



U.S. Department of Justice
Civil Division

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VIA CM/ECF

October 19, 2016

Patricia S. Connor, Clerk
U.S. Court of Appeals,
for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, Virginia 23219

RE: *Wikimedia Foundation, et al. v. National Security Agency, et al.*, No. 15-2560

Dear Ms. Connor:

Contrary to plaintiffs' suggestion, *Schuchardt v. President of the United States*, No. 15-3491 (3d Cir. Oct. 5, 2016), does not establish that plaintiffs here have standing to challenge Upstream surveillance.

Schuchardt was wrongly decided. In *Schuchardt*, plaintiff claimed that a different surveillance program than the one at issue in this case intercepts "substantially all" online communications, such that his communications must have been intercepted. Slip Op. 10. The Third Circuit recognized, however, that Schuchardt's factual allegations were equally consistent with a program of targeted acquisition, under which acquisition of his communications would be "implausible." Slip Op. 32. Accordingly, the court should have held that Schuchardt failed to "nudge[] [his] claims across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *id.* at 567-68.

In any event, *Schuchardt* construed the Government's motion to dismiss for lack of standing as a facial, rather than a factual, challenge to jurisdiction. Although *Schuchardt* recognized that sources outside the complaint, such as the PCLOB report, "undermine[d] [plaintiff's] ability to show that his own electronic communications were seized," Slip Op. 34-35, the court held that it could not consider such facts on a facial challenge, and remanded for the district court to resolve the factual

jurisdictional challenge. *Id.* 36. Here, by contrast, the Government has challenged plaintiffs' standing on factual, as well as facial, grounds. This Court may affirm dismissal of the complaint based on the two declarations the Government submitted demonstrating that plaintiffs' jurisdictional allegations were untrue. Appellees' Br. 43-45.

Moreover, as the district court properly concluded, the PCLOB Report and other materials incorporated in plaintiffs' complaint do not support plaintiffs' claim that NSA is intercepting "substantially all" international text-based communications. Appellees' Br. 34-37.

Further, plaintiffs' alleged injuries here are speculative within the meaning of *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), because plaintiffs offer no plausible factual allegations to support their assertion that their communications have been intercepted. Appellees' Br. 51-52. This case, therefore, is distinguishable from *Schuchardt*, which concluded (incorrectly) that plaintiffs' complaint supported an alleged injury. Slip Op. 29-30.

Sincerely,

/s/ Catherine H. Dorsey
CATHERINE H. DORSEY
Attorney for Appellees

cc: all counsel (via CM/ECF)

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2016, I electronically filed the foregoing using the CM/ECF system. Service will be effected that same date automatically via the CM/ECF system on all counsel.

/s/ Catherine H. Dorsey
CATHERINE H. DORSEY
Attorney for Appellees