No. 11-1025

IN THE
# Supreme Court of the United States

JAMES R. CLAPPER, JR., DIRECTOR OF NATIONAL INTELLIGENCE, *ET AL.*, *Petitioners*,

v.

AMNESTY INTERNATIONAL USA, *ET AL.*, *Respondents*.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

## BRIEF *AMICUS CURIAE* OF GUN OWNERS FOUNDATION, GUN OWNERS OF AMERICA, INC., U.S. JUSTICE FOUNDATION, DOWNSIZE DC FOUNDATION, DOWNSIZEDC.ORG, AND CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* Gun Owners Foundation, U.S. Justice Foundation, Downsize DC Foundation, and Conservative Legal Defense and Education Fund are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). Gun Owners of America, Inc., and DownsizeDC.org are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4).

*Amici curiae* are educational organizations interested in the proper interpretation of the U.S. Constitution. Most of these *amici* have filed numerous *amicus curiae* briefs in prior litigation, including in cases before this Court. All of these *amici* submitted an *amicus curiae* brief to this Court in United States v. Jones, 565 U.S. ___, 132 S.Ct. 945 (2012).[2]

## SUMMARY OF ARGUMENT

The court of appeals and the district court below purported to examine whether the Respondents have suffered an "injury in fact." Neither court examined the nature of the "legally protected interest" asserted as required under traditional standing analysis.

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[1] It is hereby certified that the parties have consented to the filing of this brief and that no counsel for a party authored this brief in whole or in part, and no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] http://lawandfreedom.com/site/constitutional/USvJones_Amicus_Merits.pdf.

Petitioners assume their interest to be a privacy one under a long line of cases since Katz v. United States. But the search and seizure of Respondents' international communications is best viewed as a violation of their exclusive property rights in their communications. The nature of Fourth Amendment law has changed significantly since this case was litigated and decided below, with this Court's decision earlier this year in United States v. Jones. Jones re-established the primacy of property principles in search and seizure cases. Using a property analysis, Respondents have a protectable property interest in their electronic communications as they do in their written communications. In Jones, even a modest violation of property right was a Fourth Amendment protected interest. Thus, because Respondents are not "targeted" by the Petitioners, Petitioners' contention that their search and seizure of Respondents' communications is only "incidental," would be unavailing.

Like any constitutional issue, however frequently litigated, analysis must begin, or at least end, with a search for the meaning of the constitutional text. There is little question that the framers invested this Court with a crucial role to limit usurpation of the people's rights under the Constitution by the other two departments of government. Petitioners' arguments based on selected standing cases seeking to persuade this court not to perform its structural role are not persuasive. As Justice Robert Jackson explained, Fourth Amendment rights "belong in the catalog of indispensable freedoms." Yet, those rights are some "of the most difficult to protect since the officers are

themselves the chief invaders, and there is no enforcement outside of court."

Lastly, an amicus curiae brief filed by six former Attorneys General urge the Court to block Respondents' access to the courthouse door in order to give another layer of protection to government officials from being sued for violations of the constitutional rights. The Attorneys General's unprecedented plea for immunity through standing suggest that there are alternative forums for Respondents to assert their rights — defense in criminal proceedings and Freedom of Information requests. Neither would be an adequate substitute for injunctive relief. The meaning of the Article III case and controversy text must not be constricted to insulate senior government officials from accountability for their actions.

## ARGUMENT

### I. TO DETERMINE WHETHER RESPONDENTS HAVE STANDING, THE COURT MUST FIRST DETERMINE THE NATURE OF THE CONSTITUTIONAL RIGHTS ALLEGED TO HAVE BEEN VIOLATED.

#### A. Both the District Court and Court of Appeals Focused on Injury in Fact, without Defining the Legally Protected Interest.

The district court below originally held that the Respondents (plaintiffs below) lacked standing to challenge the FISA Amendments Act of 2008 ("FAA"),

believing that "[t]his case turns on whether the plaintiffs have met the irreducible constitutional minimum of personal, particularized, concrete injury in fact without turning to the additional prudential aspects of standing."[3] The district court did not view Respondents' fear of being monitored or the professional and economic costs they incurred to avoid surveillance as sufficient to support standing. Thus, the district court granted summary judgment for Petitioners and dismissed the complaint without reaching the merits of the Respondents' claims.[4]

The court of appeals disagreed. Observing that the "government did not submit any evidence of its own [and] at oral argument[,] the government said it accepted the factual submissions of the plaintiffs as true for purposes of these motions."[5] The court of appeals concluded that the plaintiffs' allegations regarding the fear of surveillance, as well as the economic and professional costs reasonably incurred to protect their international communications, constituted "injury in fact" sufficient to support standing.[6]

In their decisions, both district court and the court of appeals purported to follow a practice established in

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[3] Amnesty Int'l v. Clapper, 646 F.Supp.2d 633, 643-44 (D.D.C. 2009) ("Amnesty I").

[4] *Id.* at 658.

[5] Amnesty Int'l v. James Clapper, 638 F.3d 118, 129 (2d Cir. 2011) ("Amnesty II").

[6] *Id.,* pp. 129-31.

a long line of standing cases to first determine whether a plaintiff has suffered an "injury in fact" — generally defined as "an invasion of a **legally protected interest** which is ... concrete and particularized ... and ... 'actual or imminent, not 'conjectural' or 'hypothetical....'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (emphasis added). However, both courts omitted any exposition of the "legally protected interest" involved. Identification of the specific constitutional right at issue in the case is a necessary prerequisite to determining if a plaintiff has suffered "injury in fact."

### B. Respondents Assume that the Fourth Amendment Right At Issue in this Case is a Right to Privacy.

Respondents advance two theories of standing in this case. First, they argue that, due to the "substantial risk" that their communications may be intercepted, they have had to "take costly and burdensome measures to protect" themselves, which constitutes a concrete harm. Respondents Brief ("Resp. Br."), p. 24. Second, Respondents argue that there is a "threat of imminent surveillance" which "constitutes a cognizable injury...." *Id*., p. 25. Both of these theories of harm appear to be premised on the argument that "[c]itizens and residents of the United States have a constitutionally protected **privacy interest** in the content of their telephone calls and e-mails." *See* Respondents' "Memorandum in Support of Motion for Summary Judgment," p. 17 (emphasis added). Respondents described the interest protected by the Fourth Amendment as privacy, following principles

established 45 years ago by this Court in Katz v. United States, 389 U.S. 347 (1967).

Petitioners never discuss the nature of the right asserted by Respondents, but rather repeatedly focus on the absence of an **intentional** search or seizure, and repeatedly downplay the **inevitable** intrusion into Americans' Fourth Amendment rights as "**incidental**" to the non-U.S. persons who are the primary targets of electronic surveillance. *See* Brief of Petitioners ("Pet. Br."), pp. 4, 7, 9, 10, 18, 19, 21, 23, 24, 29, 30, 33, 37, 39, 40; *see also* Petition for Certiorari, pp. 16, 18, 20, 23.

Petitioners never identify Respondents's rights as privacy, but their repeated discussion of incidental intrusion indicates they did not view Respondents as having a property right. Certainly neither party addressed the property interest that the Fourth Amendment was foremost designed to protect.

### C. The Threshold Interest Protected by the Fourth Amendment is Property, Not Privacy.

The FAA challenge below was filed after FAA was signed into law on July 10, 2008, the district court's opinion was issued on August 20, 2009, and the court of appeals decision came on March 21, 2011 — all well before this Court's January 23, 2012 decision in United States v. Jones, *supra*. As such, it is not surprising that the shift in Fourth Amendment law occasioned by Jones has played no part in the litigation of this case to this point.

In Jones, the government attached a GPS tracking device to Mr. Jones' vehicle and used it to track him for a prolonged period without a warrant. This Court found the placement of the device on the car was a search, and made it clear that whatever privacy interest might be protected by the Fourth Amendment, the threshold interest is one of property, and it is the property issue which must be addressed first. This primacy of property is dictated by (i) the historic tie of search and seizure law to the protection of property rights, (ii) the text of the Fourth Amendment, and (iii) this Court's holding in Jones.

First, as Justice Scalia explained, the intended property basis for the Fourth Amendment was illustrated by a case considered to be "'the true and ultimate expression of constitutional law' with regard to search and seizure" — Entick v. Carrington, 95 Eng. Rep. 807 (C.P. 1765) — where for purpose of search and seizure analysis, a man was declared to be "a trespasser, though he does no damage at all...." Jones, *supra*, p. 949.

Second, the constitutional text reinforced the property foundation of the Fourth Amendment:

> The text of the Fourth Amendment reflects its close connection to **property**, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in their **persons, houses, papers, and effects**" would have been superfluous. [*Id.* (emphasis added).]

Lastly, Justice Scalia never applied an "expectation of privacy" test in the Jones case, having concluded that "Jones' Fourth Amendment rights do not rise or fall with the *Katz* formulation." *Id.*, p. 950. The lesson from Jones is that if a property right has been violated, the court's analysis can begin and end with the property analysis.

Applying a property analysis to this case, the attorney Respondents alleged a property interest in their confidential communications with clients. Lawyers are not only entitled to participate in obtaining such confidential communications, but are ethically obligated to maintain possession of those communications, whether written down or committed to memory, to the exclusion of all others.[7] A lawyer's duty of confidentiality can even extend to the identity of his client.[8] A lawyer's interest, therefore, is fundamentally a property interest in protecting communications with a client.

Likewise, the Respondent journalists have a possessory interest in their communications with others. The information journalists collect is generally later packaged and sold. A journalist often must protect the identity of a confidential informer. Unless

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[7] *See generally*, American Bar Association, Model Rules of Professional Conduct, Comment on Rule 1:6 Confidentiality of Information. http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/comment_on_rule_1_6.html.

[8] *See, e.g.*, Dietz v. Doe, 935 P.2d 611 (Wash. 1997).

such information is maintained exclusively until a journalist chooses to publish that information, and unless promised confidences are kept, the journalist cannot perform his function as a member of the fourth estate. His very livelihood depends upon his ownership of information he collects, and the cultivation and earned trust of confidential sources. Like the lawyer's interest then, the journalist's interest is best understood as a proprietary interest in his communications with others.

### D. The Supreme Court Rejected the Government's "Incidental" Argument in U.S. v. Jones.

Petitioners repeatedly claim that any interception of Respondents' electronic communications would be "incidental." While such an argument may have a role in a jurisprudential Fourth Amendment privacy analysis, it has no place in a Fourth Amendment property analysis.

In Jones, *supra*, the government argued that there had been no Fourth Amendment violation because "**at most**, [the placement of the GPS tracking device] involved a **technical trespass**" or a "**modest** ... **intrusion**" onto Jones' property, as if the property interest there was merely incidental. Petitioner's Brief in U.S. v. Jones, pp. 15-16 (emphasis added). But a majority of the Court "rejected the argument that although a 'seizure' had occurred 'in a 'technical' sense' ... no Fourth Amendment violation occurred...." Jones, 132 S.Ct. at 951 (citations omitted).

Because Respondents have a property right to the electronic communications they send over a wire, just as real as their property right in a letter they send through the mail,[9] the government's warrantless search or seizure of that communication is material, regardless of whether it was intentional or incidental.

### E. Olmstead Incorrectly Denied the Existence of a Property Interest in Electronic Communications.

In the majority opinion in Jones, Justice Scalia noted that "[t]he concurrence faults our approach for 'present[ing] particularly vexing problems' **in cases that do not involve physical contact**, such as those that involve the transmission of electronic signals." *Id.*, 132 S.Ct. at 953. Justice Sotomayor too, noted that "[i]n cases of **electronic** or other novel modes of surveillance that do **not** depend upon a **physical invasion** on property, the majority opinion's trespassory test may provide little guidance." *Id.* at 955 (emphasis added). Both opinions seemed to assume the holding of the overruled Olmstead opinion that "electronic signals" are not property. As a result, the majority abandoned exclusive reliance on property principles, believing them insufficient to protect

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[9] *See, e.g.,* Ex Parte Jackson, 96 U.S. 727, 733 (1878) ("No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution.").

against electronic surveillance, and believing that only the Katz ideas of privacy could govern in such situations. *Id.* at 954.

In Olmstead v. United States, 277 U.S. 438 (1928), this Court held that the use of wiretaps to intercept telephone conversations did not constitute a Fourth search or seizure because "[t]here was no [physical] entry of the houses or offices of the defendants." *Id.* at 464. The Court based this holding on the erroneous premise that a Fourth Amendment search must be "of **material things**...." *Id.* (emphasis added). Thus, while a physical message in the mail "is a paper," nonphysical messages "passing over ... the wires beyond [one's] house ... are not...." *Id.* at 466.

In reaching this conclusion, the Court ignored one of the most basic principles of interpreting constitutional law — that its protections are not limited to instrumentalities that existed during the founding era, but also their modern day analogues. For example, in District of Columbia v. Heller, 554 U.S. 570 (2008), Justice Scalia explained that:

> Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects **modern forms of communications**, e.g., Reno v. ACLU, ... and the Fourth Amendment applies to **modern forms of search**, e.g., Kyllo v. United States, ... the Second Amendment extends, prima facie,

> to all instruments that constitute **bearable arms**, even those that were not in existence at the time of the founding. [*Id.* at 582 (emphasis added).]

Indeed, writing in dissent in Olmstead, Justice Holmes noted that "[c]lauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world." Olmstead at 472 (Holmes, J., dissenting).[10]

While the Katz Court overruled Olmstead, it did not reject Olmstead based on property principles, but based on the newly-created "reasonable expectation of privacy." Katz could have been decided on property grounds, since Mr. Katz presumably had paid for his call by putting coins into a public pay phone, thereby renting the equipment and therefore acquiring a leasehold interest in the phone booth as well the phone lines over which his call was placed. Erroneously rejecting the application of property principles to electronic communications, the Katz Court instead began a public policy fascination with a "right to privacy" that was not fundamentally re-examined and modified until 45 years later in U.S. v. Jones.

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[10] Some courts have modernized their view of property rights and the law of trespass. *See, e.g.*, Martin v. Reynolds Metals Co., 342 P.2d 790 (Or. 1959) ("[W]e may define trespass as any intrusion which invades the possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist.").

By its decision in Jones, this Court has restored the property principle to its original provenance in its Fourth Amendment jurisprudence. Consequently, Respondents' legally protected interest is best understood not as a mere interest in privacy, but as a right to exclusive possession of their proprietary interest in their business communications. Thus, they have standing regardless of whether their communications were "targeted" or only "incidentally collected." Both actions trespass upon Respondents' right to exclude others from interfering with their possessory interests.

## II. THE QUESTION PRESENTED SHOULD BE EVALUATED IN TERMS OF WHETHER THE RESPONDENTS HAVE PRESENTED A CASE OR CONTROVERSY BASED ON THE TEXT OF ARTICLE III AND THE SEPARATION OF POWER STRUCTURE OF THE CONSTITUTION.

### A. Neither Petitioners Nor Respondents Offer a Textual or Structural Analysis of Article III Standing.

Neither Petitioners nor Respondents analyze the standing issue according to the constitutional text. Petitioners refer frequently to "Article III standing," "Article III injury in fact," "Article III jurisdiction," and "Article III purposes" (*e.g.,* Pet. Br., p. 10, 24), and limit themselves to a discussion of selected Supreme Court cases. While Petitioners seek to avoid review by this Court, asserting the prerogatives of the Executive Branch, they do not explain the constitutional

underpinnings of their argument. Respondents use similar phrases, sometimes making an argument based on what Article III does not require. *E.g.*, Resp. Br., p. 26. Each party's analysis is limited to the holdings of prior cases. While the principles of standing have been explored in many cases and many contexts, it would be a mistake to fail to begin the standing analysis in this case with the constitutional text, or at least return to the text to check the veracity of a decision wholly based on decided cases.

### B. The Constitution's Text and Structure Demonstrate This Court's Crucial Role in Defending the People's Constitution.

Each of the first three Articles spells out the authority of each of the three branches of government, establishing a federal government of separated and distinct powers. Article III was carefully crafted to identify the scope of federal court jurisdiction within the tripartite structure of this federal government. In relevant part, Article III provides:

> The judicial power shall extend to all **cases**, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made ... under their authority; ... --to **controversies** to which the United States shall be a party.... [Article III, Section 2 (emphasis added).]

In the first essay on the judicial power in The Federalist Papers, Alexander Hamilton famously described the role of the judiciary has having "neither

Force nor Will, but merely judgment ... beyond comparison the weakest of the three departments of power..." Federalist No. 78, G. Carey & J. McClellan, The Federalist (1990), p. 402. Nevertheless, Hamilton identified the role of the judiciary to be a crucial defender of the people's constitution against legislative encroachment, the guardian of the limits placed by the people on the departments created by the other articles. These Constitutional limits, he believed,

> **can be preserved in practice no other way than through the medium of the courts of justice**; whose **duty** it must be to declare all acts contrary to the manifest tenor of the constitution void. **Without this**, all the reservations of particular **rights** or privileges would **amount to nothing**. [*Id.,* p. 402 (emphasis added).]

This did not mean that the judiciary was empowered to substitute its judgment for the other branches. Rather, Hamilton stated:

> It only supposes that the **power of the people** is superior to both; and **the will** of the legislature declared in its statutes, stands in opposition to that **of the people declared in the constitution**, the judges ought to be governed by the latter, rather than the former. [*Id.,* p. 403 (emphasis added).]

As guardians of the Constitution as it is written, the court should take care to discharge its duty to the people without regard for prudential concerns, such as

fear of resistance to its authority by the other branches. Rather, it is obligated to do its duty as prescribed by its structural role.

### C. Petitioners' Arguments Against Standing Disregard this Court's Intended Role.

Petitioners urge this court to bar Respondents access to the courthouse door for three basic reasons:

> 1. Respondents have not met an elevated standard for standing because of "separation-of-powers concerns" based on a congressional standing case, Raines v. Byrd, 521 U.S. 811, 819-820 (1997). Pet. Br., p. 23.
>
> 2. Respondents' injuries would not be redressed by judicial relief. Pet. Br., pp. 38-47.
>
> 3. Respondents alleged "injury in fact" is "conjectural," "speculative," and not "imminent" because plaintiffs "may not be targeted by surveillance ... and have not established that their communications have been or ever will be incidentally collected...." Pet. Br., p. 23.

First, Raines v. Byrd involved a challenge to the Line Item Veto Act by six members of Congress who believed that their legislative power was diluted by that law. Chief Justice Rehnquist opined that "'The law of Art. III standing is built on a single basic idea — the idea of separation of powers' ... [an] overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere...."

Raines, at 820 (citations omitted). However, that statement should be understood in view of this case being brought by "renegade members of Congress to bring down a law they disliked but could not defeat...." N. Devins & M. Fitts, "The Triumph of Timing," GEORGETOWN L.J. 86:351 (1997-98). Whatever meaning that statement had in a dispute which involved an internecine Congressional battle, it cannot be used to deny to the judiciary the power to do what was its "proper constitutional sphere," which Federalist No. 78 explained as preserving the limits on federal power, and the "duty ... to declare all acts contrary to the manifest tenor of the constitution void."

Second, Petitioners' claim that Respondents' concerns could not be remedied by the court is thoroughly refuted by Respondents. *See* Resp. Br., pp. 48-53. Although the Second Circuit's decision was limited to reversing the district court on standing, and no injunction has yet issued, there is no reason to assume an injunction against warrantless surveillance of Americans engaged in international communications would not be effective.

Third, the government does not allege that respondents "will not" be targeted, but that they "may not" be targeted. This is no different from the government's position in Hedges v. Obama, where the government denied standing but refused to clearly respond to the U.S. District Judge Kathleen Forrest's repeated questions as to whether plaintiffs in that case could be assured their work would **not** subject them to detention under section 1021(b)(2) of the 2012 National Defense Authorization Act. The Government's

arguments found unpersuasive by Judge Forrest in that case are also persuasive here. *See* Hedges v. Obama, 2012 U.S. Dist. LEXIS 130354, *7-13 (S.D.N.Y. Sept. 12, 2012).[11] Moreover, if the communications being intercepted are properly viewed as Respondents' property (*see* Section I), it should make no difference that the government targeted the other side of the conversation, and that the seizure of Respondents' communications was incidental. Indeed, "incidental" would appear to be the wrong word, as in every case the seizure of both sides of a targeted communication is not just incidental but actually quite intended, inevitable, and unavoidable.

### D. Fourth Amendment Rights Are Indispensable Freedoms which Can Only Be Protected by this Court.

Dissenting from the Court's determination that a particular search and seizure was reasonable, Justice, and former Attorney General, Robert Jackson charged that this Court had been treating Fourth Amendment rights as "secondary." Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting). Based on

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[11] There, Judge Forrest rejected the Government's invitation to defer its role to the political branches: "And this Court gives appropriate and due deference to the executive and legislative branches – and understands the limits of its own (and their) role(s). But due deference does not eliminate the judicial obligation to rule on properly presented constitutional questions. Courts must safeguard core constitutional rights.... Presented, as this Court is, with unavoidable constitutional questions, it declines to step aside." [*Id.* at *15-16.]

his experience, Justice Jackson knew, and asserted, that Fourth Amendment rights:

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

No doubt, the object of Justice Jackson's 1949 specific reference to his having "dwelt and worked among a people possessed of many admirable qualities" yet living under "arbitrary government" is unmistakable. Justice Jackson had returned just three years previously from several months of service as U.S. Chief Counsel for the prosecution of Nazi war criminals. From that experience in Germany, he brought back with him a fresh understanding of the significance of the Fourth Amendment to the preservation of a free people. He had studied the loss of freedom by the German people, and wrote his Brinegar dissent to instruct on the corrosive effect of a

government which does not respect the property rights of the people.

In a book written later by Whitney Harris, Executive Trial Counsel to Justice Jackson at Nuremberg, the lessons learned were expounded further. In Germany, Harris wrote, "[t]he Weimar Constitution contained positive guarantees of basic civil rights. Chief among them were personal freedom ... inviolability of the home [and] secrecy of letters and other communications...."[12] However, Harris continued, the Weimar Constitution also contained:

> a special provision under which the Reich President was authorized to **suspend basic civil rights** "if the **public safety** and order in the German Reich are considerably disturbed or endangered...." Hitler saw in that article the **Achilles' heel** of the Weimar Republic.... **A conflagration was needed**. And it was plain that the Nazis themselves would have to set the fire....
>
> The plan finally agreed upon was the burning of the Reichstag....
>
> The morning after the fire Hitler obtained from [President] Von Hindenburg the decree of the Reich President **suspending the bill of**

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[12] W. Harris, Tyranny on Trial: The Trial of the Major German War Criminals at the End of World War II At Nuremberg, Germany, 1945-1946, Southern Methodist University Press (1954), p. 41.

> **rights** of the Weimar Constitution, on the representation that the building had been burned by the Communists and a national emergency had resulted.... It provided in part:
>
> "[personal freedom ... inviolability of the home [and] secrecy of letters and other communications] are suspended until further notice [and] **violations** of the privacy of postal, **telegraphic, and telephonic communications**, and warrants for house-searches, orders for **confiscations as well as restrictions on property**, are also **permissible** beyond the legal limits unless otherwise prescribed."
>
> The decree made possible the seizure of political opponents without danger of judicial interference. It was utilized to destroy all effective political opposition.... The voice of the people had been stilled. Neither constitutional liberties nor power of government would be returned to them under Hitler. [Tyranny on Trial, pp. 45-47 (emphasis added).]

While Petitioners would have this court simply trust the executive branch with the FISA Amendments Act, Justice Jackson believed the Court's role could not be delegated to the Executive Branch:

> [T]he right to be secure against **searches and seizures** is **one of the most difficult to protect** since the **officers are themselves the chief invaders**, there is **no enforcement**

> **outside of court**. [Brinegar, 338 U.S. at 181 (Jackson, J., dissenting) (emphasis added).]

The protections of the Fourth Amendment are truly indispensable freedoms essential for the preservation of a free state. Should this Court now abdicate its intended role as protector of the people's Constitution, the Executive could become emboldened, and the results could be catastrophic and irreversible. Indeed, the Court should never assume that another opportunity will present itself later when it will make a stand to defend the Constitution against erosion justified by the necessity of war.

## III. IT IS ILLEGITIMATE TO DENY STANDING IN ORDER TO INSULATE SENIOR GOVERNMENT OFFICIALS.

In their *amicus curiae* brief filed in support of Petitioners in this case, six former Attorneys General argue that the "federal courts should not be called upon to determine the legality of Congress's careful compromise...." *Amicus* Brief of Attorneys General ("AG Brief"), p. 8. The Attorneys General brief argues that limiting standing here will "'prevent[] courts of law from undertaking tasks assigned to the political branches....'" AG Brief p. 9, citing Lewis v. Casey, 518 U.S. 343, 349 (1996). The court system, the Attorneys General would have us believe, is the **last place** that issues like those presented in this case should be decided. Instead, they argue, the courts should trust the executive branch to regulate itself, content that there is a robust system of "significant procedural and substantive protections" — whereby government

officials monitor "**themselves**." AG Brief, pp. 19, 22 (emphasis added).

The Attorneys General make the novel argument that the "standing doctrine provides important legal protections to federal government defendants who must be able to perform their duties without the distraction of litigation...." AG Brief, p. 1. The Attorneys General argue that "changes to the nature and conduct of national security activities ... have spurred a barrage of **unnecessary and disruptive lawsuits** premised on policy disagreements...." AG Brief, p. 3 (emphasis added). The brief cites no specific objectionable cases.

Although the AG Brief acknowledges that the standing doctrine is designed to ensure "the existence of a concrete 'case or controversy'" (AG Brief, p. 1), it urges this Court to use the standing doctrine as a tool to enable government officials to avoid accountability for their actions. The Attorneys General argue that "[h]igh-ranking government officials are often sued in their personal capacity long after their service concludes" and that finding standing in this case will "divert[] the attention of government officials" (AG Brief, p. 12, 13). The standing doctrine was never designed to insulate the federal government from constitutional violations, and the Attorneys General cite no case or legal principle in support of this contention.

The Attorneys General also argue that it is not important to find standing here, because Plaintiffs and others will have opportunities to challenge FISA in (i) "criminal proceedings" or (ii) "a Freedom of

Information Act Request." AG Brief, p. 23. But those avenues are in no way comparable or sufficient. An American should not need to be charged with commission of a crime to have his day in court. An FOIA request will not force the disclosure of classified documents. And, of course, in the vast majority of situations where the violation by government leads to neither prosecution nor awareness by the victim, there is no remedy.

As Justice Jackson explained in his Brinegar dissent, there are limited judicial remedies for executive violations of the Fourth Amendment: "[o]nly occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted." Brinegar at 181. As Justice Jackson believed, "there are ... many unlawful searches ... about which courts do nothing, and about which we never hear." *Id.* This problem is exponentially magnified where, as here, government officials act in secret, its activities never being exposed to the light of day.

In Jones, concurring Justice Sotomayor warned that, because much electronic surveillance "proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices" and "'alter[s] the relationship between citizen and government in a way that is inimical to democratic society.'" *Id.*, 132 S.Ct. at 956 (citation omitted). Justice Sotomayor questioned the "appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable

to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power to and prevent 'a too permeating police surveillance'...." *Id.* (citation omitted). In a regime of surreptitious electronic surveillance when government agents simply eavesdrop on a phone call, or read an email, there is no battered-in door or ransacked file cabinet to alert the victim. As Justice Jackson concluded, "[t]he citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence." *Id.* at 182.

If there somehow were a way to ensure that FISA surveillance was done perfectly, and entirely in secret, its fruit never used in criminal proceedings, no victim ever discovering that he had been the subject of secret surveillance — then there would never be a way to challenge to the FISA Amendments. It simply cannot be the answer that standing does not arise till a violation has occurred — a violation of which the victim will most likely have no knowledge.

## CONCLUSION

For the reasons set out above, the judgment of the U.S. Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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