**No. 15-2560**

IN THE

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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WIKIMEDIA FOUNDATION, *et al.*,
*Plaintiffs-Appellants*,

v.

NATIONAL SECURITY AGENCY, *et al.*,
*Defendants-Appellees*.

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**

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# BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS SEEKING REVERSAL

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## INTEREST OF AMICI CURIAE

*Amici curiae* are law professors and legal scholars from across the country with expertise in civil procedure and federal courts. *Amici* have an interest in the proper interpretation and application of pleading standards in federal court and in the effectiveness of federal courts in enforcing substantive law, including rights provided by the U.S. Constitution. *Amici* are concerned that the district court's conclusion that the plaintiffs lacked Article III standing was premised on a fundamental misapplication of federal pleading standards under the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The district court's approach imposes unnecessary obstacles on access to the federal courts and would thwart the judicial enforcement of constitutional liberties. Accordingly, *amici* respectfully submit this brief in support of appellants.[1] The list of *amici* is set forth in the appendix hereto.

[1] All parties have consented to the filing of this brief pursuant to FED. R. APP. P. 29(a). No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than *amici* or their counsel—contributed money that was intended to fund preparing or submitting the brief.

## SUMMARY OF ARGUMENT

The district court's dismissal of the plaintiffs' complaint at the pre-answer motion-to-dismiss stage was based on a fundamental misapplication of federal pleading standards and should be reversed. Contrary to the district court's ruling below, the Supreme Court's decision in *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), does not require this case to be dismissed for lack of Article III standing. Although both cases concern questions regarding the breadth of the NSA's surveillance activity, *Clapper*—unlike this case—was decided at the summary judgment stage. At the pleading stage, a plaintiff is not required to *prove* the existence of Article III standing. Rather, the court must accept the complaint's factual allegations as true. The opportunity for the parties to develop and present evidence regarding standing occurs later and must not be cut off by a premature pre-answer dismissal.

In this case, the district court improperly refused to accept as true the plaintiffs' straightforward allegations regarding the NSA's activities. In reaching its decision, the district court relied on the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), but the "plausibility" inquiry described in those cases does not permit

courts to disregard the key allegations in the plaintiffs' complaint.[2] *Twombly*, *Iqbal*, and more recent Supreme Court decisions confirm that the plaintiffs' allegations in this case are not the sort of "unadorned, the-defendant-unlawfully-harmed-me accusation" or "[t]hreadbare recitals of the elements of a cause of action" that the Supreme Court deemed could be disregarded as mere "legal conclusions." *Iqbal*, 556 U.S. at 678. Where, as here, the complaint "stated simply, concisely, and directly events that, they alleged, entitled them to [relief]," *Johnson v. City of Shelby*, 135 S. Ct. 346, 347 (2014) (per curiam), a federal court must accept that version of events as true without inquiring whether additional allegations provide evidentiary support for the truth of those allegations.

Moreover, the plaintiffs' complaint in this case contained extensive factual details regarding the NSA's Upstream surveillance of Internet communications. Those allegations are more than sufficient to "nudge[] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. As the Supreme Court has made clear, "[t]he plausibility standard is not akin to a 'probability requirement,'" *Iqbal*, 662 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556), and "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual

[2] As explained *infra* note 4, the district court may also have erred in assuming that the *Twombly*/*Iqbal* pleading framework applies to motions to dismiss for lack of Article III standing. *Amici* assume for purposes of this brief, however, that *Twombly* and *Iqbal* apply to the defendants' motion to dismiss in this case.

proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (citation and internal quotation marks omitted). The district court turned the plausibility inquiry on its head by improperly requiring the plaintiffs to *disprove* alternative explanations, rather than inquiring whether "the complaint's factual allegations '[are] enough to raise a right to relief above the speculative level.'" *Houck v. Substitute Trustee Servs., Inc.*, 791 F.3d 473, 484 (4th Cir. 2015) (quoting *Twombly,* 550 U.S. at 555)).

## ARGUMENT

**The district court misapplied federal pleading standards in finding at the pre-answer motion-to-dismiss stage that the plaintiffs lack Article III standing.**

The district court's conclusion that the plaintiffs lack Article III standing is premised on a misapplication of federal pleading standards, which led the court to mistakenly treat this case as identical to the Supreme Court's 2013 decision in *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013). In *Clapper*, the Court found—at the summary judgment stage—that the plaintiffs had failed to establish Article III standing to challenge 50 U.S.C. § 1881a because they had not demonstrated an "injury in fact" stemming from the Government's § 1881a authority. The *Clapper* majority explained:

> The party invoking federal jurisdiction bears the burden of establishing standing—and, at the summary judgment stage, such a party can no longer rest on mere allegations, but must set forth by affidavit or other evidence specific facts. [Plaintiffs], however, have set forth no specific facts demonstrating that the communications of their foreign contacts will be targeted.

*Id.* at 1148–49 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)) (internal quotation marks omitted).

Here, the district court found a lack of standing because it believed that, compared to *Clapper*, "no more is known about whether Upstream surveillance

*actually* intercepts all or substantially all international text-based Internet communications, including plaintiffs' communications." D. Ct. Op. at 19 (JA 192) (emphasis in original). At the pleading stage, however, it is not necessary for the plaintiffs—or the court—to "know[]" that Upstream surveillance "*actually* intercepts" such communications. It is only necessary that the plaintiffs' complaint adequately alleges that Upstream surveillance intercepts such communications.

In this case, the plaintiffs' complaint contains extensive factual allegations regarding the NSA's Upstream surveillance of Internet communications. *See* First Am. Compl. ¶¶ 39–77 (JA 40–53). Their allegations that the NSA intercepts and reviews substantially all international, text-based communications made over the Internet are reinforced by detailed descriptions of the goals, capacity, and mechanics of Upstream surveillance—everything ranging from the overall structure of the Internet "backbone" within the United States, the mechanism by which Internet communications travel over that backbone, the NSA's processes of copying, filtering, reviewing, retaining and using those communications, and the relationship between those processes and the stated purposes of the Upstream surveillance program.[3]

[3] One plaintiff in particular—Wikimedia Foundation—engages in such extensive Internet communications with individuals outside the United States that their communications would be intercepted even if the NSA were monitoring only a single major Internet circuit. *See* Brief of Appellants at 27; *see also* First. Am. Compl. ¶¶ 61–64, 85–88 (JA 48–49, 55–56).

The district court was not permitted to disregard these allegations in ruling on the defendants' motion to dismiss. The Supreme Court has repeatedly made clear that a plaintiff need not *prove* the existence of Article III standing at the pleading stage—it is only later in the litigation that a plaintiff must provide evidence supporting those allegations. *See Lujan*, 504 U.S. at 561 (contrasting "the pleading stage," where "general factual allegations of injury resulting from the defendant's conduct may suffice," with the summary judgment stage, where "the plaintiff can no longer rest on such mere allegations" (citations and internal quotation marks omitted)); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 65–66 (1987) ("[A] suit will not be dismissed for lack of standing if there are sufficient allegations of fact—not proof—in the complaint . . . . [T]he Constitution does not require that the plaintiff offer this proof as a threshold matter in order to invoke the District Court's jurisdiction.").

The district court in this case mistakenly applied what is essentially a summary judgment standard to a pre-answer motion to dismiss, overriding a distinction that remains important even in the wake of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).[4] *See, e.g.*, *SD3, LLC v. Black & Decker (U.S.) Inc.*,

[4] Although *amici* do not raise the issue here, the district court may also have erred in assuming that the *Twombly*/*Iqbal* pleading framework applies to motions to dismiss for lack of Article III standing. Standing is a question of federal subject-

801 F.3d 412, 425 (4th Cir. 2015) ("[T]he standards applicable to Rule 12(b)(6) and Rule 56 motions remain distinct." (citation omitted)). The opportunity for the parties to develop—and for the court to consider—actual evidence regarding Article III standing must not be cut off by the premature grant of a motion to dismiss. Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them," *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *accord Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014), and the federal judiciary plays a crucial role when it comes to ensuring that liberties guaranteed by the Constitution are protected. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (noting that the Constitution

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matter jurisdiction, whereas both *Twombly* and *Iqbal* involved a Rule 12(b)(6) motion to dismiss for failure to state a claim, which implicates Rule 8(a)(2)'s requirement of "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). Arguably, motions to dismiss for lack of standing remain subject to the Supreme Court's earlier instruction that "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 889 (1990) (internal quotation marks omitted)); *see, e.g.*, *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) ("*Twombly* and *Iqbal* are ill-suited to application in the constitutional standing context because in determining whether plaintiff states a claim under 12(b)(6), the court necessarily assesses the merits of plaintiff's case. But the threshold question of whether plaintiff has standing (and the court has jurisdiction) is distinct from the merits of his claim. . . . *Twombly* and *Iqbal* deal with a fundamentally different issue, and . . . the court's focus should be on the jurisprudence that deals with constitutional standing."). For purposes of this brief, *amici* assume that *Twombly* and *Iqbal*'s approach to pleading applies to the defendants' motion to dismiss in this case.

"most assuredly envisions a role for all three branches when individual liberties are at stake"). The pleading standard should not be distorted to prevent federal court review of the surveillance programs at issue in this case.

### A. The district court erroneously assumed that factual allegations may be rejected at the pleading stage.

The plaintiffs' complaint explicitly alleges that the NSA intercepts and reviews substantially all international, text-based communications made over the internet.[5] The district court, however, did not accept these allegations as true at the pleading stage, apparently presuming that such allegations could be disregarded unless the complaint contained additional allegations indicating how the plaintiff would ultimately prove them. *See, e.g.*, D. Ct. Op., at 18 (JA 191) ("Plaintiffs provide no factual basis to support the allegation that the NSA is using its surveillance equipment at full throttle . . . .").

[5] *See, e.g.*, First Am. Compl. ¶ 48 (JA 43) ("Upstream surveillance is intended to enable the comprehensive monitoring of international internet traffic. With the assistance of telecommunications providers, the NSA intercepts a wide variety of internet communications, including emails, instant messages, webpages, voice calls, and video chats. It copies and reviews substantially all international emails and other 'text-based' communications—i.e., those whose content includes searchable text."); *id.* ¶ 49 (JA 43–44) (describing the NSA's processes of copying, filtering, content review, retention, and use); *id.* ¶ 50 (JA 44) ("Upstream surveillance is not limited to communications sent or received by the NSA's targets. Rather, it involves the surveillance of essentially *everyone's* communications. The NSA systematically examines the full content of substantially all international text-based communications (and many domestic ones) for references to its search terms." (emphasis in original)).

It has long been the case that allegations in a complaint are presumed to be true with respect to motions that—like the defendants' motion to dismiss in this case—are directed at the pleadings. *See, e.g.*, *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1705 (2012) ("Because this case arises from a motion to dismiss, we accept as true the allegations of the complaint."). *Twombly* and *Iqbal* did clarify that mere "legal conclusions" are not entitled to that presumption of truth at the pleading stage. *See Iqbal*, 556 U.S. at 678 ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."). But the key allegations in the complaint here are not such legal conclusions. They are not a mere "unadorned, the-defendant-unlawfully-harmed-me accusation," nor are they "[t]hreadbare recitals of the elements of a cause of action." *Id.* They are allegations that describe what the NSA is doing as a factual matter. At the pleading stage, therefore, they must be accepted as true.[6]

The presumption of truth that applies to such allegations is not conclusive for the entire litigation, of course. The defendants might assert in their answer that these allegations are not true, *see* FED. R. CIV. P. 8(b)(1)(B) ("In responding to a

[6] There does not seem to be any dispute that—assuming these allegations are true—the plaintiffs would have Article III standing to challenge the NSA's conduct. The complaint alleges that the plaintiffs engage in precisely the sort of international communications that would be subjected the surveillance activity alleged. *See, e.g.*, First Am. Compl. ¶¶ 78–164 (JA 53–84). The allegations are particularly strong with respect to plaintiff Wikimedia. *See supra* note 3.

pleading, a party must . . . admit or deny the allegations asserted against it by an opposing party."), although they may do so only if they have undertaken "an inquiry reasonable under the circumstances" and concluded that denying these allegations is "warranted on the evidence" or "reasonably based on belief or a lack of information." FED. R. CIV. P. 11(b)(4). The defendants might (as the defendants in *Clapper* did) move for summary judgment on the ground that the plaintiff lacks sufficient evidence to allow a finding that these facts are true. *See Clapper*, 133 S. Ct. at 1148–49 ("[A]t the summary judgment stage, [a plaintiff] can no longer rest on mere allegations, but must set forth by affidavit or other evidence specific facts." (quoting *Lujan*, 504 U.S. at 561) (internal quotation marks and modifications omitted)). But at the pleading stage these allegations must be accepted as true.

The requirement that courts must accept these allegations as true—without insisting that evidentiary support for those allegations be contained in the complaint—is not undermined by the inquiry into "plausibility" that the Supreme Court described in *Twombly* and *Iqbal*. While the Supreme Court has instructed that the complaint must "'state a claim to relief that is plausible on its face,'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 554 U.S. at 570), that inquiry must be undertaken on the assumption that all non-conclusory allegations are, in fact, true. *Id.* (noting that "factual matter" alleged in a complaint must be "accepted as true");

*see also Houck v. Substitute Trustee Servs., Inc.,* 791 F.3d 473, 484 (4th Cir. 2015) ("It is well established that a motion filed under Rule 12(b)(6) challenges the *legal sufficiency* of a complaint, and that the legal sufficiency is determined by assessing whether the complaint contains sufficient facts, when accepted as true, to state a claim to relief that is plausible on its face." (emphasis in original) (citations and internal quotation marks omitted)). It would be a contradiction to say that a court must accept non-conclusory allegations as true but may also *refuse* to credit those allegations unless other allegations show how the plaintiff will prove them. *See* Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1316–18 (2010).

As the Court emphasized in *Twombly*, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). It also explained that "when a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations." *Id.* at 563 n.8. More recently, the Court has clarified that the inquiry at the pleading stage is "not whether [the plaintiff] will ultimately prevail." *Skinner v. Switzer*, 562 U.S. 521, 529–30 (2011) (citing *Scheuer*, 416 U.S. at 236). Rather, a plaintiffs' allegations are sufficient under *Twombly* and *Iqbal* as long as

they "state[] simply, concisely, and directly events that, they allege[], entitle[] them to [relief] from the [defendant]." *Johnson v. City of Shelby*, 135 S. Ct. 346, 347 (2014) (per curiam).

Supreme Court decisions since *Iqbal*—and even *Iqbal* itself—confirm this. In *Iqbal* the Court recognized that it had to accept as true the complaint's allegation that "the FBI, under the direction of Defendant [FBI Director Robert Mueller], arrested and detained thousands of Arab Muslim men as part of its investigation of the events of September 11." *Iqbal*, 556 U.S. at 681 (quoting ¶ 47 of the plaintiffs' complaint in *Iqbal*). It also had to accept as true the allegation that "the policy of holding post–September–11th detainees in highly restrictive conditions of confinement until they were cleared by the FBI was approved by Defendants [Attorney General John Ashcroft] and [FBI Director Mueller] in discussions in the weeks after September 11, 2001." *Id.* (quoting ¶ 69 of the plaintiffs' complaint in *Iqbal*). The Court in *Iqbal* recognized that these were "factual allegations" that must be "[t]aken as true." *Id.* The Court did not indicate that any additional allegations were required to "plausibly suggest" the truth of these allegations.

In *Johnson v. City of Shelby*, 135 S. Ct. 346 (2014) (per curiam), the Court clarified that *Iqbal* requires a plaintiff to "plead facts sufficient to show that her claim has *substantive* plausibility." *Id.* at 347 (emphasis added). The *Johnson*

complaint—which alleged that the plaintiffs were fired by the city's board of aldermen, not for deficient performance, but because they brought to light criminal activities of one of the aldermen—was sufficient because it "stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city." *Id.* The Court explained: "Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim." *Id.*[7] Significantly, the Court did not indicate that a complaint must include allegations showing how the plaintiffs would ultimately *prove* their allegations that the defendants acted with retaliatory intent. Rather, it was sufficient merely to "state[] simply, concisely, and directly events that, they alleged, entitled them to damages from the city." *Id.*

Other post-*Iqbal* decisions are similar in this regard. In *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27 (2011), the Court unanimously held that the plaintiffs had adequately pled that the defendant's misrepresentations were material for purposes of federal securities law. The plaintiffs in *Matrixx* had

[7] As support for this proposition, the Supreme Court cited Federal Rules 8(a)(2), 8(a)(3), 8(d)(1), and 8(e). *See Johnson*, 135 S. Ct. at 347. Rule 8(a)(2) & (a)(3), of course, set forth the basic pleading obligations: the complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief" FED. R. CIV. P. 8(a)(2), and "a demand for the relief sought." FED. R. CIV. P. 8(a)(3). Rule 8(d) states: "Each allegation must be simple, concise, and direct. No technical form is required." FED. R. CIV. P. 8(d). And Rule 8(e) makes clear that "[p]leadings must be construed so as to do justice." FED. R. CIV. P. 8(e).

claimed that the defendant had made material misrepresentations by withholding information suggesting a connection between its product, the cold remedy Zicam, and a risk of anosmia (the loss of smell). *Id.* at 31. The Court recognized that—under *Iqbal*—"facts" alleged in a complaint must be "assumed to be true." *Id.* at 31–32. Accordingly, the Court accepted as true the plaintiffs' allegations that various studies of which the defendant was aware "confirmed the toxicity of zinc," even though the defendant insisted that they involved different zinc compounds. *Id.* at 46 n.13. In response to the defendant's argument that these studies did not sufficiently rule out the common cold as a cause for their patients' condition, the Court accepted without further inquiry the plaintiffs' allegation that "in one instance, a consumer who did not have a cold lost his sense of smell after using Zicam." *Id.* at 45–46 n.12. The Court did not indicate that additional allegations were required to suggest that these allegations were in fact true.

In *Skinner v. Switzer*, 562 U.S. 521 (2011), which involved a prisoner's § 1983 action seeking to obtain DNA testing as a matter of procedural due process, the Court explained: "Because this case was resolved on a motion to dismiss for failure to state a claim, the question below was not whether Skinner will ultimately prevail on his procedural due process claim, but whether his complaint was sufficient to cross the federal court's threshold." *Id.* at 529–30 (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002), and *Scheuer v. Rhodes*, 416 U.S. 232,

236 (1974) (internal quotation marks omitted)). While the Court ultimately did not decide the legal "vitality" of Skinner's claim, *id.* at 531, it accepted as true Skinner's allegations regarding both his and the State's behavior without insisting on additional allegations to plausibly suggest the truth of those allegations. *See id.* at 530.

Thus, the "plausibility" inquiry does not give courts authority to second-guess a complaint's allegations on the theory that the complaint itself does not explain how the plaintiff will prove these allegations as an evidentiary matter. The district court here was wrong to dismiss the case based on its view that it is not "known" whether "Upstream surveillance *actually* intercepts all or substantially all international text-based Internet communications, including plaintiffs' communications" D. Ct. Op. at 19 (JA 192) (emphasis in original). Nothing in *Twombly*, *Iqbal*, or the Supreme Court's post-*Iqbal* pleading decisions permits the district court to disregard the truth of the complaints' allegations regarding the NSA's activities, because those allegations are more than mere legal conclusions. There is no need, therefore, for this Court to inquire whether *other* allegations plausibility suggest the truth of those allegations.[8] As the chief drafter of the

[8] Accordingly, this case differs from *Twombly* and *Iqbal*, because in those cases a necessary requirement of a meritorious claim had *not* been alleged with anything more than a mere legal conclusion. *See, e.g.*, *Twombly*, 550 U.S. at 564 (refusing to accept plaintiffs' conspiracy allegations that were "merely legal conclusions" but recognizing that an "independent allegation of actual agreement among the

Federal Rules of Civil Procedure observed when Rule 8(a)(2) first came into being: "we cannot expect the proof of the case to be made through the pleadings" because "such proof is really not their function." Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937).

### B. Even on the district court's mistakenly restrictive understanding of federal pleading standards, the complaint's additional allegations are sufficient to avoid dismissal for lack of Article III standing.

For the reasons set out in the previous Section, the complaint's straightforward allegations regarding the NSA's surveillance activity must be accepted as true at the pleading stage, without requiring that additional allegations in the complaint plausibly suggest the truth of those allegations. But even if one adopts the district court's mistaken understanding on this point, the plaintiffs' complaint should survive the defendants' motion to dismiss. The complaint's detailed account of the technological capacity and structure of the NSA surveillance apparatus and the stated goals of the Upstream surveillance program,

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[defendants]" would suffice). In that situation, the nonconclusory allegations would be insufficient to state a claim standing alone, but the complaint might nonetheless survive if those nonconclusory allegations (accepted as true) "plausibly suggest an entitlement to relief." *Iqbal*, 556 U.S. at 681. Here, however, the complaint's allegations provide a straightforward description of what the NSA is doing, and there seems to be no dispute that—if those allegations are true—the plaintiffs would have Article III standing to pursue these claims. *See supra* note 6. The ultimate truth of those allegations must be determined not by scrutinizing the pleadings, but rather through the consideration of actual evidence.

*see* First Am. Compl. ¶¶ 39–77 (JA 40–53), is more than sufficient to "plausibly suggest" that the NSA is engaging in the sort of broad surveillance alleged.

"The plausibility standard is not akin to a 'probability requirement.'" *Iqbal*, 662 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556). The Supreme Court has made clear that "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (citations and internal quotation marks omitted); *see also Houck v. Substitute Trustee Servs., Inc.*, 791 F.3d 473, 484 (4th Cir. 2015) ("This plausibility standard requires only that the complaint's factual allegations 'be enough to raise a right to relief above the speculative level.'" (quoting *Twombly,* 550 U.S. at 555)). Accordingly, "a plaintiff need not demonstrate that her right to relief is probable or that alternative explanations are less likely. . . . If her explanation is plausible, her complaint survives a motion to dismiss under Rule 12(b)(6), regardless of whether there is a more plausible alternative explanation." *Houck*, 791 F.3d at 484.

In this case, the district court turned the plausibility inquiry on its head. It found the complaint *insufficient* simply because it was possible that the NSA was *not* engaging in such surveillance. The district court reasoned that "it does not follow that the NSA is, in fact, using the surveillance equipment to its full potential" even though it recognized that "the NSA has a strong incentive to do

so." D. Ct. Op. at 18 (JA 191). This logic does not justify dismissal of the plaintiffs' complaint. *See SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 426 (4th Cir. 2015) (finding error because the district court "required [the plaintiff] to definitively show an agreement rather than asking whether the allegations plausibly suggested such an agreement" (citations and internal quotation marks omitted)). While it may be that the NSA is engaged in more limited surveillance activity than the plaintiffs allege, the district court did not—and could not—take the position that this was such a strong "obvious alternative explanation," *Iqbal*, 556 U.S. at 682 (quoting *Twombly*, 550 U.S. at 567), that it rendered the plaintiffs' allegations implausible.[9] *See Houck*, 791 F.3d at 484 (concluding that the district

[9] The district court did comment that "the fact that all NSA surveillance practices must survive FISC review—*i.e.,* must comport with the Fourth Amendment—suggests that the NSA is not using its surveillance equipment to its full potential." D. Ct. Op. at 18 (JA 191). The district court cited no support in the FISC's opinions for this assertion, however. And it surely cannot be assumed that the government's obligation to comply with the Fourth Amendment somehow establishes that the government is in fact doing so. Moreover, to *amici*'s knowledge, the defendants in this case have not conceded that the sort of surveillance alleged by the plaintiffs *would* violate the Fourth Amendment. The key legal issue in this case is whether or not such surveillance is legally permissible. It is strange, then, for the district court to claim that the obligation to comply with the Fourth Amendment suggests that the NSA's surveillance activities are more limited than the plaintiffs allege. The district court's reasoning is also puzzling because, if taken to its logical extent, no complaint could ever survive the pleading stage; a defendant's mere obligation to comply with the law would render any claim that the defendant is engaging in illegal activity implausible.

court "incorrectly undertook to determine whether a lawful alternative explanation appeared more likely").

With respect to summary judgment, of course, the plaintiffs would have an evidentiary burden on this issue. *See Clapper*, 133 S. Ct. at 1148–49 (noting that at the summary judgment stage a plaintiff must establish standing "by affidavit or other evidence"). But for purposes of a pre-answer motion to dismiss, the allegations made by the plaintiffs regarding the goals, capacity, and mechanics of Upstream surveillance have certainly "nudged their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

## CONCLUSION

For the foregoing reasons, the district court's order should be reversed, and the case should be remanded for further proceedings.

DATED: February 24, 2016

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(C), the attached brief *amici curiae* is proportionally spaced, has a typeface of 14 points or more, and contains 7,000 words or less. Excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), it contains 5,017 words. This certificate was prepared in reliance on the word count feature of the word-processing system (Microsoft Word) used to prepare this brief.

DATED: February 24, 2016 /s/ Adam Steinman

# APPENDIX

Following is a list of the *amici curiae* law professors. Institutional affiliations are provided for identification purposes only.

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *amici curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on February 24, 2016.

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/s/ Adam Steinman