v. Tucker*, 364 U.S. 479, 490 (1960) (striking down as overbroad a statute requiring teachers to list the organizations to which they had belonged as a condition of employment, reasoning that "[t]he statute's comprehensive interference with associational freedom goes far beyond what might be justified").

The Supreme Court has suggested in recent Fourth Amendment cases that sustained surveillance in public threatens freedom of association. *United States v. Jones*, 565 U. S. ___, ___ (2012) (Sotomayor, J., concurring) (slip op., at 3) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."); *Riley v. California*, 573 U.S. ___ , ___ (2014) (slip op., at 20) (quoting Justice Sotomayor's concurrence in *Jones*). The Court in these recent cases suggests that sustained surveillance of

individuals threatens freedom of association even when the surveillance is conducted in public places. Searching the contents of private Internet communications for "selector" information, thereby uncovering individuals' associations, poses as great if not more of a threat to free association as surveillance conducted in public places. *See generally* Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. Rev. 741 (2008).

The Fourth Circuit has recognized that privacy violations implicate freedom of association. In *Marshall v. Stevens People and Friends for Freedom*, the Fourth Circuit agreed with the Supreme Court that "disclosure of affiliation with groups engaged in advocacy may constitute an effective restraint on freedom of association." 669 F.2d 171, 176 (4th Cir. 1981). The court required the government to show a "'substantial relation'" between the governmental interest and the information required to be disclosed." *Id.* at 177 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1976)). In a later case, the Fourth Circuit assessed association disclosure requirements under "exacting scrutiny" required by the Supreme Court. *Master Printers of Am. v. Donovan*, 751 F.2d 700, 705 (4th Cir. 1984) ("[T]he government must show that the disclosure and reporting requirements are justified by a compelling government interest, and that the legislation is narrowly tailored to serve that interest."). The revelation of associative information through mass

surveillance may thus constitute a significant First Amendment harm.

c. The First Amendment Protects the Right to Receive Information in Private.

The First Amendment protects not only the right to receive information, but the right to receive information in private. The right to receive information in private has been recognized in Supreme Court First Amendment case law. *See, e.g.*, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (noting that it is "now well established that the Constitution protects the right to receive information and ideas" and recognizing that privacy violations implicate that right). In *Lamont v. Postmaster General*, the Supreme Court held unconstitutional a requirement that mail recipients affirmatively write in to request communist literature, because identifying themselves as readers of that literature would deter individuals from accessing it. 381 U.S. 301, 307, 309 (1965). *See also, e.g.*, *Martin v. Struthers*, 319 U.S. 141, 146, 149 (1943) (holding that ban on door-to-door distribution of circulars violated First Amendment right to receive information); *Stanley*, 394 U.S. at 564 (holding same for a ban on possession of obscenity in the privacy of the home). In a recent Fourth Amendment decision, the Court recognized a privacy interest in Internet searches and browsing history, suggesting that reader privacy remains important even when readers employ newer technologies. *Riley v. California*, 573 U.S. ___ , ___ (2014) (slip op., at 19) ("An Internet search and browsing history… could reveal an individual's private interests or concerns—

perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD.").

The Fourth Circuit has recognized that it is "well established" that the First Amendment protects a right to receive information from a willing speaker. A plaintiff can establish standing to bring a right-to-receive claim by showing the existence of a willing speaker. *Stephens v. Cnty. of Albemarle, VA*, 524 F.3d 485, 491-92 (4th Cir. 2008) (citing *Stanley*; *In re Application of Dow Jones & Co.*, 842 F.2d 603, 606–08 (2d Cir. 1988); and *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 787 n.12 (1st Cir. 1988)). Thus a website whose users are surveilled may be able to directly assert its own First Amendment right to receive information from its now-chilled users. Alternatively, that website may be able to assert third-party standing on behalf of those users whose reading and browsing behavior is now affected by surveillance.

2. "Chilling Effects" are a Recognized Form of First-Amendment Injury.

The chilling effect is a classic First Amendment injury. *See Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) ("In First Amendment cases, the injury-in-fact element is commonly satisfied by a sufficient showing of 'self-censorship, which occurs when a claimant is chilled from exercising h[is] right to free expression.'") (quoting *Benham v. City of Charlotte*, 635 F. 2d 129, 135 (4th Cir. 2011)). The chilling effect occurs when an individual self-censors in response to

government action. *Id.* Social science suggests that individuals self-censor in response to surveillance; surveillance produces conformist tendencies and muffles the expression of dissident viewpoints. *See* Gregory L. White & Philip G. Zimbardo, *The Effects of Threat of Surveillance and Actual Surveillance on Expressed Opinions Toward Marijuana*, 111 J. Soc. Psychol. 49, 59 (1980). In November 2013, PEN America released a study of over 500 writers, which indicated that twenty-eight percent of the writers surveyed had curtailed social media activities in response to knowledge of widespread government surveillance, while twenty-four percent had deliberately avoided topics in phone and email conversations because of concerns over government surveillance. The FDR Group & PEN American Ctr, *Chilling Effects: NSA Surveillance Drives U.S. Writers to Self-Censor* 3–4 (Nov. 12, 2013), available at http://www.pen.org/sites/default/files/Chilling%20Effects_PEN%20American.pdf.

Surveillance-driven conformity fundamentally threatens a free democratic society. If the First Amendment protects anything, it is diversity of viewpoint. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."). Surveillance can prescribe "what shall be orthodox" by chilling unorthodox behavior and viewpoints.

The Fourth Circuit has established that a chilling effect exists for purposes of determining First Amendment injury-in-fact whenever government action "is likely to deter a person of ordinary firmness from the exercise of First Amendment rights." *Benham*, 635 F. 2d at 135 (quoting *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005)) (internal quotation marks omitted). A claimant need not show that she stopped all expressive activity to show a chill; she need only show that the chill was objectively reasonable. *Id.* ("[A] claimant need not show [he] ceased those activities altogether to demonstrate an injury in fact."). In the context of First Amendment cases, the existence of a chilling effect routinely conveys standing. *See, e.g.*, *Cooksey*, 721 F.3d at 235; *Benham*, 635 F.2d at 135; *Smith v. Frye*, 488 F.3d 263, 272 (4th Cir. 2007); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005). As long as self-censorship is objectively reasonable, it constitutes a recognized First Amendment injury in this Circuit.

B. First Amendment Standing is Permissive.

We have outlined the types of First Amendment injuries a plaintiff might receive. Beyond understanding these possible injuries, however, is crucial to recognize that First Amendment standing doctrine is generally permissive towards plaintiffs. *See Cooksey*, 721 F.3d at 229 ("The district court erred . . . in not analyzing [appellant's] claims under the First Amendment standing framework.").

This is unsurprising, given the priority free speech receives in American constitutional law. In standing doctrine, as elsewhere, courts put a thumb on the scale in favor of free speech. The district court erred by failing to recognize that the First Amendment injuries alleged here must be evaluated under First Amendment standing doctrine.

1. Threshold Standing Requirements are More Liberally Interpreted in the First Amendment Context.

The Fourth Circuit has recognized that standing, and especially the injury-in-fact component, is "somewhat relaxed in First Amendment cases." *Id.* at 235. That is because in the face of stringent standing requirements, individuals engaged in protected speech may choose to refrain from speaking rather than challenge a government action. Then "[s]ociety as a whole . . . would be the loser." *Id.*

Free speech is so fundamental to our democratic society that we do not want to risk its loss by making legal challenges too difficult. *Id.* (noting that "when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged") (quoting *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1984)). The Supreme Court has explained that this "leniency of First Amendment standing manifests itself most commonly in the doctrine's first element: injury-in-fact." *Id.*

As discussed below, the Supreme Court's recent decision in *Amnesty* did not

impact the general leniency of First Amendment standing doctrine. Indeed, the Fourth Circuit reaffirmed after *Amnesty* that standing requirements are less rigid in First Amendment cases. *See Cooksey*, 721 F.3d at 235 (noting that First Amendment cases "raise unique standing considerations that tilt dramatically toward a finding of standing") (quoting *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010) (internal quotation marks and citations omitted)). Here, the district court erred in failing to recognize the uniqueness of First Amendment standing considerations.

a. Third Parties Can Have Standing Under the First Amendment.

First Amendment standing doctrine is permissive with respect to third parties. Courts have held that entities such as newspapers, internet service providers, and website hosts have standing under *jus tertii* to assert the First Amendment rights of their readers and posters. *See, e.g.*, *McVicker v. King*, 266 F.R.D. 92, 95-96 (W.D. Pa. 2010); *Enterline v. Pocono Med. Ctr.*, 751 F. Supp. 2d 782, 786 (M.D. Pa. 2008). A newspaper has standing to assert the rights of anonymous commentators because those individuals "face practical obstacles to asserting their own First Amendment rights," and the newspaper has a real interest in zealously arguing the issue because of its "desire to maintain the trust of its readers and online commentators." *Enterline*, 751 F. Supp. 2d at 785-86. Moreover, a newspaper can itself suffer injury-in-fact because revelation of

posters' identities could "compromise the vitality of the newspaper's online forums." *Id.* Courts have recognized that a blog administrator can, like a newspaper, assert standing on behalf of anonymous online posters. *See In re Drasin*, No. CIV.A. ELH-13-1140, 2013 WL 3866777, at *2 n.3 (D. Md. July 24, 2013) (citing *Enterline*, 751 F. Supp. 2d at 786).

Additionally in the First Amendment context, a free speech litigant can raise the rights of third parties, even when she has no special relationship with those third parties, by using overbreadth doctrine. *See, e.g.*, *Peterson*, 478 F.3d at 633–34 ("The Supreme Court has relaxed standing requirements for overbreadth challenges to allow litigants 'to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'") (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). It is thus comparatively common for a plaintiff in First Amendment challenges to raise the rights of parties not before the court.

b. Anticipated Injuries Can Suffice to Create Standing Under the First Amendment.

First Amendment standing doctrine is also more permissive with respect to anticipated injuries. Anticipated injuries often suffice for First Amendment standing, especially when the harm alleged is the chilling effect. For example, the

Supreme Court recently decided in *Susan B. Anthony v. Driehaus* that a credible threat of enforcement of a statute can suffice for First Amendment injury-in-fact. 134 S. Ct. 2334, 2338 (2014). Plaintiffs who did not even show that they themselves would violate the law in the future could nonetheless assert standing based on this credible threat of enforcement. *Id*. Similarly, the Fourth Circuit has held that the threat of government enforcement combined with continued government monitoring of a plaintiff's blog sufficed to show First Amendment injury-in-fact. *Cooksey*, 721 F.3d at 237 (noting as part of injury-in-fact that plaintiff received "an explicit warning from the State Board that it will continue to monitor the plaintiff's speech in the future"). Thus continued monitoring coupled with a credible threat that a statute will be applied can give rise to First Amendment standing for asserting a chilling-effects claim.

c. The First Amendment's Treatment of Facial Challenges Again Demonstrates the Permissiveness of First Amendment Standing.

While the present case is not a facial challenge, how courts treat First Amendment facial challenges again demonstrates the general permissiveness of First Amendment standing doctrine. In free speech cases, courts take the risk of harm to others and the risk of a collective chilling effect very seriously. This concern is evidenced by courts' evaluations of First Amendment facial challenges. Facial challenges stem from the notion that, as commenters have noted, "everyone

has a personal right, independent of third-party standing, to challenge the enforcement of a constitutionally invalid statute against her." Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1327 (2000).

Under the First Amendment, facial challenges look to whether overbreadth is "real . . . [and] substantial . . . judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); *see generally*, Lewis Sargentich, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970). By contrast, in cases not involving the First Amendment, facial challenges typically prevail only when there is no constitutional application of a statute. *See, e.g.*, *United States v. Stevens*, 559 U.S. 460, 473 (2010) (noting that "to succeed in a typical facial attack, [a party] would have to establish 'that no set of circumstances exists under which the [measure] would be valid'") (citation omitted).

In *United States v. Stevens*, for example, the defendant successfully challenged as overbroad under the First Amendment a statute criminalizing the creation, sale, or possession of certain depictions of animals, even though he was prosecuted for creating only one type of banned depiction (a video of dogfighting). 559 U.S. at 465, 474. Outside of First Amendment standing doctrine, Stevens' facial challenge likely would have failed if the government could show a single

"circumstance[] . . . under which the [statute] would be valid." *Id.* at 473 (citation omitted). In assessing Stevens' First Amendment overbreadth challenge, the Court evinced concern about the broader chilling effect of the statute on parties not before them. This more lenient treatment of First Amendment facial challenges shows that courts take the risk of a collective chilling effect heavily into account when assessing the standing to bring First Amendment challenges.

2. *Laird* and *Amnesty* Do Not Overturn Permissive First Amendment Standing Doctrine.

As the above analysis shows, courts routinely take a broad view of standing for First Amendment challenges. The district court erred in finding that *Amnesty* controls the First Amendment claims presented here. This Court should recognize the narrow context in which the *Amnesty* decision was made. *Amnesty* addressed a facial challenge where plaintiffs could not show the existence of a surveillance program traceable to the challenged statute. An earlier case, *Laird*, is similarly fact-bound. *Laird* addressed surveillance conducted in public, and general rather than specific allegations of chilling effects. Amici caution this court against extending the holdings of these cases, in light of otherwise permissive First Amendment standing doctrine.

a. *Laird v. Tatum* Addressed Otherwise-Legal Surveillance in Public, and General Rather than Specific Allegations of Chilling Effects.

The Supreme Court's holding in *Laird* is fact-bound. The Supreme Court in

Laird addressed Army surveillance of *public* activities, conducted by reading the news and attending meetings open to the public. The Court noted that there was in *Laird* "no evidence of illegal or unlawful surveillance activities." *Laird v. Tatum*, 408 U.S. 1, 9 (1972) (quoting *Tatum v. Laird*, 444 F.2d 947, 953 (D.C. Cir. 1971)). Thus, the Court observed, "the information gathered is nothing more than a good newspaper reporter would be able to gather by attendance at public meetings." *Id.* The challengers failed to allege any surveillance on the part of the Army that was unlawful in itself, alleging instead that a First Amendment chilling effect arose from the collection of publicly available information. *Id.* at 8 (citing the district court's findings).

Wiretapping is different in kind from the public surveillance addressed in *Laird*: "[n]o one here denies that the Government's interception of a private . . . e-mail conversation amounts to an injury that is 'concrete and particularized.'" *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1155 (2013) (Breyer, J., dissenting). *Laird* does not preclude a finding of standing based on First Amendment injury arising from government surveillance of private communications, or government uncovering of anonymous speakers' hidden identities, or of private and protected associations.

The Court in *Laird* also addressed only generalized allegations of chilling effects, rather than specifically alleged chills. Two years after *Laird*, Justice

Marshall characterized the holding as standing merely for a need for specific rather than general allegations of a chilling effect. *See Socialist Workers Party v. Attorney General*, 419 U.S. 1314, 1319 (1974) (Marshall, J.) ("In this case, the allegations are much more specific: the applicants have complained that the challenged investigative activity will have the concrete effects of dissuading some YSA delegates from participating actively in the convention and leading to possible loss of employment for those who are identified as being in attendance. Whether the claimed 'chill' is substantial or not is still subject to question . . . [but t]he specificity of the injury claimed . . . is sufficient . . . to satisfy the requirements of Article III."). Justice Marshall characterized *Laird*'s language on whether challengers need to show regulatory action as *dicta* distinguishing other cases, rather than setting a rule. *See id.* at 1318 (characterizing the discussion in *Laird* of regulatory, proscriptive, or compulsory exercises of government power as *dicta* "merely distinguishing earlier cases, not setting out a rule for determining whether an action is justiciable or not").

The Fourth Circuit has characterized *Laird* as applying to surveillance conducted in public, and has cited *Laird* primarily for the proposition that plaintiffs must make specific allegations of injury. In *Donohue v. Duling*, the Fourth Circuit addressed a police department's use of surveillance in public and concluded that it did not cause a First Amendment injury. 465 F.2d 196, 202 (4th Cir. 1972). The

Fourth Circuit explained that the surveillance at issue was not only conducted in public, but was not even clandestine. *Id.* at 201. By contrast, here the surveillance is clandestine, and conducted not in public but on private communications.

The Fourth Circuit also cited *Laird* for the requirement that there must be "a claim of *specific* present objective harm or a threat of *specific* future harm" to support a justiciable claim for relief. *Id.* at 202 (emphases added). The court noted that the plaintiffs in *Donohue* had offered no testimony of injuries, including none inhibiting their exercise of free speech; no testimony of penalties, loss of employment or reasonably foreseeable threat of such. *Id*. All of these possible injuries—inhibitions of the exercise of free speech, testimony of penalties, or threat of loss of employment—appear to be injuries the Fourth Circuit would have considered adequate for standing purposes in *Donohue*. The Fourth Circuit has thus itself characterized *Laird* as addressing government surveillance conducted in public, and conjectural rather than concrete allegations of harms to third parties whose specific injuries were not presented to the court. *Id* (observing that plaintiffs sought "primarily to vindicate the alleged rights of others, whose actual intimidation or injury is purely conjectural and speculative"). Where surveillance is conducted over private email communications or private Internet browsing, and plaintiffs can present concrete allegations of harm, *Laird* does not control.

b. *Clapper v. Amnesty International* Addressed a Facial Challenge Where Plaintiffs Could Not Show the Existence

of a Surveillance Program Traceable to the Challenged Statute.

Clapper v. Amnesty International arose under unusual factual and procedural circumstances. 133 S. Ct. 1138 (2013). In *Amnesty*, the Court addressed a facial challenge to Section 702 of the FISA Amendments Act, filed on the day the statute was enacted. *Id.* at 1146. The plaintiffs were not able to point to any evidence at all of a surveillance program established by the Government under Section 702. *Id.*at 1148 ("Respondents fail to offer any evidence . . . [and] respondents have no actual knowledge . . . [and thus] 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.") (emphases added). The Court expressed reluctance under those highly speculative circumstances to find standing, especially given the statute's facial requirement that the FISA Court (FISC) adhere to the Fourth Amendment. *Id.* at 1150 ("We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors… critically, the [FISA] Court must also assess whether the Government's targeting and minimization procedures comport with the Fourth Amendment."). The Court did not at the time know (a) what surveillance programs existed under Section 702, or (b) the extent to which the FISA Court has authorized or restricted these programs. Now the public knows both.

This Court will need to consider whether *Amnesty*, which addressed a facial

challenge to a statute in the absence of knowledge of any government surveillance program arising from that statute, controls a challenge to a specific surveillance program that the government itself acknowledges and has described to the public in extensive detail. *See, e.g.*, NSA Director of Civil Liberties and Privacy Office Report: *NSA's Implementation of Foreign Intelligence Surveillance Act Section 702*, at 5 (April 16, 2014) ("compelled service provider assistance has generally been referred to as Upstream collection"), *available at* http://www.dni.gov/files/documents/0421/702%20Unclassified%20Document.pdf; Office of the Inspector General, Department of Justice, *A Review of the Federal Bureau of Investigation's Activities Under Section 702 of the Foreign Intelligence Surveillance Act Amendments Act of 2008*, at xxvii n.12, 32 n.44, 151 (Sept. 2012) ("Approximately nine percent of the total Internet communications that the NSA acquires under Section 702 are through upstream collection"), *available at* https://oig.justice.gov/reports/2015/o1501.pdf.

Other courts have found that the current level of public knowledge of government surveillance programs can convey standing. *See, e.g., Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 801 (2d Cir. 2015) ("Appellants in this case have, despite those substantial hurdles, established standing to sue."); *Obama v. Klayman*, 2015 WL 5058403 at *6 (D.C. Cir. 2015) ("[P]laintiffs have nonetheless met the bare requirements of standing.") (Brown, J., concurring).

We now know far more about the extent of government surveillance under Section 702 than we did at the time of the *Amnesty* decision, when we knew nothing at all. The government has acknowledged that it performs Upstream surveillance under Section 702, collecting the content of Internet communications, from emails to search engine queries to browsing history, from the chokepoints through which most Internet traffic enters and leaves this country. PCLOB Report 7, 33–41; PCLOB Report 125; Charlie Savage, *N.S.A. Said to Search Content of Messages to and from U.S.*, N.Y. Times, Aug. 8, 2013, http://nyti.ms/1E1nlsi (concluding that "the N.S.A. is temporarily copying and then sifting through the contents of what is apparently most e-mails and other text-based communications that cross the border."). The government has acknowledged that it searches the contents of communications like emails and webpages. PCLOB Report 120; [Redacted], 2011 WL 10945618, at *11 (Oct. 3, 2011). A published NSA document in fact identifies Wikipedia traffic in particular as a target for surveillance. XKEYSCORE for Counter-CNE, Intercept, July 1, 2015, http://bit.ly/1Jr79Uc (Slide 9). Knowledge of these surveillance programs—both their actual existence and their sheer scope—must affect any attempt to apply the Court's reasoning in *Amnesty*.

Amnesty's reasoning relies on a "highly attenuated chain of possibilities" specific to the circumstances of that case. *Amnesty Int'l*, 133 S. Ct. at 1148. If this

Court decides to look to *Amnesty* for guidance, it will need to address how the Supreme Court's contingent holding in that case provides guidance to a First Amendment challenge where the length of the Court's five-part "chain of possibilities" has been meaningfully attenuated. The Supreme Court in *Amnesty* enumerated five parts of this "chain of possibilities," which compounded together "do[] not satisfy the requirement that threatened injury must be certainly impending." *Id.* The Court said nothing as to whether standing would be satisfied should any part of that chain be significantly more robust. Plaintiffs here, by contrast, have concrete knowledge that the government employs its 702 authority for the challenged surveillance program, which the government acknowledges exists, and which entails the interception of private communications, a clearly recognized harm with significant First Amendment implications.

A second core point of uncertainty that the Court emphasized in *Amnesty* but is not present here is the position of the FISA Court (FISC) on the constitutionality of any Section 702 program. The Court in *Amnesty* was deeply concerned over speculating about the unknown decisions of independent actors, including the FISC. *Id.* at 1150 (expressing distaste at speculating over the FISA court's use of its discretion to authorize surveillance: "We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors"). Thus current public knowledge of the FISC's decisions on

Upstream surveillance traceable to Section 702 also disrupts the five-part chain. *See [Redacted]*, 2012 WL 9189263 (regarding NSA measures on handling of domestic communications acquired through "upstream collection"); *[Redacted]*, 2011 WL 10947772 (approving amended minimization procedures for communications acquired through "upstream collection"); *[Redacted]*, 2011 WL 10945618 (finding that (1) NSA substantially misrepresented "upstream collection"; (2) current targeting and minimization procedures violated the Fourth Amendment; and (3) current minimization procedures violated the FISA); *all available at* https://epic.org/privacy/surveillance/fisa/fisc/. Courts need no longer speculate about the existence of the Upstream surveillance program or FISC authorization of the program.

This Court faces a new question. The parties in *Amnesty* waived any distinction between First Amendment standing and Fourth Amendment standing. *See Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 122 (2d Cir. 2011). That is not the case here. The parties in *Amnesty* "agreed that Article III standing should be addressed under a single standard with respect to all of the plaintiffs' claims." *Id.* As a result, the Supreme Court did not contemplate in *Amnesty* how First and Fourth Amendment standing analysis would diverge in a less speculative case.

This is the less speculative case. *Amici* express no view as to Fourth Amendment standing after *Amnesty*. We note, however, that the Supreme Court

continues to leniently recognize chilling-effect harms in First Amendment cases. *See, e.g.*, *Susan B. Anthony*, 134 S. Ct. at 2338. This Court should keep in mind the long tradition of leniency in the First Amendment standing context. Given the "danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged." *Cooksey*, 721 F.3d at 235.

CONCLUSION

Privacy violations can trigger a variety of First Amendment injuries, threatening the right to speak anonymously, the right to privacy in one's associations, and the right to receive information in private. Surveillance can also trigger the well-recognized chilling effect. First Amendment standing to address these harms is permissive. Under First Amendment standing doctrine, there is often more room to address harms against third parties as well as speculative future harms. This is because in the absence of First Amendment challenges, democratic society as a whole is harmed.

Laird and *Amnesty* do not obviate traditional First Amendment standing doctrine. It is our hope that this court will recognize the crucial import of First Amendment challenges for our self-governing democracy.

Respectfully submitted,

_____/s/_____

CHELSEA J. CRAWFORD

JOSHUA R. TREEM

BROWN, GOLDSTEIN & LEVY, LLP

120 E. Baltimore Street, Suite 1700
Baltimore, Maryland 21202
T: (410) 962-1030
F: (410) 385-0869
ccrawford@browngold.com
jtreem@browngold.com

CERTIFICATE OF SERVICE

On February 24, 2016, I served a copy of Brief of *Amici Curiae* First Amendment Legal Scholars in Support of Plaintiffs-Appellants and Supporting Reversal upon the following counsel via this Court's electronic-filing system:

Alexander Abraham Abdo
Ashley Marie Gorski
Jameel Jaffer
Patrick Christopher Toomey
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004-2400
aabdo@aclu.org
ptoomey@aclu.org
jjaffer@aclu.org

Deborah Jeon
David Robert Rocah
American Civil Liberties Union of Md.
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211-0000
jeon@aclu-md.org
rocah@aclu-md.org

Charles S. Sims
Proskauer Rose, LLP
11 Times Square
New York, NY 10036-8299

H. Thomas Byron, III
Catherine H. Dorsey
U. S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

_____/s/_____
CHELSEA J. CRAWFORD

JOSHUA R. TREEM

Counsel for Amici Curiae First Amendment Legal Scholars

Date: February 24, 2016

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 15-2560 **Caption:** Wikimedia Foundation et al., v. National Security Agenc

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(s) Chelsea J. Crawford

Attorney for Amici Curiae

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