# 09-4112-cv

*In the*

## United States Court of Appeals

*for the*

## Second Circuit

AMNESTY INTERNATIONAL USA; GLOBAL FUND FOR WOMEN; GLOBAL RIGHTS; HUMAN RIGHTS WATCH; INTERNATIONAL CRIMINAL DEFENSE ATTORNEYS ASSOCIATION; THE NATION MAGAZINE; PEN AMERICAN CENTER; SERVICE EMPLOYEES INTERNATIONAL UNION; WASHINGTON OFFICE ON LATIN AMERICA; DANIEL N. ARSHACK; DAVID NEVIN; SCOTT MCKAY; and SYLVIA ROYCE,

*Plaintiffs-Appellants,*

- v. -

DENNIS C. BLAIR, in his official capacity as Director of National Intelligence; LT. GEN. KEITH B. ALEXANDER, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service; and ERIC H. HOLDER, in his official capacity as Attorney General of the United States,

*Defendants-Appellees*

On Appeal from the United States District Court for the Southern District of New York

**BRIEF OF LAW PROFESSORS AS *AMICI CURIAE***
**IN SUPPORT OF PLAINTIFFS-APPELLANTS AND IN SUPPORT OF VACATUR**
*(See inside cover for list of amici curiae)*

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December 23, 2009

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## TABLE OF CONTENTS

## TABLE OF CONTENTS
## (CONTINUED)

PAGE

## TABLE OF AUTHORITIES

**PAGE(S)**

**CASES**

## TABLE OF AUTHORITIES (CONTINUED)

**PAGE(S)**

## TABLE OF AUTHORITIES (CONTINUED)

**PAGE(S)**

## TABLE OF AUTHORITIES (CONTINUED)

**PAGE(S)**



## OTHER AUTHORITIES

## INTEREST OF *AMICI CURIAE*[1]

*Amici* are scholars of constitutional law and federal jurisdiction with extensive experience analyzing, teaching, and writing on issues of Article III standing. *Amici* are concerned that the district court's decision below imposes a uniquely higher burden on plaintiffs challenging government surveillance -- a burden that is not consistent with the historical development of the standing doctrine, that is not permitted by Article III or prevailing precedent, that conflicts with the policies and purposes underlying the law of standing, and that, in this case, improperly insulates from all judicial review the legality of a significant and controversial government program. *Amici* respectfully submit this brief to urge vacatur of the district court's judgment.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this *amici curiae* brief.

## SUMMARY OF THE ARGUMENT

At issue on this appeal is the fundamental question of who, if anyone, can sue to challenge allegedly unlawful government surveillance.

In granting the government's motion for summary judgment, the district court below held that Article III standing in the surveillance context is limited to plaintiffs who can show that "surveillance of their communications has . . . taken place" or that specific authorization for such surveillance has been "sought or obtained" by the government. *Amnesty Int'l USA* v. *McConnell*, 646 F. Supp. 2d 633, 646 (S.D.N.Y. 2009); *see id.* at 642-58. But that is not the law. Contrary to the district court's decision, there is no different, stricter doctrine of standing in surveillance cases.

To satisfy constitutional standing requirements, all that a plaintiff must show -- in the surveillance context as elsewhere -- is "that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress the injury." *Massachusetts* v. *EPA*, 549 U.S. 497, 517 (2007). *Amici* respectfully submit that, under a proper understanding and application of the law, the injuries asserted by appellants in this case -- (i) a "realistic danger" and an "actual and well-founded fear" that their communications will be monitored under the FISA Amendments Act of 2008 ("FAA") and (ii) harm due to the costly and burdensome measures that the FAA has compelled appellants to take in order to protect the confidentiality of their communications -- are more than sufficient to satisfy these requirements for Article III standing.

In support of their arguments for vacatur, *amici* begin this brief by addressing the often misunderstood and inadequately acknowledged origins and history of the Article III standing doctrine, and explaining why the district court's decision in this case is not consistent with the historical development of the law of standing. Indeed, as we discuss below, the district court's determination that appellants lack standing here because they are not "subject to" the FAA more closely resembles the antiquated "legal interest" test for standing, which the Supreme Court expressly held was not the law almost forty years ago, than it does the law of standing as it exists today. *See infra pp.* 4-11.

*Amici* also examine in this brief the governing precedents -- inside and outside the surveillance context -- in order to explain how appellants' injuries satisfy the requirements for Article III standing, and why the district court's ruling to the contrary is without merit. In particular, as we discuss below, the district court's decision in this case is irreconcilable with the applicable standing case law both as to probabilistic injury and as to the sort of indirect or derivative harms that courts have found sufficient to show judicially cognizable injury-in-fact. *See infra* pp. 11-24.

Finally, *amici* demonstrate below how the district court's rejection of appellants' claims on standing grounds is inconsistent with the policies and purposes underlying the standing doctrine. Indeed, the real policy danger here is that if appellants and those like them are denied standing to sue, then the FAA will be effectively insulated from all judicial review. While that concern, of course,

cannot override the requirements of Article III, it certainly should, and does, inform them. *See infra pp.* 24-26.

For all these reasons, as we discuss below, *amici* urge that the district court's decision be vacated, and this Court find that appellants' asserted injuries are sufficient to establish standing under Article III.

## ARGUMENT

## I.

## THE ORIGINS AND HISTORY OF STANDING: THE DISTRICT COURT'S DECISION IS NOT CONSISTENT WITH THE HISTORICAL DEVELOPMENT OF THE STANDING DOCTRINE

Article III of the Constitution limits federal-court jurisdiction to the resolution of "Cases" and "Controversies." "In order to ensure that this 'bedrock' case-or-controversy requirement is met, courts require that plaintiffs establish their 'standing' as 'the proper part[ies] to bring' suit." *W.R. Huff Asset Mgmt. Co.* v. *Deloitte & Touche LLP*, 549 F.3d 100, 106 (2d Cir. 2008) (quoting *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997)). Under current doctrine, a plaintiff seeking to sue in federal court must demonstrate it has suffered an "injury in fact," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will "likely . . . be redressed by a favorable decision." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

While this three-part standing test may seem simple enough on its face, both courts and commentators have acknowledged that standing is "one of the most confused areas of the law." Erwin Chemerinsky, *Federal Jurisdiction*

§ 2.3.1, at 57 (5th ed. 2007); *see, e.g.*, *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) ("We need not mince words when we say that the concept of 'Article III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it . . . ."); *Bordell* v. *Gen. Elec. Co.*, 922 F.2d 1057, 1059 (2d Cir. 1991) (noting that standing principles are "riddled with ambiguities"); 1 Laurence H. Tribe, *American Constitutional Law* § 3-14, at 390-91 (3d ed. 2000) (noting the "inconsistent and often obtuse nature of the Court's standing rulings"). The origins and history of the doctrine of standing are often misunderstood. *See, e.g.*, Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 170 (1992) ("[T]he modern understanding of standing is insufficiently self-conscious of its own novelty, even of its revisionism.").

Accordingly, we begin this brief by examining the historical development of Article III standing -- from the very beginnings of the Republic to the present day. As we discuss below, this examination makes clear that the district court's finding that appellants lack standing here is without merit -- and, indeed, that it more closely adheres to the long since abandoned "legal interest" test for standing than it does to the current law.

## A. The Origins and Historical Development of the Standing Doctrine

Although sometimes referred to by courts as an "unchanging" limitation on the federal judicial power, *see, e.g.*, *Davis* v. *FEC*, 128 S. Ct. 2759, 2768 (2008), the modern law of standing -- requiring injury-in-fact, causation, and

redressability -- is a relatively recent development. *See, e.g.*, Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System* 113-14 (6th ed. 2009) ("*Hart and Wechsler's*"); Sunstein, *supra*, at 168-70; Tribe, *supra*, § 3-15, at 392-93.

The Constitution itself contains no explicit requirement of "standing" or "injury in fact"; as noted, it states only that federal courts are confined to the decision of "Cases" and "Controversies." Nor do the Framers provide us with significant insight here; they had little to say about the case-or-controversy language or the jurisdictional limitations of Article III. *See, e.g.*, *Hart and Wechsler's*, *supra*, at 49; Sunstein, *supra*, at 173. In fact, prior to the twentieth century, there was no separate standing doctrine at all. To determine whether a case was justiciable, courts looked to whether the plaintiff had a right to sue created by the legislature or rooted in the common law or equity. If substantive law conferred a cause of action, a party could bring suit. There was no independent inquiry into whether the plaintiff had "standing" or had suffered "injury in fact" under Article III. *See, e.g.*, Richard J. Pierce, Jr., *Is Standing Law or Politics*, 77 N.C. L. Rev. 1741, 1763-65 (1999); Sunstein, *supra*, at 170-71; Tribe, *supra*, § 3-15, at 393.

It was not until the 1920s and 1930s that standing first emerged as a discrete body of law in the federal courts. *See, e.g.*, Pierce, *supra*, at 1767; Sunstein, *supra*, at 179-80. Under the doctrine that was developed, a plaintiff had to show invasion of a "legal right" based in common law, statutory law, or the Constitution in order to establish standing to sue. *See, e.g.*, *Tenn. Elec. Power*

*Co.* v. *Tenn. Valley Auth.*, 306 U.S. 118, 137 (1939) (holding that standing is unavailable "unless the right invaded is a legal right, -- one of property, one arising out of a contract, one protected against tortious invasion, or one founded on a statute which confers a privilege"); *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510, 535-36 (1925) (finding standing to sue based on infringement of plaintiff's constitutional rights). This "legal right," or "legal interest," test for standing remained the law for decades -- until it was expressly abandoned by the Supreme Court in 1970.

In *Association of Data Processing Service Organizations* v. *Camp*, the unanimous Supreme Court held that a plaintiff no longer needed to show an invasion of a protectable "legal interest" to establish standing. 397 U.S. 150, 152-53 (1970). Rather, the Court concluded, the test for standing now turned on whether the plaintiff had suffered "an injury in fact, economic or otherwise." *Id.* at 152. In rejecting the prior doctrine, the Supreme Court explained that "[t]he 'legal interest' test goes to the merits. The question of standing is different." *Id.* at 153.

As the Supreme Court made clear, the injury-in-fact test was formulated in an effort to liberalize the law of standing and expand access to the courts. *See, e.g.*, *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 616-17 (1973) (noting that the "injury in fact" test was intended to "expand[] the types of 'personal stake(s)' which are capable of conferring standing on a potential plaintiff"); *see also* Tribe, *supra*, § 3-15, at 393. Consistent with this liberalization and expansion of the doctrine, the *Data Processing* Court defined "injury in fact" broadly, stating that it covered not only injuries to legal or economic interests, but also to

"aesthetic," "conservational," "recreational," and "spiritual" interests. 397 U.S. at 154; *see also United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (standing can be based on any "identifiable trifle"). During this period, the Supreme Court also articulated the purpose of the standing doctrine broadly: as ensuring that there is a specific controversy before the court and that there is an advocate with a sufficient "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962).

In the years the followed, the Burger and Rehnquist Courts took several steps that appeared to constrict the law of standing. In particular, a number of Supreme Court cases seemed to narrow of the scope of the "judicially cognizable" harm that would satisfy the injury-in-fact requirement and expressly added "causation" and "redressability" to the now-familiar three-part standing inquiry. *See, e.g.*, *Warth* v. *Seldin*, 422 U.S. 490 (1975); *Allen* v. *Wright*, 468 U.S. 737 (1984); *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992). The Court also placed much greater emphasis in its decisions on the separation-of-powers "concern about the proper -- and properly limited -- role of the courts in a democratic society." *Warth*, 422 U.S. at 498; *see also, e.g.*, *Lewis* v. *Casey*, 518 U.S. 343, 353 n.3 (1996).

Most recently, the Supreme Court has backed away from an overly restrictive view of standing. *See, e.g.*, *Davis*, 128 S. Ct. at 2769 (holding that "a

realistic and impending threat" of future harm is sufficient to satisfy the Article III requirement of injury-in-fact); *Massachusetts* v. *EPA*, 549 U.S. 497, 526 (2007) (finding that State of Massachusetts had standing to challenge EPA order denying a petition for rulemaking to regulate greenhouse gas emissions from motor vehicles where "[t]he risk of catastrophic harm, though remote, is nevertheless real" and "[t]hat risk would be reduced to some extent if petitioners received the relief they seek"); *Friends of the Earth*, 528 U.S. at 181-85 (holding that plaintiff environmental organizations had standing to sue a corporation under the Clean Water Act where the pollution damage allegedly caused by defendant dissuaded plaintiffs from using certain lands and waterways); *FEC* v. *Akins*, 524 U.S. 11, 20-26 (1998) (holding that voters had standing to bring suit against FEC under federal election laws, and noting that "where a harm is concrete, though widely shared, the Court has found 'injury in fact'"); *see also Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (finding no standing on the facts before it, but noting that harm to "the recreational or even the mere esthetic interests of the plaintiff" will suffice to establish injury-in-fact under Article III). And the Court's decisions continue to emphasize that the core purpose of the standing doctrine is not to limit access to the courts, but rather "[t]o ensure the proper adversarial presentation" in order to improve judicial decisionmaking. *Massachusetts* v. *EPA*, 549 U.S. at 517.

At bottom, as commentators have noted, this development of the law over the years leaves us with one principal standing question today: what counts as injury-in-fact, and what does not? *See, e.g.*, F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L. Rev. 275, 298 (2008); Tribe,

*supra*, § 3-16, at 400. That question can be fully answered only by examining the various cases addressing issues of injury-in-fact. *See, e.g.*, Chemerinsky, *supra*, § 2.3.2, at 69; Tribe, *supra*, § 3-16, at 400. We do that below, concluding that under a proper understanding of the relevant case law, the district court should have found appellants' injuries sufficient to establish standing. *See infra* pp. 11-24.

But first, we briefly review what else this historical analysis has revealed: that the district court's approach to the standing analysis simply is not consistent with the development of the doctrine and is instead closer to the long-abandoned "legal interest" test for standing.

### B. The District Court's Decision Is Not Consistent with the Historical Development of the Law of Standing

The district court below granted summary judgment to the government on standing grounds because it determined that appellants had not shown that "surveillance of their communications has ever taken place under the [FAA]" or that the government "has sought or obtained approval" from the Foreign Intelligence Surveillance Court to conduct such surveillance. *Amnesty Int'l USA*, 646 F. Supp. 2d at 646. Without such a showing, in the district court's view, appellants could not establish that they were "subject to" the FAA, and thus could not establish standing under Article III. *Id.* at 645-47.

Not only does this decision by the district court conflict with the governing case law under the injury-in-fact test (as we discuss below, *see infra* pp. 11-24), it also treads close to the "legal interest" test for standing that, as

discussed above, was rejected by the Supreme Court forty years ago. In particular, the district court's inquiry -- by focusing on whether appellants were "subject to" the FAA and whether their communications were "subjected to actual surveillance" under the statute, and ignoring the other harms asserted -- resembles more the analysis under the "legal interest" test (*i.e.*, whether a protectable "legal interest" of appellants has been infringed by the government's conduct) than it does the current law of standing. *Amnesty Int'l USA*, 646 F. Supp. 2d at 647; *see id.* at 645-55. As the Supreme Court has made clear, however, any "concrete and particularized injury that is either actual or imminent," be it to a legal interest or otherwise, suffices to establish the necessary injury-in-fact required for standing under Article III. *Massachusetts* v. *EPA*, 549 U.S. at 517. Appellants injuries, as discussed in more detail below, *infra pp.* 22-23, meet that governing standard.

## II.

## UNDER THE APPLICABLE LAW OF STANDING, APPELLANTS HAVE ASSERTED JUDICIALLY COGNIZABLE INJURY-IN-FACT

The Supreme Court and this Court have found numerous types of injuries to be sufficient for standing purposes: common-law, constitutional, statutory, economic, and even aesthetic and environmental. *See, e.g.*, Chemerinsky, *supra*, § 2.3.2, at 69-79 (citing and discussing cases); *see also, e.g.*, *Friends of the Earth*, 528 U.S. at 182-85; *Denney* v. *Deutsche Bank AG*, 443 F.3d 253, 264-65 (2d Cir. 2006). To qualify under Article III, the law simply requires that these injuries be "concrete" and "distinct," rather than merely "abstract," "conjectural," or "hypothetical." *E.g.*, *Massachusetts* v. *EPA*, 549 U.S. at 517;

*Friends of the Earth*, 528 U.S. at 180-81; *Akins*, 524 U.S. at 21, 23-24. And threats of future, or prospective, harm can satisfy the injury-in-fact requirement, just as well as harm that has already been "actualized." *Davis*, 128 S. Ct. at 2769; *see also, e.g.*, Tribe, *supra*, § 3-16, at 409.

Here, like in other government surveillance cases, appellants have asserted two sorts of injury: (1) injury based on a "realistic danger" and an "actual and well-founded fear" that their communications will be monitored under the FAA; and (2) injury due to the costly and burdensome measures that the FAA has compelled appellants to take in order to protect the confidentiality of their communications.

As noted, the district court found that these harms did not suffice. That ruling, however, is not consistent with the law of standing. In particular, as we discuss below, the district court's decision conflicts with the applicable standing case law as to probabilistic injury and as to the indirect or derivative harms that courts have found sufficient to show judicially cognizable injury-in-fact.

### A. The Law of Probabilistic Injury

The Supreme Court has made clear that demonstrating a certainty of injury is not necessary to establish Article III standing. *See, e.g.*, *Massachusetts* v. *EPA*, 549 U.S. at 525 n.23 (noting that "[e]ven a small probability of injury" may be "sufficient to create a case or controversy" (quoting *Vill. of Elk Grove Vill.* v. *Evans*, 997 F.2d 328, 329 (7th Cir. 1993))); *see also* Tribe, *supra*, § 3-16, at 409-15 (discussing cases). Rather, prospective harm will also satisfy the injury-in-fact

requirement whenever there is a "realistic danger" of "direct injury." *Davis*, 128 S. Ct. at 2769; *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *see also, e.g.*, *Pennell* v. *City of San Jose*, 485 U.S. 1, 7-8 (1988); *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102, 106-111 (1983); *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 73-74 (1978).

Just last year, in *Davis* v. *FEC*, for example, the Supreme Court held that a "realistic and impending" prospective injury constituted judicially cognizable injury-in-fact, even though the threatened harm at issue was far from certain at the time the suit was filed and ultimately never materialized. 128 S. Ct. at 2769. Specifically, in *Davis*, a candidate for the U.S. House of Representatives brought suit to challenge the facial constitutionality of a federal campaign-finance law, the so-called "Millionaire's Amendment," that imposed greater restrictions on contributions to candidates who spent more than $350,000 of their own money than on contributions made to those candidates' opponents. *Id.* at 2766. The Supreme Court held that the plaintiff candidate had standing to challenge this law, despite the undisputed fact that "[w]hen [the plaintiff] commenced the action, his opponent had not yet qualified for the asymmetrical limits, and later, when his opponent did qualify to take advantage of those limits, he chose not to do so." *Id.* at 2769. The *Davis* Court determined that the injury-in-fact requirements were satisfied because, when he filed suit, the plaintiff had declared his intention to pass the spending threshold that would trigger the asymmetrical limits, and because, the Court asserted, "most candidates who had the opportunity to received expanded contributions had done so" and "there was no indication that [the plaintiff's]

opponent would forgo that opportunity." *Id.* Thus, relying on nothing more than the plaintiff's stated intentions and its own probabilistic analysis, the Supreme Court concluded that the "requisite injury" existed and that the plaintiff had standing under Article III to challenge the statute. *Id.*

The Supreme Court had endorsed this same sort of probabilistic injury-in-fact analysis in the years, and decades, before *Davis* as well. Thirty years ago, in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, the Supreme Court found that the emission of radiation into the environment where plaintiffs lived sufficed as cognizable injury even though the "health and genetic consequences" of the emissions was "uncertain[]" and whether those consequences would impact plaintiffs was also uncertain. 438 U.S. at 74. And in the seminal case of *City of Los Angeles* v. *Lyons*, though rejecting standing on the facts before it, the Supreme Court made clear that the injury-in-fact requirement would be satisfied if plaintiff could show a "realistic threat" and a "sufficient likelihood" of future injury. 461 U.S. at 106 n.7, 109, 111; *see also Pennell*, 485 U.S. at 7-8 (relying on probabilistic analysis, and noting that a plaintiff has standing to challenge a statute where he can demonstrate "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement"); *Babbitt*, 442 U.S. at 298-300 (same).[2]

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[2] In the recent decision of *Summers* v. *Earth Island Institute*, the Supreme Court appeared to suggest that something stricter than the "realistic threat" standard articulated in *Lyons* may be required to satisfy Article III. 129 S. Ct. at 1152-53. But not only was the Supreme Court's statement in this regard dicta -- the *Summers* majority made clear that the plaintiffs there "no more meet [the realistic-threat] requirement than they meet" the "imminent harm" standard it

Moreover, where, as here, First Amendment values are at stake, this Court's precedents hold the Article III injury-in-fact test is even less demanding -- requiring not a "realistic danger," but only that the plaintiff demonstrate "an actual and well-founded fear" of injury. *Am. Booksellers Found.* v. *Dean*, 342 F.3d 96, 101 (2d Cir. 2003).

**B. Indirect and Derivative Harm as Injury-in-Fact**

The Supreme Court also has reaffirmed in recent years that indirect, conditional, and derivative harms -- much like the costly measures and changes in behavior that appellants assert the FAA has compelled them to take in this case in order to protect the confidentiality of their communications -- are sufficient to establish judicially cognizable injury-in-fact. *See Friends of the Earth*, 528 U.S. at 181-85; *see also, e.g.*, Chemerinsky, *supra*, § 2.3.2, at 62-65; Tribe, *supra*, § 3-16, at 409-15.

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characterized as "the usual formulation" for determining whether prospective injury qualified as injury-in-fact -- any abandonment by the Supreme Court of the "realistic threat"/"realistic danger" approach to probabilistic injury would be flatly inconsistent with the decades of case law discussed in the text above (but, other than *Lyons*, not mentioned by the Supreme Court at all in *Summers*). *Id.*; *see also* Scott Michelman, *Who Can Sue Over Government Surveillance?*, 57 UCLA L. Rev. 71, 102 n.156 (2009). Accordingly, this Court, in the post-*Summers* decision of *Connecticut* v. *American Electric Power Co.*, found that the test for assessing whether future injury constituted constitutional injury-in-fact remained unchanged. 582 F.3d 309, 340-44 (2d Cir. 2009). As this Court noted, the Article III requirement of "imminence" does "not impos[e] a strict temporal requirement that a future injury occur within a particular time period following the filing of the complaint"; rather, "[s]tanding depends on the probability of harm, not its temporal proximity." *Id.* at 343 (quoting *520 S. Mich. Ave. Assocs. Ltd.* v. *Devine*, 433 F.3d 961, 962 (7th Cir. 2006)) (internal quotation marks omitted).

Specifically, in *Friends of the Earth*, the Supreme Court held that environmental groups had standing to sue a corporation under the Clean Water Act because the environmental damage allegedly caused by the defendant corporation had deterred members of the plaintiff organizations from using and enjoying certain lands and rivers. 528 U.S. at 181-85. In finding that the requirements of Article III were met, the Supreme Court emphasized that as long as plaintiffs had curtailed their activities as a reasonable response to the conduct they were challenging, "that is enough for injury in fact." *Id.* at 184-85; *see* Chemerinsky, *supra*, § 2.3.2, at 65 (discussing *Friends of the Earth*); *Hart and Wechsler's*, *supra*, at 118 (same).

*Friends of the Earth* does not stand alone. The Supreme Court's determination there that indirect, conditional, and derivative harm was sufficient to show constitutional injury-in-fact, despite the existence of intermediate links between the harm and the challenged conduct, is of a piece with both prior and subsequent case law. *See, e.g.*, *Massachusetts* v. *EPA*, 549 U.S. at 521-26 (finding that State of Massachusetts had Article III standing to challenge EPA order refusing to regulate greenhouse gas emissions from motor vehicles because "U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming," and because " -- at least according to petitioners' uncontested affidavits -- the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts"); *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 678, 683-90 (1973) (holding that a group of

law students had standing to challenge an increase in railroad rates that, they alleged, would decrease the use of recycled products, which would eventually lead to negative environmental effects in the area where the plaintiffs attended school, which would in turn impair the plaintiffs' use of "the forests, streams, mountains, and other resources in the . . . [affected] area").

### C. Under this Governing Case Law, Appellants' Asserted Injuries Constitute Judicially Cognizable Injury-in-Fact

The law of probabilistic injury and derivative harm just discussed is the law that applies here. Contrary to the decision of the district court, there is no stricter doctrine applicable to government surveillance cases.

The Supreme Court's decision in *Laird* v. *Tatum* is instructive in this regard. 408 U.S. 1 (1972). In *Laird*, the Supreme Court denied standing to plaintiffs challenging "the Department of the Army's alleged surveillance of lawful and peaceful civilian political activity." *Id.* at 2 (internal quotation marks omitted). Given the context of the case, *Laird* provides helpful guidance for assessing the core questions at issue on this appeal -- *i.e.*, what is the law of standing in surveillance cases; and how, if at all, is it different from the law of standing generally -- and nothing in the decision supports a special surveillance rule for standing. To the contrary, as we discuss below, *Laird* is fully consistent with the general standing principles reviewed above, both as to probabilistic injury and as to derivative harm.

Accordingly, under the governing case law, to establish Article III injury-in-fact here, appellants need only demonstrate: (1) a "realistic danger" or

"actual and well-founded fear" that their communications will be monitored under the FAA; or (2) harm due to the costly and burdensome measures the FAA has reasonably caused them to take in order to protect the confidentiality of their communications. We submit, as discussed below, that appellants' unrebutted affidavits are more than sufficient to make such a showing.

### 1. *Laird* and Probabilistic Injury

*Laird* provides no basis for imposing a more stringent standard on claims of probabilistic injury in surveillance cases. While the *Laird* Court found that the plaintiffs there did not have standing to sue, its decision was not based on some new, ratcheted-up rule requiring certainty of injury for challenges to government surveillance. Instead, the Supreme Court held that the plaintiffs were without standing because they lacked any "claim of specific present objective harm or a threat of specific future harm" whatsoever. 408 U.S. at 12-14; *see also* Br. for Pls.-Appellants at 25-26 (discussing the attenuated claim of standing asserted by the *Laird* plaintiffs). And the Court was careful to caution that its decision should not in any way be read to preclude standing by plaintiffs who, consistent with generally applicable principles under Article III, could demonstrate either "actual or threatened injury." *Id.* at 15-16.

Despite what the Supreme Court held, the D.C. Circuit does appear to have read *Laird* differently -- as imposing a requirement that plaintiffs demonstrate not merely that they have a "realistic danger" of injury to establish standing, but that they have actually been spied on by the government. The D.C. Circuit first articulated this view in *Halkin* v. *Helms*, concluding there that *Laird*'s requirement

that plaintiffs show "either a 'specific present objective harm or a threat of specific future harm'" meant that "the absence of proof of actual acquisition of [plaintiffs'] communications [wa]s fatal" to their claims. 690 F.2d 977, 999-1000 (D.C. Cir. 1982) (quoting *Laird*, 408 U.S. at 14). Subsequently, in *United Presbyterian Church in the U.S.A.* v. *Reagan*, then-Judge Scalia relied on *Halkin* in finding that plaintiffs' allegations that they faced a threat of government surveillance were not good enough to establish injury-in-fact; without evidence of actual surveillance or a demonstration that some "specific action is threatened or . . . contemplated against them," the D.C. Circuit held, plaintiffs' challenge to an executive order authorizing certain government "intelligence-gathering activities" failed on standing grounds. 738 F.2d 1375, 1380-81 (D.C. Cir. 1984) (Scalia, J.).

The district court below placed great weight on *United Presbyterian Church* in reaching its decision that appellants do not have standing to sue in this case. *See Amnesty Int'l USA*, 646 F. Supp. 2d at 645-47. Based on the holding in *United Presbyterian Church*, the district court determined that, to establish judicially cognizable injury-in-fact, appellants here must show either that "surveillance of their communications has . . . taken place" or that specific authorization for such surveillance has been "sought or obtained" by the government. *Id.* at 646; *see also ACLU* v. *NSA*, 493 F.3d 644, 688, 690-92 (6th Cir. 2007) (Gibbons, J., concurring in the judgment). But this is not the law. As noted above, *Laird* offers no support for such a special, stricter standing rule in surveillance cases. And, thus, *United Presbyterian Church* -- which is based on *Halkin*'s flawed reading of *Laird* -- can offer no support either. *See, e.g.*, *ACLU* v.

*NSA*, 493 F.3d at 697-700 (Gilman, J., dissenting); *see also* Michelman, *supra*, at 87-89, 99-105.

In sum, nothing in *Laird*, or in any other decision of the Supreme Court or this Court, provides a basis for applying a different rule to claims of probabilistic injury in surveillance cases. In surveillance cases, just as any other, the rule is the one already discussed above: plaintiffs must demonstrate a "realistic danger" or, where First Amendment values are at stake, an "actual and well-founded fear" of injury.

### 2. *Laird* and Derivative Harm

*Laird* also does not support a stricter rule for evaluating claims of indirect, conditional, and derivative injury in surveillance cases. As noted above, the plaintiffs in *Laird* had simply suffered no injury at all. *See supra* p. 18. Thus, in the surveillance context as any other, the relevant law is the same: plaintiffs who curtail their activities as a reasonable response to challenged conduct have demonstrated injury-in-fact under Article III. *See supra* pp. 15-17. *Laird* does not change that.

While some courts, including the district court in this case, have interpreted *Laird* more broadly -- as precluding all standing based on derivative harm in surveillance cases, or permitting such standing only where the harm is the result of "regulatory, proscriptive, or compulsory" government action -- both the Supreme Court itself and various lower courts have made clear that this is not the proper reading of the decision.

Just two years after *Laird*, Justice Marshall, sitting as Circuit Justice, upheld standing based on derivative harm in a surveillance case, and clarified that the *Laird* Court's reference to "regulatory, proscriptive, or compulsory" actions "was merely distinguishing earlier cases, not setting out a rule for determining whether an action is justiciable or not." *Socialist Workers Party* v. *Attorney Gen.*, 419 U.S. 1314, 1317-19 (1974) (Marshall, Circuit Justice). Then-Judge Breyer, writing for the First Circuit, reached the same conclusion, holding that *Laird* permits standing, in surveillance cases as elsewhere, when the challenged activity "reasonably leads" the plaintiff to change his behavior. *Ozonoff* v. *Berzak*, 744 F.2d 224, 229-30 (1st Cir. 1984) (Breyer, J.). And, in *Meese* v. *Keene*, the Supreme Court left no doubt: *Laird*'s prohibition of standing based on "subjective chill" did not preclude standing based on non-subjective derivative injury. 481 U.S. 465, 473-76 (1987); *see also* Chemerinsky, *supra*, § 2.3.2, at 70-71 (discussing *Laird* and *Meese*); Tribe, *supra*, § 3-16, at 413 n.89 (noting that "the Supreme Court has narrowly characterized the standing barrier imposed by *Laird*"). Lower courts have continued to follow this properly restrained reading of *Laird*. *See, e.g.*, *Presbyterian Church (U.S.A.)* v. *United States*, 870 F.2d 518, 520-23 (9th Cir. 1989); *Clark* v. *Library of Congress*, 750 F.2d 89, 92-93 (D.C. Cir. 1984); *Muslim Cmty. Ass'n of Ann Arbor* v. *Ashcroft*, 459 F. Supp. 2d 592, 594-95, 597-98, 601 (E.D. Mich. 2006); *Williams* v. *Price*, 25 F. Supp. 2d 623, 629-30 (W.D. Pa. 1998).

In applying its broader interpretation of *Laird*, the district court below attempted to distinguish many of these decisions -- holding that because appellants

were not "subject to" surveillance under the FAA, *Socialist Workers Party*, *Ozonoff*, and *Meese* were of no value to their arguments for standing here. *Amnesty Int'l USA*, 646 F. Supp. 2d, at 656-57; *see also ACLU* v. *NSA*, 493 F.3d at 663-66 (Opinion of Batchelder, J.); *id.* at 688 (Gibbons, J., concurring in the judgment). But, as already discussed, that is not what these cases stand for. *See also, e.g.*, *ACLU* v. *NSA*, 493 F.3d at 700-01 (Gilman, J., dissenting); *see also* Michelman, *supra*, at 89-99, 105-10. Indeed, the statute at issue in *Meese* did not directly regulate the plaintiff there (a U.S. politician who wished to exhibit certain foreign films that had been designated by the government as "political propaganda") at all; it required agents of foreign governments to label such material as "political propaganda" and take other steps before disseminating, but imposed no direct duty on U.S. exhibitors of the material. 481 U.S. at 470-71 & nn. 5-6.

Simply put, the district court's view of the law here is simply inconsistent -- on no reasoned basis -- with not just *Laird* and its progeny, but also with *Friends of the Earth* and the larger body of standing case law finding derivative harm sufficient to establish injury-in-fact.

### 3. Appellants' Asserted Injuries Suffice to Establish Injury-in-Fact

While *amici* do not attempt in this brief to address in detail all of the assertions of injury made by appellants in the affidavits they submitted below, we note that the district court itself recognized that these unrebutted affidavits establish, *inter alia*, the following: (i) that some of the appellants communicate by telephone and e-mail with people the U.S. government believes or believed to be

associated with terrorist organizations; (ii) that some of the appellants communicate with political and human rights activists who oppose governments that are supported economically or militarily by the United States; (iii) that some of the appellants communicate with people located in geographic areas that are a special focus of the U.S. government's counterterrorism or diplomatic efforts; (iv) that all of the appellants exchange information that constitutes foreign intelligence information under the FAA; (v) that appellants believe that their communications will be monitored under the FAA, and that those communications will be retained, analyzed, and disseminated by the government; (vi) that this belief has affected the way appellants do their jobs by, for example, constraining them in locating witnesses, cultivating sources, gathering information, and communicating confidential information; (vii) that appellants have ceased engaging in certain conversations; and (viii) that, in an effort to protect the confidential and privileged nature of their communications, some of the appellants now travel long distances, at considerable cost, to meet personally with individuals instead of communicating with those individuals over telephone or e-mail. *Amnesty Int'l USA*, 646 F. Supp. 2d at 642.

We submit that these uncontested facts are more than enough for appellants to show both (a) a "realistic danger" and "actual and well-founded fear" that their communications will be monitored under the FAA, and (b) harm due to the costly and burdensome measures the FAA has reasonably caused them to take in order to protect the confidentiality of their communications. *See, e.g.*, *Massachusetts* v. *EPA*, 549 U.S. 497, 521-23, 525-26 (2007) (relying on

"petitioners' unchallenged affidavits" to find that probabilistic, derivative harm constituted injury-in-fact); *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181-85 (2000) (finding that plaintiffs' affidavits, asserting that they curtailed their use of certain lands and rivers in response to defendants' alleged pollution, were "entirely reasonable" and thus sufficient to demonstrate injury-in-fact based on derivative harm). Under the case law discussed, they are also therefore sufficient to establish judicially cognizable injury-in-fact under Article III. *See supra* pp. 11-17.

## III.

## THE DISTRICT COURT'S DECISION IS INCONSISTENT WITH THE POLICIES AND PURPOSES UNDERLYING THE STANDING DOCTRINE

Finally, *amici* submit that the district court's rejection of appellants' claims on standing grounds here is simply inconsistent with the policies and purposes underlying the Article III standing doctrine.

The Supreme Court has long made clear that applying the law of standing is far from "a mechanical exercise." *Allen* v. *Wright*, 468 U.S. 737, 751 (1984). Instead, the Court has held, the standing inquiry must be understood in light of the core purpose of the doctrine: to ensure that there is a specific controversy before the court and that there is an advocate with "such a personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Massachusetts* v. *EPA*, 549

U.S. at 517 (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)). This purpose is plainly served by allowing appellants -- who, as noted, submitted voluminous, unrebutted affidavits demonstrating their individualized stakes in this dispute -- to sue here. *See supra* pp. 22-24. Moreover, because such concrete harm has been demonstrated, the standing doctrine's other principal purpose -- the separation-of-powers concern of keeping the courts "within certain traditional bounds," *Lewis* v. *Casey*, 518 U.S. 343, 353 n.3 (1996) -- is also served by permitting appellants to bring suit. *See, e.g.*, *Massachusetts* v. *EPA*, 549 U.S. at 522-23 & 526 n.24; *Akins*, 524 U.S. at 24.

Indeed, the only apparent policy danger here is that if appellants and those like them are denied standing to sue, then the FAA (as well as similar surveillance statutes) will effectively be insulated from judicial review entirely. *See, e.g.*, Michelman, *supra*, at 110-13; *see also, e.g.*, *ACLU* v. *NSA*, 493 F.3d at 701-02 (Gilman, J., dissenting).

Appellants in this case have alleged that the FAA "allows the mass acquisition of U.S. citizens' and residents' international communications" and "[i]n some circumstances . . . allows the warrantless acquisition of purely domestic communications," in violation of the First Amendment, the Fourth Amendment, and Article III. Compl. ¶ 3, *available at* 2008 WL 2773811; *see Amnesty Int'l USA*, 646 F. Supp. 2d at 642-43. Commentators have likewise observed that the FAA raises significant constitutional questions regarding individual liberties, the separation of powers, and the rule of law. *See, e.g.*, Michael J. Kelly, *Responses to the Ten Questions*, 35 Wm. Mitchell L. Rev. 5059, 5063 (2009); William C.

Banks, *Responses to the Ten Questions*, 35 Wm. Mitchell L. Rev. 5007, 5007-08, 5013-16 (2009); *see also* Michelman, *supra*, at 110-13.

Under the district court's decision below, however, standing to challenge this program of allegedly sweeping government surveillance and to raise these issues of grave constitutional import is limited to plaintiffs who can show that "surveillance of their communications has . . . taken place" or that specific authorization for such surveillance has been "sought or obtained" by the government. *Amnesty Int'l USA*, 646 F. Supp. 2d at 646. As appellants discuss in their brief to this Court, such a restrictive rule of standing would appear to make it effectively impossible to find a plaintiff who actually could bring suit here. *See* Br. for Pls.-Appellants at 50-57; *see also ACLU* v. *NSA*, 493 F.3d at 701-02 (Gilman, J., dissenting); Michelman, *supra*, at 110-13.

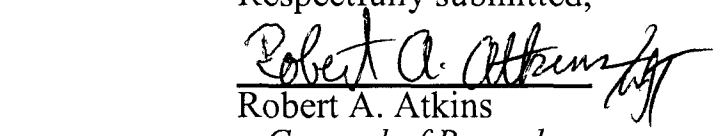
While this concern that the FAA (and, indeed, government surveillance statutes generally) will be completely insulated from judicial review, of course, cannot override the requirements of Article III, *see Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974), it certainly should, and does, inform those requirements. *See, e.g.*, Michelman, *supra*, at 110. And, as the Supreme Court has made clear, where, as here, "individual liberties are at stake," the Constitution "most assuredly envisions a role for all three branches" -- including an essential role, as in this case, for the judiciary. *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 536 (2004); *see also, e.g.*, *Boumediene* v. *Bush*, 128 S. Ct. 2229, 2246, 2277 (2008).

## CONCLUSION

For the reasons set forth above, the Court should vacate the district court's decision, and hold that appellants' asserted injuries are sufficient to establish Article III standing.

Dated: December 23, 2009

Respectfully submitted,



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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) and Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,934 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

I hereby certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman.

Dated: December 23, 2009

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## CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND IN SUPPORT OF VACATUR to be served by Federal Express upon each of the following on December 23, 2009:

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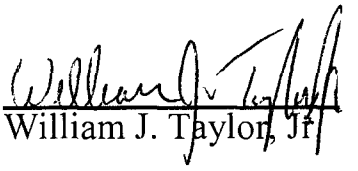
APPELLANTS AND IN SUPPORT OF VACATUR by hand and by electronic mail with the Clerk of the Court (civilcases@ca2.uscourts.gov), and also served it by electronic mail on counsel for the parties (Douglas.Letter@usdoj.gov, David.Jones6@usdoj.gov, Tony.coppolino@usdoj.gov, and JJaffer@aclu.org).



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