

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

LARRY KLAYMAN, *et al.*,

Plaintiffs,

v.

BARACK OBAMA, President of the
United States, *et al.*,

Defendants.

Civil Action No.
1:13-cv-0851-RJL

**THE GOVERNMENT DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Dated: May 9, 2014

STUART F. DELERY
Assistant Attorney General

JOSEPH H. HUNT
Director, Federal Programs Branch

ANTHONY J. COPPOLINO
Deputy Branch Director

JAMES J. GILLIGAN
Special Litigation Counsel

MARCIA BERMAN

Senior Trial Counsel

BRYAN DEARINGER

Trial Attorney

RODNEY PATTON

Trial Attorney

JULIA BERMAN

Trial Attorney

U.S Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W., Room 6102
Washington, D.C. 20001
Phone: (202) 514-3358
Fax: (202) 616-8470

Counsel for the Government Defendants

TABLE OF CONTENTS

INTRODUCTION	1
BACKGROUND	5
Statement of Facts.....	5
Proceedings to Date	7
ARGUMENT	10
I. PLAINTIFFS’ REQUEST TO CONSOLIDATE THE DETERMINATION OF THEIR FOURTH AMENDMENT CLAIM WITH THE COURT’S DECISION ON THEIR MOTION FOR A PRELIMINARY INJUNCTION SHOULD BE DENIED AS PREJUDICIAL TO DEFENDANTS AND CONTRARY TO THE INTERESTS OF JUDICIAL ECONOMY THAT RULE 65(a)(2) IS MEANT TO PROMOTE.....	10
II. IF PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT IS CONSIDERED AT THIS TIME, IT SHOULD BE DENIED.	14
A. Plaintiffs Have Not Established Their Standing To Sue.....	14
1. The requirements of Article III standing.....	14
2. Plaintiffs have not presented evidence of specific facts from which it can be concluded that records of their calls have been collected or reviewed.	15
3. The Court’s earlier ruling on standing should not be followed here.....	18
B. THE SECTION 215 TELEPHONY METADATA PROGRAM DOES NOT VIOLATE PLAINTIFFS’ FOURTH AMENDMENT RIGHTS.	23
1. Plaintiffs have no protected privacy interest in telephony metadata.	24
2. Smith is not distinguishable from this case.	27
3. The telephony metadata program is reasonable.	33
CONCLUSION.....	36

TABLE OF AUTHORTIES

CASES

<i>ACLU v. Clapper</i> , 959 F. Supp. 2d 724 (S.D.N.Y. 2013).....	<i>passim</i>
<i>Agostini v. Felton</i> , 521 U.S. 203 (1997).....	32
<i>Air Line Pilots Ass'n Int'l v. Alaska Airlines, Inc.</i> , 898 F.2d 1393 (9th Cir. 1990)	11
<i>Anderson v. Davila</i> , 125 F.3d 148 (3d Cir. 1997).....	11
<i>AttorneyFirst, LLC v. Ascension Entertainment, Inc.</i> , 144 Fed. Appx. 283 (4th Cir. June 8, 2005)	11
<i>Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls</i> , 536 U.S. 822 (2002).....	34
<i>Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics</i> , 403 U.S. 388 (1971).....	8
<i>Bond v. United States</i> , 529 U.S. 334 (2000).....	27
<i>CFTC v. Bd. of Trade of Chicago</i> , 657 F.2d 124 (7th Cir. 1981)	11
<i>Clapper v. Amnesty Int'l USA</i> , 133 S. Ct. 1138 (2013).....	<i>passim</i>
<i>DaimlerChrysler Corp. v. Cuno</i> , 547 U.S. 332 (2006).....	14, 16
<i>Devlin v. Scardelletti</i> , 536 U.S. 1 (2002).....	15
<i>Haig v. Agee</i> , 453 U.S. 280 (1981).....	35
<i>Horton v. California</i> , 496 U.S. 128 (1990).....	22

<i>In re Directives</i> , 551 F.3d 1004 (FISC-R 2008)	35
<i>In re Grand Jury Proceedings</i> , 827 F.2d 301 (8th Cir. 1987)	30
<i>In re Sealed Case</i> , 310 F.3d 717 (FISC-R 2002)	34
<i>Johnson v. Quander</i> , 440 F.3d 489 (D.C. Cir. 2006)	21
<i>Katz v. United States</i> , 389 U.S. 347 (1967)	25
<i>Klayman v. Obama</i> , 957 F. Supp. 2d 1 (D.D.C. 2013)	<i>passim</i>
<i>Laird v. Tatum</i> , 408 U.S. 1 (1972)	18
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	14 15, 22
<i>Mann v. Castiel</i> , 681 F.3d 368 (D.C. Cir. 2012)	12
<i>Maryland v. King</i> , 133 S. Ct. 1958 (2013)	34
<i>Morris v. Dist. of Columbia</i> , 2014 WL 1648293 (D.D.C. Apr. 25, 2014)	11
<i>Mova Pharm. Corp. v. Shalala</i> , 955 F. Supp. 128 (D.D.C. 1997)	11
<i>Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.</i> , 526 U.S. 344 (1999)	12
<i>NTEU v. Von Raab</i> , 489 U.S. 656 (1989)	34, 35
<i>Quon v. Arch Wireless Operating Co., Inc.</i> , 529 F.3d 892 (9th Cir. 2008),	26

<i>Raines v. Byrd</i> , 521 U.S. 811 (1997).....	14
<i>Rakas v. Illinois</i> , 439 U.S. 128 (1978).....	30
<i>Reporters Comm. for Freedom of the Press v. AT&T</i> , 593 F.2d 1030 (D.C. Cir. 1978).....	26
<i>SEC v. Jerry T. O'Brien, Inc.</i> , 467 U.S. 735 (1984).....	27
<i>Smith v. Maryland</i> , 442 U.S. 735 (1979).....	<i>passim</i>
<i>Steagald v. United States</i> , 451 U.S. 204 (1981).....	30
<i>Steel Co. v. Citizens for a Better Env't</i> , 523 U.S. 83 (1998).....	15
<i>Tea Party Leadership Fund v. Fed. Election Comm'n</i> , No. 12-1707, 2012 WL 5382844 (D.D.C. Nov. 2, 2012)	10
<i>Teva Pharm. USA, Inc. v. FDA</i> , 398 F. Supp. 2d 176 (D.D.C. 2005)	10
<i>Texas v. Brown</i> , 460 U.S. 730 (1983).....	23
<i>U.S. Telecom Ass'n v. FCC</i> , 227 F.3d 450 (D.C. Cir 2000)	26
<i>United Presbyterian Church in the USA v. Reagan</i> , 738 F.2d 1375 (D.C. Cir. 1984).....	18
<i>United States ex rel. Shea v. Verizon Bus. Network Servs., Inc.</i> , 904 F. Supp. 2d 28 (D.D.C. 2012)	16
<i>United States v. Banks</i> , 3 F.3d 399 (11th Cir. 1993)	23
<i>United States v. Baxter</i> , 492 F.2d 150 (9th Cir. 1973)	26

<i>United States v. Clutter</i> , 674 F.3d 980 (8th Cir. 2012)	23
<i>United States v. Dionisio</i> , 410 U.S. 1 (1973).....	30
<i>United States v. Doe</i> , 537 F. Supp. 838 (E.D.N.Y. 1982)	26
<i>United States v. Fithian</i> , 452 F.2d 505 (9th Cir. 1971)	26
<i>United States v. Forrester</i> , 512 F.3d 500 (9th Cir. 2008)	26
<i>United States v. Jacobsen</i> , 466 U.S. 109 (1984).....	22, 33
<i>United States v. Jones</i> , 132 S. Ct. 945 (2012).....	<i>passim</i>
<i>United States v. Licata</i> , 761 F.2d 537 (9th Cir. 1985)	23
<i>United States v. Miller</i> , 425 U.S. 435 (1976).....	<i>passim</i>
<i>United States v. Moalin</i> , 2013 WL 6079518 (S.D. Cal. Nov. 18, 2013)	24
<i>United States v. Place</i> , 462 U.S. 696 (1983).....	22, 33
<i>United States v. Reed</i> , 575 F.3d 900 (9th Cir. 2009)	26
<i>United States v. Rigmaiden</i> , 2013 WL 1932800 (D. Ariz. May 8, 2013)	30
<i>United States v. U.S. Dist. Court</i> , 407 U.S. 297 (1972).....	34
<i>United States v. VanLeeuwen</i> , 397 U.S. 249 (1970).....	22

<i>University of Texas v. Camenisch</i> , 451 U.S. 390 (1981).....	11
<i>Valley Forge Christian Coll. v. Americans United for Separation of Church & State</i> , 454 U.S. 464 (1982).....	14
<i>Vernonia Sch. Dist. 47J v. Acton</i> , 515 U.S. 646 (1995).....	34
<i>W. Va. Cmty. Health Ctrs. v. Heckler</i> , 734 F.2d 1570 (D.C. Cir. 1984).....	10
<i>Whitmore v. Arkansas</i> , 495 U.S. 149 (1990).....	16

STATUTES

50 U.S.C. § 1861.....	1
-----------------------	---

FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. P. 56(a)	14
Fed. R. Civ. P. 25(d)	1
Fed. R. Civ. P. 65(a)(2).....	2, 10, 13
Fed. R. Civ. P. 26.....	8

pending the D.C. Circuit's ruling on the Government's appeal, remarking on the "novelty" of the constitutional questions involved and the national security interests at stake. It is difficult to conceive of a case in which making a rush to judgment would be more ill-advised. Yet that is precisely what Plaintiffs now ask of this Court, by moving to advance the Court's ruling on the merits of their Fourth Amendment claim, and consolidate it with the Court's decision on their motion for preliminary injunctive relief. That request should be denied.

In order to promote the interests of judicial economy, Federal Rule of Civil Procedure 65(a)(2) permits a court in appropriate cases to advance the determination of a case on the merits and consolidate it with the hearing on a plaintiff's motion for a preliminary injunction. The Supreme Court has instructed, however, that it is generally inappropriate for a court at the preliminary injunction stage to render a final judgment on the merits, unless the parties are given adequate notice and each party has the opportunity to fully present its case. Consolidation in this case, however—where the Government had less than two weeks to prepare its opposition to Plaintiffs' motion, where Plaintiffs provided no notice of their intention to seek summary judgment while the Fourth Amendment issue remains on appeal, and where the scope of the issues to be decided in this Court will not be known with certainty until the D.C. Circuit rules on the Government's appeal—would deprive the Government Defendants of an opportunity to fully present their case in support of the legality of the telephony metadata program.

It also cannot be overlooked that Plaintiffs have asserted *Bivens* claims against three current and former Government officials seeking damages from them in their personal capacities for alleged violations of Plaintiffs' constitutional rights. Because Plaintiffs have yet to serve these defendants in their personal capacities, summary judgment cannot be entered against them. Nevertheless, even if judgment were entered only against the Government Defendants, the

individual-capacity defendants would be prejudiced if the Court arrived at a judgment on the merits of Plaintiffs' Fourth Amendment claim before the individual defendants can be heard. Moreover, it would not promote, but disserve the interests of judicial economy to reach the merits of Plaintiffs' claim while the Fourth Amendment issue remains on appeal, as explained in the Government Defendants' motion for a stay. Indeed, entering judgment on that claim now, only to be followed (as Plaintiffs propose) by discovery on Plaintiffs' remaining First and Fifth Amendment claims, and a trial on damages, presumably against the still unserved individual defendants, would be a blueprint for procedural chaos, not efficiency.

Even if the Court were to entertain Plaintiffs' motion for summary judgment at this time, it still should be denied. For the reasons discussed herein, the Court lacks jurisdiction to consider Plaintiffs' Fourth Amendment claim, and the claim fails to state grounds on which relief can be granted. First, Plaintiffs have not carried their burden of proving specific facts demonstrating their standing. The fact that they are subscribers of telecommunications services provided by Verizon Wireless is not sufficient. Although the Government has acknowledged that the Section 215 telephony metadata program is broad in scope and involves the aggregation of metadata collected from multiple telecommunications companies, the program has never collected information on all (or virtually all) telephone calls made and/or received in the United States, as the Court previously surmised. The Government has only confirmed the participation, for the duration of one, now-expired FISC order, of Verizon Business Network Services, Inc., a separate business entity from Verizon Wireless. Otherwise, the identities of any carriers participating in the program at any time remains properly classified.

Beyond the issue of collection, Plaintiffs have not proven that they have suffered any injury from the querying of metadata collected under the telephony metadata program. They

express concerns that metadata collected under the program could be “used against” them in some undefined manner, but they have presented no evidence that NSA personnel have reviewed, much less misused, metadata pertaining to their calls. Indeed, because of the strict legal constraints on the NSA’s access to and use of the metadata, only a tiny fraction of the metadata is ever seen by any person. Thus it is sheer speculation to suggest that records of calls to or from Plaintiffs have been or ever will be retrieved or reviewed, much less that the Government could use such information against them.

Second, Plaintiffs’ claim fails on the merits. Plaintiffs’ Fourth Amendment claim is foreclosed by *Smith v. Maryland*, 442 U.S. 735 (1979), which held that there is no reasonable expectation of privacy for purposes of the Fourth Amendment in the numbers dialed to connect a telephone call. Thus, the Government does not conduct a Fourth Amendment “search” when it collects telephony metadata, nor does it “seize” Plaintiffs’ property when telecommunications companies provide their own business records to the Government under orders of the FISC. The reasoning of *Smith*—that telephone subscribers voluntarily convey dialing information to the telephone company and therefore assume the risk that the telephone company will reveal that information to the Government—is fully applicable here, as all courts to consider the question, save this one, have concluded. As the FISC recently held, neither the greater volume of metadata at issue here nor changes in technology since 1979 provide a basis on which to disregard the controlling authority of *Smith*.

Even if Plaintiffs had a reasonable expectation of privacy in business records held by a third party, Plaintiffs have not alleged an invasion of that privacy interest, and in any event the telephony metadata program is reasonable, and therefore lawful, under Fourth Amendment “special needs” analysis. That analysis requires a balancing between the minimal privacy

interests involved in the collection of non-content telephony metadata, and the Government's important interest in identifying and tracking terrorist operatives. That balance tilts in favor of the constitutionality of the telephony metadata program.

For these reasons, discussed more fully below, Plaintiffs' request for entry of summary judgment on their Fourth Amendment claim should be denied, and a decision on the merits of Plaintiffs' Fourth Amendment claim should await both the Court of Appeals' ruling on the Government's appeal from this Court's preliminary injunction, and an opportunity for all parties to prepare and present their cases on the extraordinary issues of constitutional law, and national security, presented by this case.

BACKGROUND

Statement of Facts

The Government Defendants incorporate herein by reference the Statement of Facts contained in the Government Defendants' Opposition to Plaintiffs' Motions for Preliminary Injunctions ("Gov't Defs.' PI Opp.") (ECF No. 25) so far as it pertains to the NSA's acquisition of bulk telephony metadata under Section 215. *See id.* at 5-7, 8-13. The Government Defendants supplement that discussion, however, as follows.

The substantial protections and prohibitions built into the Section 215 telephony metadata program "to safeguard U.S. person information," *In re Application of the FBI for an Order Requiring the Production of Tangible Things from [Redacted]*, Dkt. No. BR 13-109, Am. Mem. Op. at 9 (F.I.S.C. Aug. 29, 2013) (publicly released, unclassified version) ("Aug. 29, 2013 FISC Op.") (Gov't Defs.' PI Opp., Exh. A); Gov't Defs.' PI Opp. at 10-13, have been further enhanced by two recent modifications to the program announced by the President in January 2014 and adopted in subsequent FISC orders. Prior to these modifications, FISC orders

authorizing the program provided that one of 22 designated NSA officials had to make a determination of reasonable, articulable suspicion that a proposed selector was associated with an identified foreign terrorist organization before it could be used to conduct queries of the database. The FISC orders also permitted query results to include identifiers and associated metadata up to three steps (or hops) away from the suspected-terrorist selector. *See* Gov’t Defs.’ PI Opp. at 11–12; *id.* Exh. E (*In re Application of the FBI for an Order Requiring the Production of Tangible Things [etc.]*, Dkt. No. BR 13-80, Primary Order (F.I.S.C. Apr. 25, 2013)) (“Primary Order”) at 7; *id.* Exh. C (Declaration of Teresa H. Shea) (“Shea Decl.”) ¶ 22.

In January the President announced that he was directing the Government to take immediate steps to implement two changes to the program. Remarks by the President on Review of Signals Intelligence, <http://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence>. The first requires advance findings by the FISC of reasonable, articulable suspicion that selectors used to query the metadata are associated with foreign terrorist organizations (except in emergency situations, in which case the Government must seek retrospective FISC approval of the selector). The second limits query results to metadata within two “hops” (rather than three) of suspected terrorist selectors. In February, the FISC granted the Government’s motion to implement these two changes. *See* Decl. of Teresa H. Shea, Signals Intelligence Director, NSA (“Klayman Shea Decl.”) (Exhibit A, hereto) ¶¶ 3–5 & Exh. A (*In re Application of the FBI for an Order Requiring the Prod. of Tangible Things [etc.]*, Dkt. No. BR 14-01, Order Granting the Gov’t’s Mot. To Amend the Court’s Primary Order dated January 3, 2014 (F.I.S.C. Feb. 15, 2014)) at 3–9.²

² On March 27, 2014, the President further announced, after considering options presented to him by the Intelligence Community and the Attorney General, that he will seek legislation to replace the Section 215 bulk telephony-metadata program. Statement by the

Although the Government has acknowledged that the Section 215 program is broad in scope and involves the collection and aggregation of a large volume of data from multiple telecommunications service providers, *see* Gov't Defs.' PI Opp. at 11–12, the program has never captured information on all (or virtually all) calls made and/or received in the United States. Public speculation to that effect is untrue. *Klayman* Shea Decl. ¶ 8. The FISC has also explained that the Government does not acquire call detail records relating to all telephone calls to, from, or within the United States. Aug. 29, 2013 FISC Op. at 4 n.5 (“production of all call detail records of all persons in the United States has never occurred under this program”).

Proceedings to Date

Plaintiffs brought this action on June 6, 2013, immediately following the unauthorized public disclosure of then classified information regarding the NSA's Section 215 telephony metadata program by *The Guardian*. Compl. (ECF No. 1); *see* Class Action Am. Compl. (ECF No. 4), and claim that the program violates their rights under the First, Fourth, and Fifth Amendments. Third Am. Compl. (ECF No. 77), ¶¶38–58. Plaintiffs name as defendants the NSA and DOJ, *id.* ¶¶ 15, 17, together with Government officials sued in their official and/or

President on the Section 215 Bulk Metadata Program, <http://www.whitehouse.gov/the-press-office/2014/03/27/statement-president-section-215-bulk-metadata-program>. The President stated that his goal was to “establish a mechanism to preserve the capabilities we need without the government holding this bulk metadata” to “give the public greater confidence that their privacy is appropriately protected,” while maintaining the intelligence tools needed “to keep us safe.” Instead of the Government obtaining business records of telephony metadata in bulk, the President proposed that telephony metadata should remain in the hands of telecommunications companies. The President stated that “[l]egislation will be needed to permit the government to obtain this information with the speed and in the manner that will be required to make this approach workable.” Under such legislation, the Government would be authorized to obtain telephony metadata from the companies pursuant to individualized orders from the FISC. The President explained that, in the meantime, the Government would seek from the FISC a 90-day reauthorization of the existing Section 215 program, with the two modifications already approved by the FISC in February, and the court has since entered an order reauthorizing the program as modified. *See generally id.*; *Klayman* Shea Decl. ¶¶6–7.

individual capacities (defendants Obama, Holder, Alexander, and the Hon. Roger Vinson, United States District Judge, formerly of the FISC), *id.* ¶¶ 13–14, 16, 18. Plaintiffs seek various forms of injunctive and other equitable relief, in addition to \$3 billion in damages against the individually named defendants under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Id.* ¶¶ 43, 49–50, 58–60. To the best of the Government Defendants’ knowledge, and so far as the record reflects, the individual defendants have not yet been served with process in their personal capacities. See Mem. of Individual Fed. Defs. in Opp’n to Pls.’ “Mot. for Entry of Default” (ECF No. 88) (Mem. of Individual Defs. in Opp’n to Mot. for Default”) at 3, 7, 10.

Plaintiffs moved for preliminary injunctive relief in this case (and in *Klayman v. Obama*, No. 13-cv-881 (RJL)) on October 29, 2013. See Pls.’ Mot. for Prelim. Inj. (ECF No. 13). The following day, the Government Defendants sought an extension of the deadline to submit their opposition to Plaintiffs’ motion until December 2, 2013, to coincide with the deadline to file their then-anticipated motion to dismiss Plaintiffs’ Class Action Amended Complaint. Gov’t Defs.’ Mot. To Extend the Time To Respond to Pls.’ Mots. for Prelim. Injs. (ECF No. 16). At the status conference held on October 31, 2013, the Court denied the Government’s request and directed the Government Defendants to file their opposition on November 11, 2013. Minute Entry dated October 31, 2013. The Court heard argument on November 18, 2013, see Minute Entry dated November 18, 2013, following which the parties, on November 26, 2013, submitted supplemental briefs on the issues of standing and the Court’s jurisdiction to consider Plaintiffs’ (now withdrawn) statutory claims. See ECF Nos. 43, 44.

On December 16, 2013, the Court granted Plaintiffs’ motion for a preliminary injunction prohibiting NSA’s collection or retention of metadata associated with their communications as

part of the Section 215 bulk telephony metadata program. Mem. Op. and Order (ECF Nos. 48, 49); *Klayman v. Obama*, 957 F. Supp. 2d 1 (D.D.C. 2013). The Court determined that plaintiffs Larry Klayman and Charles Strange have standing to challenge the legality of the program, and concluded that they had shown a likelihood of success on the merits of their Fourth Amendment claim. *Klayman*, 957 F. Supp. 2d at 25-42. The Court did not reach the merits of Plaintiffs' other constitutional claims. *See id.* at 9 n.7. Citing "the significant national security interests at stake," and what it described as "the novelty of the constitutional issues," the Court *sua sponte* stayed its injunction pending appeal. *Id.* at 43-44.

On January 3, 2014, the Government filed a notice of appeal from the Court's preliminary injunction. ECF No. 64. The deadline for dispositive motions (extended once on the Government's motion) expired on April 11, 2014. *See Klayman v. Obama*, No. 14-5005 (D.C. Cir.), Per Curiam Order (Mar. 5, 2014) (Dkt. No. 1482432). Thereupon the Government filed a motion seeking entry of a briefing schedule. *Id.* (Dkt. No. 1488123).

Since the Court issued its preliminary injunction ruling, Plaintiffs have repeatedly expressed a desire to conduct discovery in support of their claims while the Court's ruling remains on appeal, and thereafter to proceed to trial, before seeking a decision of the case on the merits. *See* Pls.' Mot. for Status Conference (ECF No. 63); Pls.' Opp. to Mot. for Stay of Proceedings Against the Gov't Defs. Pending Appeal of Prelim. Inj. [etc.] (ECF No. 70) at 3, 4, 6; Pls.' Opp. to Gov't Defs.' Partial Mot. To Dismiss (ECF No. 74) at 3, 11; Pls.' Am. Mot To Compel Defs.' Compliance with FRCP Rule 26 (ECF No. 104). At no point (until now) have Plaintiffs indicated an intention to seek summary judgment on their Fourth Amendment claim while the Court's preliminary injunction ruling remains on appeal. Nonetheless, on April 15, 2014, Plaintiffs filed their motion for partial summary judgment on their Fourth Amendment

claim (ECF No. 108), seeking entry of a permanent injunction under Federal Rule of Civil Procedure 65(a)(2), to be followed by “discovery and trial on the damage claims,” including Plaintiffs’ “other constitutional claims under the First and Fifth Amendments.” Mem. in Supp. of Pls.’ Mot. for Partial Summ. Judg. (ECF No. 108) (“Pls.’ SJ Mem.”) at 1, 12.

ARGUMENT

Plaintiffs’ request to advance the Court’s ruling on the merits of their Fourth Amendment claim and to consolidate it with the Court’s ruling on their motion for a preliminary injunction should be denied as premature, prejudicial to the Government Defendants, prejudicial to the individual defendants, and contrary to the orderly and efficient administration of justice.

Alternatively, Plaintiffs’ motion should be denied (1) for lack of subject matter jurisdiction, as Plaintiffs have not established their standing to sue, or (2) on its merits, for even if Plaintiffs had established their standing, they have not demonstrated a violation of their Fourth Amendment rights entitling them to judgment as a matter of law.

I. PLAINTIFFS’ REQUEST TO CONSOLIDATE THE DETERMINATION OF THEIR FOURTH AMENDMENT CLAIM WITH THE COURT’S DECISION ON THEIR MOTION FOR A PRELIMINARY INJUNCTION SHOULD BE DENIED AS PREJUDICIAL TO DEFENDANTS AND CONTRARY TO THE INTERESTS OF JUDICIAL ECONOMY THAT RULE 65(A)(2) IS MEANT TO PROMOTE.

Rule 65(a)(2) provides, in pertinent part, that “[b]efore or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing.” “This procedural device is designed to conserve judicial resources and avoid duplicative proceedings.” *Tea Party Leadership Fund v. FEC*, 2012 WL 5382844, *1 (D.D.C. Nov. 2, 2012) (citation omitted); *Teva Pharm. USA, Inc. v. FDA*, 398 F. Supp. 2d 176, 181 n.1 (D.D.C. 2005) (same), *vacated on other grounds*, 441 F.3d 1 (D.C. Cir. 2006).

The Supreme Court has instructed, however, that because “a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits,” and “[a] party thus is not required to prove [its] case in full at a preliminary-injunction hearing,” “it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits.” *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); see *W. Va. Ass’n of Cmty Health Ctrs. v. Heckler*, 734 F.2d 1570, 1578 (D.C. Cir. 1984). See also *AttorneyFirst, LLC v. Ascension Entm’t, Inc.*, 144 Fed. Appx. 283, 287-88 (4th Cir. June 8, 2005). Thus, before a ruling on the merits of a party’s claim may be consolidated with the hearing on a plaintiff’s application for a preliminary injunction, “the parties should normally receive clear and unambiguous notice [of the court’s intent] either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases.” *Camenisch*, 451 U.S. at 395; *AttorneyFirst*, 144 Fed. Appx. at 287; *Anderson v. Davila*, 125 F.3d 148, 157-58 (3d Cir. 1997); *Morris v. Dist. of Columbia*, 2014 WL 1648293, *2 n.1 (D.D.C. Apr. 25, 2014). A final judgment entered at the preliminary injunction stage must be vacated if a party was deprived of that chance. *Mova Pharm. Corp. v. Shalala*, 955 F. Supp. 128, 129 n.1 (D.D.C. 1997). See *CFTC v. Bd. of Trade of Chi.*, 657 F.2d 124, 127 (7th Cir. 1981) (citing cases); see also *Anderson*, 125 F.2d at 158-59; *Air Line Pilots Ass’n Int’l v. Alaska Airlines, Inc.*, 898 F.2d 1393, 1397 (9th Cir. 1990).

Plaintiffs’ request for consolidation should be denied because consolidation in the current posture of this case would deprive the Government Defendants of the opportunity to fully present their case on a question of substantial constitutional importance with potential ramifications for national security. Under the schedule ordered by the Court, the Government had less than two weeks to prepare its opposition to Plaintiffs’ preliminary injunction motion, see *supra* at 8, and

was given no notice at the time that the record on which Plaintiffs' motion was to be decided would also become the basis for rendering a final judgment. Moreover, since the Court ruled on Plaintiffs' motion in December 2013, Plaintiffs have given no indication that they would be seeking summary judgment while the Court's preliminary injunction remains on appeal. *See supra*, at 9. Thus, the Government Defendants have been given no reason to expect that at this time they would have to present their full case on the merits (or defend the constitutionality of the Section 215 program on the basis of an abbreviated record), and do so without critical guidance from the Court of Appeals regarding the issues, if any, that remain to be addressed.

The Government Defendants are not the only parties that could be prejudiced by a final judgment rendered on Plaintiffs' Fourth Amendment claim at this time. Plaintiffs have brought identical *Bivens* claims against three current and former Government officials, and a sitting federal judge, seeking \$3 billion in damages against them for allegedly violating Plaintiffs' constitutional rights. *See supra* at 7; Third Am. Compl. ¶¶ 38–58. Although this case is nearly a year old, these individually named defendants still have not been properly served with process in their individual capacities, *see* Mem. of Individual Defs. in Opp'n to Mot. for Default at 5-9, and are under no present obligation to participate or even appear in these proceedings, *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 353 (1999) ("service of process [is] the official trigger for responsive action by an individual or entity named defendant"); *Mann v. Castiel*, 681 F.3d 368, 372 (D.C. Cir. 2012) ("Service of process ... is fundamental to any procedural imposition on a named defendant.") (citation and quotation marks omitted), much less to present their case on the merits.³ Entering final judgment on Plaintiffs' Fourth Amendment

³ Indeed, the Court should dismiss the individual-capacity claims under Federal Rule of Civil Procedure 4(m) due to Plaintiffs' failure to prosecute those claims. *See* Mem. of Individual Defs. in Opp'n to Mot. for Default at 10-11.

claim would prejudice these defendants (even if the judgment were limited to the Government Defendants) because the Court would have arrived at a final determination of the very claim that is raised against them without providing them an opportunity to be heard.

Not only would consolidation prejudice all the defendants in this case, it would also disserve the interests of judicial economy that Rule 65(a)(2) is intended to promote. The Court itself has remarked on what it viewed as the “novel[]” constitutional issues presented here. *Klayman*, 957 F. Supp. 2d at 43. Rendering judgment on Plaintiffs’ Fourth Amendment claims without awaiting the Court of Appeals’ guidance on those issues would require expenditures of time, effort and resources by the Court and the parties that could be avoided depending on the Court of Appeals’ ruling. *See* Gov’t Defs.’ Stay Mot. at 6. Moreover, Plaintiffs themselves envision that, following the Court’s ruling on their Fourth Amendment claim, the case would still proceed to discovery on their First and Fifth Amendment claims—thus dissipating any efficiencies that might be gained from an accelerated decision on the Fourth Amendment claim. Pls’ Mot. at 1, 12. They also anticipate a trial on damages, *id.*, presumably against the as yet unserved individual-capacity defendants, who would still be entitled to present their case on the underlying Fourth Amendment claim. Executing Plaintiffs’ plan for “consolidation” would hopelessly splinter, not streamline, these proceedings.

For these reasons, Plaintiffs’ request for entry of summary judgment on their Fourth Amendment claim, whether under Rule 65(a)(2) or otherwise, should be denied as premature until the D.C. Circuit has ruled on the Government Defendants’ appeal from this Court’s preliminary injunction, and all parties have been given a full opportunity thereafter to prepare and present their cases.

II. IF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IS CONSIDERED AT THIS TIME, IT SHOULD BE DENIED.

Even if Plaintiffs' motion for summary judgment were procedurally proper, it should be denied nevertheless because Plaintiffs have not established their standing to challenge the legality of the Section 215 telephony metadata program, nor demonstrated a violation of their Fourth Amendment rights entitling them to judgment as a matter of law. Fed. R. Civ. P. 56(a).

A. Plaintiffs Have Not Established Their Standing To Sue.

1. The requirements of Article III standing

"The judicial power of the United States ... is not an unconditioned authority to determine the [validity] of legislative or executive acts," but is limited by Article III of the Constitution "to the resolution of 'cases' and 'controversies.'" *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 471 (1982). "No principle is more fundamental to the judiciary's proper role in our system of government." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). A demonstration by Plaintiffs of their standing to sue "is an essential and unchanging part of the case-or-controversy requirement." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). While the Supreme Court "ha[s] always insisted on strict compliance with this jurisdictional standing requirement," *Raines v. Byrd*, 521 U.S. 811, 819 (1997), the "standing inquiry has been especially rigorous when reaching the merits of the dispute would force [a court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (internal quotation marks and citations omitted). As the Supreme Court observed in *Amnesty International*, it has "often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs." *Id.*

To establish Article III standing, Plaintiffs must seek relief from an injury that is “concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.” *Id.* Because standing is “an indispensable part of [a] plaintiff’s case,” *Defenders of Wildlife*, 504 U.S. at 561, Plaintiffs, as the parties invoking federal jurisdiction, bear the burden of establishing these three elements. *Devlin v. Scardelletti*, 536 U.S. 1, 6–7 (2002). To shoulder that burden at the summary judgment stage, Plaintiffs “can no longer rest on ... mere allegations, but must set forth by affidavit or other evidence specific facts” demonstrating that metadata pertaining to their communications have been acquired under the Section 215 program. *See Amnesty Int’l*, 133 S. Ct. at 1149 (quoting *Defenders of Wildlife*, 504 U.S. at 561). If Plaintiffs cannot carry their threshold jurisdictional burden of establishing their standing, “the [C]ourt cannot proceed” and must dismiss the case. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 104 (1998).

2. Plaintiffs have not presented evidence of specific facts from which it can be concluded that records of their calls have been collected or reviewed.

Plaintiffs’ motion for summary judgment should be denied because they have presented no evidence of specific facts demonstrating that they have been injured because of the telephony metadata program. Plaintiffs Klayman and Charles Strange attest (in affidavits submitted in support of their preliminary injunction motion) that they have for many years been subscribers of cellular telephone service provided by Verizon Wireless. Aff. of Larry Klayman (“Klayman Aff.”) (ECF No. 13-2) ¶ 3; Aff. of Charles Strange (“Strange Aff.”) (ECF No. 13-3) ¶¶ 2-3. They state that the alleged collection of information about (and contained in) their communications “impact[s]” their ability to communicate by telephone due to their “concern”

that these communications will be “overheard” or “obtained” by the NSA and “used against” them in some manner. *Klayman Aff.* ¶ 10; *Strange Aff.* ¶ 11.

It cannot be assumed, solely on the basis that Plaintiffs are Verizon Wireless subscribers, that metadata about their calls have been produced to the NSA as part of the Section 215 program. Except for a single, now-expired Secondary Order issued in April 2013 to Verizon Business Network Services, Inc.—a separate business entity from Verizon Wireless, *see, e.g., United States ex rel. Shea v. Verizon Bus. Network Servs., Inc.*, 904 F. Supp. 2d 28, 30 (D.D.C. 2012)—the Government has not declassified or otherwise acknowledged the identities of the carriers participating in the program, either now, or at any time in the past. *Klayman Shea Decl.* ¶ 8. The consequences of that gap in the record must befall Plaintiffs, as it is their “burden to prove their standing by pointing to specific facts, not the Government’s burden to disprove standing by revealing details” of its intelligence programs. *Amnesty Int’l*, 133 S. Ct. at 1149 n.4.

Even presuming that records of Plaintiffs’ calls have been collected under this program, Plaintiffs’ allegations of injury are speculative and conjectural, not actual or imminent, as Article III requires. *Amnesty Int’l*, 133 S. Ct. at 1147; *see also DaimlerChrysler*, 547 U.S. at 345; *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). They express concern that information about their telephone calls allegedly collected by the NSA may be “used against” them in some unspecified manner, *Klayman Aff.* ¶ 10; *Strange Aff.* ¶ 11, but these unsubstantiated fears cannot support their standing in face of the established facts. Under current FISC orders, NSA personnel may only review records responsive to queries initiated using selectors that the FISC has approved based on reasonable, articulable suspicion that they are associated with specific foreign terrorist organizations. *See supra* at 6; Primary Order at 6–7; *Klayman Shea Decl.* ¶¶ 3-5. As a result, only a “tiny fraction” of the records is ever seen by any person. *Shea Decl.*

¶ 23. Plaintiffs have presented no evidence that the NSA has accessed or reviewed records of Plaintiffs' calls as a result of queries made under the "reasonable, articulable suspicion" standard (or otherwise). Thus, it is sheer speculation to suggest that records of calls to or from Plaintiffs either have been or ever will be retrieved or reviewed through queries of the database, much less "used against" them by the Government in some unexplained fashion.

The Supreme Court's decision in *Amnesty International* addressed a similar standing question and establishes that Plaintiffs' speculation concerning the scope and operation of the Section 215 program is insufficient to demonstrate their standing. In *Amnesty International*, various human rights, labor, and media organizations challenged the constitutionality of the FISA Amendments Act of 2008, which expanded the Government's authority to intercept the communications of non-U.S. persons located abroad. 133 S. Ct. at 1144. The organizations alleged that they interacted and engaged in sensitive communications with persons who were likely to be considered by the Government as potential terrorists, or persons of interest in terrorism investigations. *See id.* at 1145–46. They further alleged that they would suffer harms as a result of the Government surveillance program, including a compromised ability to "locate witnesses, cultivate sources, obtain information, and communicate confidential information," and a need to undertake various costly measures to avoid possible surveillance. *Id.*

The Supreme Court, however, held that none of these alleged harms was sufficient to confer standing, because it was "speculative whether the Government will imminently target communications to which respondents are parties." *Id.* at 1148. Rather, the Court held that the plaintiffs' claimed injury rested on a "speculative chain of possibilities," including "that the Government [would] target the communications of non-U.S. persons with whom they communicate," that it would succeed in intercepting them, and that the plaintiffs would be parties

to the particular communications the Government intercepts. *Id.* at 1148–50. So, too, here. The idea that the course of unspecified Government counter-terrorism investigations would lead to particular telephone numbers; that the FISC would approve use of these numbers to conduct queries of the database, based on reasonable, articulable suspicion that they are associated with foreign terrorist organizations; and that these queries would return records of Plaintiffs’ calls that NSA analysts would in turn review (or misuse), is just as speculative as the allegations of harm that were rejected as insufficient in *Amnesty International*.⁴

3. The Court’s earlier ruling on standing should not be followed here.

Defendants recognize that in granting Plaintiffs’ motion for a preliminary injunction this Court concluded that plaintiffs Klayman and Charles Strange have standing to challenge the alleged collection and “analysis” of metadata about their telephone calls under the Section 215 program. *Klayman*, 957 F. Supp. 2d at 26–29. For the reasons that follow, Defendants respectfully submit that this conclusion is not supportable and should not be followed here.

Turning first to the question of collection, as noted above Plaintiffs have presented no evidence of specific facts demonstrating that records pertaining to their calls have been or will be collected under the Section 215 telephony metadata program, other than the fact that they are

⁴ Plaintiffs’ related assertions that the Section 215 program has “directly and significantly impacted” their “ability to communicate via telephone,” and to engage in public advocacy, *Klayman Aff.* ¶¶ 9-10; *Strange Aff.* ¶¶ 11, 19-20, are simply reflections of their unsubstantiated fears that the NSA will misuse metadata about their calls, fears that are insufficient to establish a cognizable injury for purposes of standing. *Amnesty Int’l USA*, 133 S. Ct. at 1152 (holding that the costs allegedly incurred in efforts to avoid possible surveillance was the “product of” the plaintiffs’ “fear of surveillance” and that “such fear is insufficient to create standing”); *Laird v. Tatum*, 408 U.S. 1, 10, 14 (1972) (holding that “[a]llegations of a subjective ‘chill’” arising from plaintiffs’ knowledge of the existence of “a governmental investigative and data-gathering activity,” without “any specific action of the [Government] against them,” were “not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm”); *United Presbyterian Church in the USA v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984) (chilling effect produced by fear of surveillance is an insufficient basis for standing under *Laird*).

Verizon Wireless subscribers. The Court inferred, however, from the Government’s explanation of the contact-chaining process, crossing multiple communications networks and time periods, that the NSA “*must* have collected metadata from Verizon Wireless . . . as well as AT&T and Sprint,” if the program were to serve its intended function. *Klayman*, 957 F. Supp. 2d at 26-27 (emphasis in original). The Court should no longer rely on that reasoning, for two reasons.

First, the record now contains specific evidence refuting the inference the Court made when ruling on Plaintiffs’ preliminary injunction motion. As explained in the *Klayman* Shea Declaration, although the Government has acknowledged that the Section 215 program is broad in scope and involves the aggregation of an historical repository of data collected from more than one provider, the program has never captured information on all (or virtually all) telephone calls made and/or received in the United States. *Klayman* Shea Decl. ¶ 8. As the FISC itself observed in a decision last year, “[t]he production of all call detail records of all persons in the United States has never occurred under [the Section 215 telephony metadata] program.” Aug. 29, 2013 FISC Op. at 4 n.5. It does not follow, therefore, that the NSA “must” collect metadata from all of the three “largest carriers” in order to perform its function, as the Court surmised, *Klayman*, 957 F. Supp. 2d at 27, and collection of metadata about Plaintiffs’ calls cannot be presumed on the basis of such an assumption.

Second, the Court should not continue to rely on its prior standing analysis because, Defendants respectfully submit, it is inconsistent with the Supreme Court’s decision in *Amnesty International*. There the Court insisted that plaintiffs seeking judicial review of actions taken by the Government in the field of intelligence-gathering “set forth . . . specific facts demonstrating” that communications to which they were parties would be targeted for interception, and because the plaintiffs failed to do so, the Court dismissed their claims for lack of standing. 133 S. Ct. at

1149. Notably, the majority declined to follow the approach advocated by the dissenting Justices, who, relying on “commonsense inferences,” found a “very high likelihood” that the Government would intercept at least some of the plaintiffs’ communications under the challenged statute. *Id.* at 1157 (Breyer, J., dissenting). The dissent based its conclusion on a combination of various facts, including that the plaintiffs regularly engaged in the type of electronic communications—with and about suspected foreign terrorists, their families and associates, and their activities—that the Government was authorized and highly motivated, for counter-terrorism purposes, to intercept, and that the record showed the Government had in fact intercepted on thousands of occasions in the past. *Id.* at 1156–59.⁵

Akin to the dissent’s approach in *Amnesty International*, this Court previously attempted to draw an inference, based on unclassified information about the general operation of the Section 215 program, that the NSA must have collected metadata about the Plaintiffs’ calls (or, at the very least, metadata from Plaintiffs’ provider), without the benefit of facts specific to Plaintiffs demonstrating that to be the case. The decision in *Amnesty International* teaches, however, that relying solely on inferences drawn from limited information about the scope and operation of the Government’s intelligence-gathering activities, is not a sufficiently “rigorous” basis on which to make a determination of standing, at least in cases such as this where litigants seek to call the constitutionality of those activities into question. *See* 133 S. Ct. at 1147. Rather, to establish Plaintiffs’ standing to challenge the acquisition of telephony metadata under the Section 215 program, the record must contain evidence of specific facts demonstrating that

⁵ The dissent also observed that the “Government [did] not deny that it ha[d] both the motive and the capacity to listen to communications of the kind described by [the] plaintiffs.” 133 S. Ct. at 1159–60.

information about their communications has been or imminently will be collected under the program. *See id.* at 1149. As discussed above, Plaintiffs have presented no such evidence.

Defendants respectfully submit that the Court’s standing analysis regarding the query process is also inconsistent with the available facts, and precedent, and should not be followed here. In ruling on Plaintiffs’ request for preliminary relief, the Court concluded that Plaintiffs also have standing to challenge alleged analysis of metadata pertaining to their calls, on the basis that when the NSA queries the database, “its system must necessarily analyze metadata for *every* phone number in the database by comparing the foreign target number against *all* of the stored call records to determine which U.S. phones, if any, have interacted with the target number.” 957 F. Supp. 2d at 28. The Court concluded that this use of the NSA’s Section 215 database “‘implicates the Fourth Amendment each time a government official monitors it,’” in the same manner as Government monitoring of the hypothetical home video camera discussed in *Johnson v. Quander*, 440 F.3d 489 (D.C. Cir. 2006). *Id.* at 28-29 (quoting *Johnson*, 440 F.3d at 499). The analogy, however, is not apt.

The Court of Appeals explained in *Johnson* that an in-home video camera raises Fourth Amendment concerns each time it is monitored by a government official because, each time it is so monitored, the camera reveals new and otherwise private information about the homeowner to that official. 440 F.3d at 498–99. The same cannot be said regarding queries of the bulk telephony metadata obtained by the NSA under Section 215. As discussed above, when the NSA runs queries of the database, the analysts see no metadata associated with anyone’s calls, and thus, the analysts learn no information about the communications of any individuals, unless their telephone numbers (or other identifiers) fall within two (previously three) “hops” of a suspected terrorist selector. *See* Shea Decl. ¶¶ 22-24; *Klayman* Shea Decl. ¶¶ 4-5. NSA’s queries are more

akin to the sniff of a narcotics-detection dog, which “discloses only the presence or absence of narcotics” in a person’s luggage, and “does not expose noncontraband items that otherwise would remain hidden from public view, as does . . . an officer’s rummaging through the [luggage’s] contents.” *See United States v. Place*, 462 U.S. 696, 707 (1983) (holding that a canine sniff of luggage is not a search). *See also United States v. Jacobsen*, 466 U.S. 109, 123 (1984) (“A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy.”).⁶ Therefore, absent some indication that NSA analysts conducting queries of the database, using selectors authorized by the FISC under the “reasonable, articulable suspicion” standard, have retrieved and reviewed records containing metadata associated with Plaintiffs’ calls—of which there is no evidence in the record—Plaintiffs cannot demonstrate that the query process itself constitutes an “*invasion* of a legally protected interest,” *Defenders of Wildlife*, 504 U.S. at 560 (emphasis added), even assuming, *contra Smith v. Maryland*, 442 U.S. 735 (1979), that Plaintiffs have a protected privacy interest in telephony metadata. *See Horton v. California*, 496 U.S. 128, 142 n.11 (1990) (government’s acquisition of an item without examining its contents “does not compromise the interest in preserving the privacy of its contents”); *United States v. VanLeeuwen*, 397 U.S. 249,

⁶ The Court’s analogy of a library patron searching for every book that cites *Battle Cry of Freedom*, *Klayman*, 957 F. Supp. 2d at 28 n.38, is also distinguishable from the NSA’s query process in the same critical respect. As described in the Court’s hypothetical, to find every book in the library citing *Battle Cry of Freedom*, the patron herself reviews the contents of each book in the library’s collection. In contrast, NSA analysts who query the database see no information contained in any of the call detail records stored in the database, except for the tiny fraction containing metadata within two hops of the suspected terrorist selector—as if the patron saw only those few books in the library that actually contain references to *Battle Cry of Freedom*.

253 (1970) (defendant’s interest in the privacy of his detained first-class mail “was not disturbed or invaded” until the Government opened the packages).⁷

Plaintiffs have presented no evidence of specific facts demonstrating with the rigor required in this context, *Amnesty International*, 133 S. Ct. at 1147, 1149, that they have standing to contest the NSA’s collection or querying of bulk telephony metadata under Section 215. Plaintiffs’ motion for summary judgment must therefore be denied.

B. THE SECTION 215 TELEPHONY METADATA PROGRAM DOES NOT VIOLATE PLAINTIFFS’ FOURTH AMENDMENT RIGHTS.

Even if Plaintiffs had established their standing, the legal foundation of their Fourth Amendment claim—that they have a reasonable expectation of privacy in the numbers dialed to connect a telephone call (and other metadata) that is protected by the Fourth Amendment—is foreclosed by the controlling and squarely applicable authority of *Smith v. Maryland*, 442 U.S. 735 (1979). That authority, and the third-party doctrine on which it is based, remain the law today. The factual differences between *Smith* and the telephony metadata program are immaterial to the reasoning of *Smith*, as the FISC recently explained in an opinion rejecting the Court’s reasons in its preliminary injunction ruling, 957 F. Supp. 2d at 32-37, for declining to follow *Smith*. *In re Application of the FBI for an Order Requiring the Prod. of Tangible Things*,

⁷ The Court described the above-quoted language from *Horton* and *VanLeeuwen* as dicta, see *Klayman*, 957 F. Supp. 2d at 29 n.40, but they are in fact statements of the law. See, e.g., *United States v. Clutter*, 674 F.3d 980, 984 (8th Cir. 2012) (seizure of computers, subsequently found to contain child pornography, did not implicate Fourth Amendment privacy interests at time seizure occurred); *United States v. Banks*, 3 F.3d 399, 401-02 (11th Cir. 1993) (“no Fourth Amendment privacy interest in first-class mail is invaded by detaining such mail . . . until a search warrant can be obtained,” because “the privacy interest in the packages” was not disturbed); *United States v. Licata*, 761 F.2d 537, 541 (9th Cir. 1985) (seizure of a closed container “affects only the owner’s possessory interests and not the privacy interests vested in the contents”). See also *Texas v. Brown*, 460 U.S. 730, 748-49 (1983) (Stevens, J., concurring in the judgment) (noting that seizure of a locked suitcase does not alone “compromise the secrecy of its contents” or “implicate any privacy interests”).

Dkt. No. BR14-01, Op. and Order, 21-22 (FISC Mar. 20, 2014) (“Mar. 20, 2014 FISC Order”) (Exhibit B, hereto); *see also* *ACLU v. Clapper*, 959 F. Supp. 2d 724, 752 (S.D.N.Y. 2013); *United States v. Moalin*, 2013 WL 6079518, at *5–8 (S.D. Cal. Nov. 18, 2013). Even if there were a reasonable expectation of privacy in telephony metadata, contrary to *Smith*, Plaintiffs have not alleged an invasion of that interest, and the Section 215 telephony metadata program would still pass constitutional muster as it is reasonable under the standard applicable to searches that serve special needs of the Government. For these reasons, Plaintiffs’ motion for entry of summary judgment on their Fourth Amendment claim must be denied.

1. Plaintiffs have no protected privacy interest in telephony metadata.

The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” The Government’s acquisition of bulk telephony metadata pursuant to orders of the FISC does not constitute a “seizure” of Plaintiffs’ records, because the orders are directed to telecommunications service providers, not to subscribers, and direct the production of what are indisputably the providers’ own business records. *See* Shea Decl. ¶ 18; *Smith*, 442 U.S. at 741 (because the government ascertained the telephone numbers dialed from a telephone by installing equipment on telephone company property, the petitioner could not claim that his property was invaded); *United States v. Miller*, 425 U.S. 435, 440-41 (1976) (rejecting a bank depositor’s Fourth Amendment challenge to a subpoena of bank records because, inasmuch as the bank was a party to the transactions, the records belonged to the bank); *ACLU*, 959 F. Supp. 2d at 751 (call detail records obtained under the Section 215 telephony metadata program are created and maintained by the telecommunications providers, not the plaintiff subscribers, and are not, therefore, the plaintiff’s call records).

The Fourth Amendment's proscription against unreasonable "searches" was understood "for most of our history ... to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates." *United States v. Jones*, 132 S. Ct. 945, 949-50 (2012). Since the decision in *Katz v. United States*, 389 U.S. 347 (1967), however, it has been understood that a Fourth Amendment "search" also takes place when governmental investigative activities "violate a person's 'reasonable expectation of privacy.'" *Jones*, 132 S. Ct. at 949-50 (quoting *Katz*, 389 U.S. at 360). In *Katz*, the Court held that the Government's interception of the contents of a telephone conversation occurring in a public telephone booth constituted a search under the Fourth Amendment. The Supreme Court squarely held in *Smith*, however, that individuals have no reasonable expectation of privacy in the mere telephone numbers they dial because they knowingly give that information to telephone companies when they dial the numbers; the government's acquisition of such numbers did not therefore constitute a search under the Fourth Amendment. *Smith*, 442 U.S. at 741-46.

In *Smith*, the police requested (without a warrant or court order) that the telephone company install a pen register device at its central offices to record the numbers dialed from a robbery suspect's (Smith's) home phone. *Smith*, 442 U.S. at 737. After Smith was arrested, he sought to suppress evidence derived from the pen register as a violation of his Fourth Amendment rights. Contrasting the collection of the numbers dialed with the acquisition of the contents of communications at issue in *Katz*, *id.* at 741, the Court held that even if Smith harbored a subjective expectation that the phone numbers he dialed would remain private, that expectation was not reasonable. The Court explained that it "consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Id.* at 743-44 (citing, *inter alia*, *Miller*, 425 U.S. at 441-43 (no reasonable expectation of privacy

in financial records a depositor voluntarily provided to his bank)). Telephone users “typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes.” *Id.* at 743. By using his phone, Smith “voluntarily conveyed numerical information to the telephone company and ‘exposed’ that information to its equipment in the ordinary course of business,” and therefore “assumed the risk that the company would reveal to police the numbers he dialed.” *Id.* at 744; *see also id.* at 745; *Miller*, 425 U.S. at 443 (“depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government.”).⁸

Smith controls the instant case because the pen-register metadata at issue in *Smith* are “indistinguishable” from the non-content telephony metadata at issue in the Section 215 program,⁹ and its rationale is fully applicable. Mar. 20, 2014 FISC Order at 11.

⁸ The third-party doctrine has consistently been applied to call detail records like the business records at issue here. *See, e.g., Reporters Comm. for Freedom of the Press v. AT&T*, 593 F.2d 1030, 1043-46 (D.C. Cir. 1978); *United States v. Baxter*, 492 F.2d 150, 167 (9th Cir. 1973); *United States v. Fithian*, 452 F.2d 505, 506 (9th Cir. 1971); *United States v. Doe*, 537 F. Supp. 838, 839-40 (E.D.N.Y. 1982). *See also U.S. Telecom Ass’n v. FCC*, 227 F.3d 450, 454 (D.C. Cir. 2000) (“telephone numbers are not protected by the Fourth Amendment”) (citing *Smith*). Courts have also applied *Smith* in the Internet age to find no reasonable expectation of privacy in email “to/from” and Internet protocol (“IP”) addressing information, *United States v. Forrester*, 512 F.3d 500, 510-11 (9th Cir. 2008), and in text message addressing information. *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892, 905 (9th Cir. 2008), *rev’d on other grounds*, 130 S. Ct. 2619 (2010).

⁹ Just as Plaintiffs voluntarily turn over the phone numbers they dial to their phone companies, they voluntarily turn over the dates, times, and durations of their calls; the telephone numbers from which incoming calls originate are also not protected by the Fourth Amendment. *See United States v. Reed*, 575 F.3d 900, 914 (9th Cir. 2009); *United States Telecom Ass’n*, 227 F.3d at 454, 459. Other communications routing information collected under the program, such as trunk identifiers, is information collected or generated by the phone companies themselves. *See Primary Order* at 3 n.1.

2. **Smith is not distinguishable from this case.**

The Government Defendants recognize that this Court concluded otherwise when it ruled on Plaintiffs’ motion for a preliminary injunction, but respectfully submit for the reasons explained herein that *Smith* cannot be distinguished on the grounds the Court cited.

First, the Section 215 telephony metadata program cannot be distinguished from *Smith* based on the Government’s more extensive collection and longer retention of metadata pertaining to each individual’s calls. See *Klayman*, 957 F. Supp. 2d at 32. As the FISC observed, *Smith* reaffirmed that the third-party disclosure doctrine applies regardless of the disclosing person’s assumptions or expectations as to what will be done with the information afterward, ““even if the information is revealed on the assumption that it will be used only for a limited purpose.”” Mar. 20, 2014 FISC Order at 14-15, quoting *Smith*, 442 U.S. at 744; see also *Miller*, 425 U.S. at 443; *SEC v. Jerry T. O’Brien, Inc.*, 467 U.S. 735, 743 (1984) (“It is established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities.”). Significantly *Miller*, on whose central holding *Smith* relied, upheld in the face of a Fourth Amendment challenge the compelled production of almost four months of a person’s bank records—copies of checks, deposit slips, financial statements, monthly statements—records that are more substantive and personal in nature than phone numbers, and more likely to reveal details about an individual’s life than years’ worth of telephony metadata. Mar. 20, 2014 FISC Order at 21-22.¹⁰

¹⁰ As the FISC also pointed out, “a telephone user who is making a call fully divulges to the phone company the numbers he dials,” unlike the bus passenger in *Bond v. United States*, 529 U.S. 334, 338 (2000), cited in *Klayman*, 957 F. Supp. 2d at 33 n.47, who sought to preserve the privacy of the contents of his carry-on bag by using an opaque bag and placing that bag directly above his seat. Mar. 20, 2014 FISC Order at 16 n.8.

Thus, under the third-party doctrine that the Supreme Court has consistently applied in *Smith* and other cases, see Mar. 20, 2014 FISC Order at 15-16, “[i]f a person who voluntarily discloses information can have no reasonable expectation concerning limits on how the recipient will use or handle the information, it necessarily follows that he or she also can harbor no such expectation with respect to how the Government will use or handle the information after it has been divulged by the recipient ... regardless of how it might be later used by the recipient or the Government.” *Id.* at 17. The fact that the Government here acquires metadata pertaining to a greater number of each individual’s calls, and retains the data for a much longer period, does not meaningfully differentiate the Section 215 program from *Smith*.

Indeed, while the volume of data collected and retained about each individual’s phone calls is greater here than in *Smith*, the privacy concerns were actually greater in *Smith* than here. In *Smith*, the police targeted the phone calls of a single, known individual (Smith), in fact examined the data gathered to ascertain whether he had contacted another known individual (his victim), and used that information to arrest and prosecute him. 442 U.S. at 737. The Court nonetheless ruled that Smith had no reasonable expectation of privacy in telephone numbers he dialed. *Id.* at 741–42. Here, by contrast, Plaintiffs can point to no equivalent intrusion on their privacy. The FISC orders here direct specific telecommunications companies to provide the Government with the companies’ own business records, in which Plaintiffs have no reasonable expectation of privacy. Nor have Plaintiffs shown that any metadata of their phone calls have ever been examined by NSA analysts. As discussed above, the NSA can only query the database of call detail records with a now judicially-approved suspected-terrorist selector and can only review metadata within two steps of that suspected-terrorist selector. Even if any allegedly collected records of Plaintiffs’ calls have been among the tiny fraction of the records ever

reviewed by NSA analysts, the call detail records collected by the NSA reveal only such information as phone numbers, dates and times, and routing information, but not the names, addresses, or other identifying information of parties to the calls. *See* Mar. 20, 2014 FISC Order at 22 (“it must be emphasized that the non-content telephony metadata at issue here is particularly limited in nature and subject to strict protections that do not apply to run-of-the-mill productions of similar information in criminal investigations.”). Plaintiffs can complain of no putative invasion of privacy of the kind experienced by the petitioner in *Smith*.

Second, and for the same reasons, perceived distinctions between the relationship of the government with the telephone company in *Smith*, and the relationship of the Government here with the telecommunications companies that participate in the program, *Klayman*, 957 F. Supp. 2d at 32-33, are simply irrelevant to whether a search occurred. Mar. 20, 2014 FISC Order at 17–18. Nor is there support in the record for the conclusion that the telecommunications companies that receive Section 215 orders are collecting telephony metadata for law enforcement purposes, “operat[ing] what is effectively a joint intelligence-gathering operation with the Government.” *Klayman*, 957 F. Supp. 2d at 33. Rather, “pursuant to the FISC’s orders, telecommunications service providers turn over to the NSA business records that the companies already generate and maintain for their own pre-existing business purposes (such as billing and fraud prevention).” Shea Decl. ¶ 18. *See also* Mar. 20, 2014 FISC Order at 18 n.9 (pointing out that this Court acknowledged that “the information produced to NSA consists of ‘telephony metadata records . . . which the companies create as part of their business of providing telecommunications services to customers.’”) (quoting 957 F. Supp. 2d at 15).

Third, the Court also emphasized that the telephony metadata program allegedly involves the collection of data “on hundreds of millions of people.” *See Klayman*, 957 F. Supp. 2d at 33

& n.48, 34, 36. That observation “is misplaced under settled Supreme Court precedent.” Mar. 20, 2014 FISC Order at 19–20. Fourth Amendment rights “are personal in nature, and cannot bestow vicarious protection on those who do not have a reasonable expectation of privacy in the place to be searched.” *Steagald v. United States*, 451 U.S. 204, 219 (1981); *accord Rakas v. Illinois*, 439 U.S. 128, 133–34 (1978). No Fourth Amendment interest of Plaintiffs is implicated, therefore, by the fact that the metadata of many other individuals’ calls are collected as well as (allegedly) their own. *See United States v. Dionisio*, 410 U.S. 1, 13 (1973) (where single grand jury subpoena did not constitute an unreasonable seizure, it was not “rendered unreasonable by the fact that many others were subjected to the same compulsion”); *In re Grand Jury Proceedings*, 827 F.2d 301, 305 (8th Cir. 1987) (“[T]he fourth amendment does not necessarily prohibit the grand jury from engaging in a ‘dragnet’ operation.”); *ACLU*, 959 F. Supp. 2d at 752 (“The collection of breathtaking amounts of information unprotected by the Fourth Amendment does not transform that sweep into a Fourth Amendment search.”); *United States v. Rigmaiden*, 2013 WL 1932800, at *13 (D. Ariz. May 8, 2013) (Government did not violate defendant’s Fourth Amendment rights by collecting a high volume (1.8 million) of IP addresses); Aug. 29, 2013 FISC Op. at 8–9.

Finally, the Court also suggested that individuals’ decisions to voluntarily convey and expose their telephone numbers to their phone companies are a necessity of modern life that did not exist in 1979 when *Smith* was decided. *See Klayman*, 957 F. Supp. 2d at 36. The year 1979 was, of course, not that long ago, and the use of banks, credit cards, telephones, and the like, to conduct the affairs of life was clearly prevalent at that time, as both *Smith* and *Miller* demonstrate, and as the dissent in *Smith* expressly argued. *See* 442 U.S. at 749–50 (Marshall, J., dissenting). *See also ACLU*, 959 F. Supp. 2d at 749 n.16 (citing cases prior to 1979 holding no

Fourth Amendment privacy interest in various information provided to third parties). It is true that cell phones did not exist in 1979, and that cell phones are used for purposes other than making telephone calls (such as accessing the Internet, taking pictures, and text messaging). See *Klayman*, 957 F. Supp. 2d at 34-36. “But none of these additional functions generates any information that is being collected by NSA as part of the telephony metadata program, which . . . involves only non-content records concerning the placing and routing of telephone calls. Accordingly, such changes are irrelevant . . .” Mar. 20, 2014 FISC Order at 19. See also *ACLU*, 959 F. Supp. 2d at 752 (“Telephones have far more versatility now than when *Smith* was decided, but this case only concerns their use as telephones.”); *Klayman*, 957 F. Supp. 2d at 35 (acknowledging that the types of information acquired under the telephony metadata program are “limited” to “phone numbers dialed, date, time, and the like.”).

Nor does *Jones* provide any basis for departing from the controlling authority of *Smith*. See *Klayman*, 957 F. Supp. 2d at 36. As the FISC explained, the majority opinion in *Jones*, in holding that an individual has a protected Fourth Amendment interest against the police attaching a GPS tracker to his car, relied on the “physical intrusion” the tracker effected and “declined to address the question whether use of the GPS device, without the physical intrusion, impinged upon a reasonable expectation of privacy . . .” Mar. 20, 2014 FISC Order at 24-25.

This Court placed reliance on Justice Sotomayor’s concurring opinion in *Jones* for the proposition that “the metadata from each person’s phone ‘reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.’” *Klayman*, 957 F. Supp. 2d at 36 (citing *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring)).¹¹ But *Smith* itself recognized

¹¹ The *Jones* majority opinion is, of course, controlling, and did not, as explained above, undermine the vitality of *Smith* in any way. “And the Supreme Court has instructed lower courts not to predict whether it would overrule a precedent even if its reasoning has been supplanted by

that a list of telephone numbers dialed “could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person’s life,” *Smith*, 442 U.S. at 748 (Stewart, J., dissenting), and yet the Court ruled that there is no reasonable expectation of privacy in telephone numbers dialed. Moreover, this potential is in fact less of a concern here, where the NSA does not know to whom the phone numbers collected under the telephony metadata program belong; where analysts can only find out that information for phone numbers or other metadata that result from authorized queries made with selectors approved by the FISC under the reasonable, articulable suspicion standard; and where Plaintiffs offer no proof that any metadata of their calls have been reviewed. In contrast, the police in *Smith* knew Smith’s identity when the pen register identified the phone numbers he dialed. Similarly, in *Jones*, law enforcement officers attached a GPS device to a single, known person’s vehicle, recorded the vehicle’s locations over a period of time, and used that information to prosecute him.¹²

* * *

Thus, *Smith* compels the conclusion that the alleged acquisition of metadata records about Plaintiffs’ telephone calls does not constitute a search for purposes of the Fourth Amendment, thereby ending the Fourth Amendment inquiry. But even if the Court concluded, contrary to *Smith*, that Plaintiffs have a reasonable expectation of privacy in metadata allegedly collected about their phone calls, they point to no invasion of that interest that would rise to the level of a Fourth Amendment search.

later cases” (which has not occurred here). *ACLU*, 959 F. Supp. 2d at 752 (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997)).

¹² Although Justice Sotomayor also stated in her concurring opinion that it may be necessary to reconsider the third-party doctrine, which she posited is ill-suited to the digital age, she expressly concluded that “[r]esolution of these difficult questions in this case is unnecessary, however, because the Government’s physical intrusion on Jones’ Jeep supplies a narrower basis for decision.” *Jones*, 132 S. Ct. at 957. See also Mar. 20, 2014 FISC Order at 28.

Call detail records are not “searched” in a constitutional sense, *see Klayman*, 957 F. Supp. 2d at 29–30, every time an electronic query of the database is performed. When such queries are conducted, the only information made available for review by human beings are the records within two hops of the suspected terrorist selectors used to initiate the queries. NSA analysts receive no information about the calls of any other individuals. *See* Shea Decl. ¶¶ 20–26. Thus, as discussed above, the query process is analogous, in Fourth Amendment terms, to a canine sniff to ascertain “the presence or absence of narcotics” in a person’s luggage, which the Supreme Court has held does not constitute a search because it “does not expose noncontraband items that otherwise would remain hidden from public view.” *Place*, 462 U.S. at 707. *See also Jacobsen*, 466 U.S. at 123 (chemical test that only reveals to law enforcement officials whether a particular substance is cocaine does not compromise any legitimate interest in privacy).

Because Plaintiffs have not presented evidence that information associated with any of their phone calls has been reviewed by analysts in response to queries of the bulk telephony metadata collected by the NSA, they cannot maintain that NSA queries of the database intrude upon any putative expectation of privacy they claim to have in that information. For this reason as well, Plaintiffs have not been subjected to a search for purposes of the Fourth Amendment, once again bringing the Fourth Amendment inquiry to a close.

3. The telephony metadata program is reasonable.

Even if the operation of the Section 215 telephony metadata program results in a “search” as to Plaintiffs, the Fourth Amendment bars only “unreasonable” searches and seizures. The Section 215 telephony metadata program is reasonable under the standard applied to assess suspicionless searches that serve special government needs. As the Supreme Court has explained, “where a Fourth Amendment intrusion serves special governmental needs, beyond the

normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *NTEU v. Von Raab*, 489 U.S. 656, 665–66 (1989). More specifically, the scope of the privacy interest and the character of the intrusion are balanced against the nature of the government interests to be furthered, the immediacy of the government's concerns regarding those interests, and the efficacy of the program in addressing those concerns. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658, 660, 662-63 (1995).

The telephony metadata program clearly serves special governmental needs above and beyond normal law enforcement. The undisputed purpose of the telephony metadata program is identifying unknown terrorist operatives and preventing terrorist attacks—forward-looking goals that fundamentally differ from most ordinary criminal law enforcement, which typically focuses on solving crimes that have already occurred, not preventing unlawful activity and protecting public safety and national security. *See, e.g., United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 322-23 (1972); *In re Sealed Case*, 310 F.3d 717, 746 (FISC-R 2002).

If, contrary to *Smith*, Plaintiffs could be said to have any Fourth Amendment privacy interest that is implicated by the mere acquisition of non-content telephony metadata, that interest would be minimal. Moreover, the intrusion on that interest would be mitigated still further by the statutorily mandated restrictions on review and dissemination of the metadata that are written into the FISC's orders. Primary Order at 4-14. *See also Maryland v. King*, 133 S. Ct. 1958, 1979 (2013); *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 833 (2002); *Vernonia*, 515 U.S. at 658. As noted above, the Government Defendants respectfully disagree with the Court's conclusion that Plaintiffs have "a very significant

expectation of privacy” in telephony metadata, *Klayman*, 957 F. Supp. 2d at 39, or, absent evidence that data pertaining to their calls have ever been reviewed by NSA analysts, that the program has infringed on any such expectation.

On the other side of the balance, the acquisition and review of telephony metadata promote overriding public interests. The interest in identifying and tracking terrorist operatives for the purpose of preventing terrorist attacks is a national security concern of overwhelming importance. *See Haig v. Agee*, 453 U.S. 280, 307 (1981) (“[N]o governmental interest is more compelling than the security of the Nation.”) (internal quotation marks omitted); *In re Directives*, 551 F.3d 1004, 1012 (FISC-R 2008) (Government interest in national security “is of the highest order of magnitude.”); *ACLU*, 959 F. Supp. 2d at 754. That interest cannot be as effectively achieved by conditioning access to telephony metadata on individualized suspicion, because such a requirement would not permit the type of historical analysis, contact-chaining, and timely identification of terrorist contacts that the program makes possible. *See* Shea Decl. ¶¶ 44–63; Aug. 29, 2013 FISC Op. at 20–22; *ACLU*, 959 F. Supp. 2d at 747–48. Imposing an individualized suspicion requirement on this program, is not only “impracticable” but may also be entirely infeasible. *Von Raab*, 489 U.S. at 665–66.

The Government also respectfully disagrees with the Court’s conclusions regarding the efficacy of the program. *Klayman*, 957 F. Supp. 2d at 40–41. As an initial matter, the ability to quickly analyze past connections and chains of communication to determine terrorist connections can be critical in the midst of an active terrorism investigation. *See id.* at 39–40 (“A closer examination of the record . . . reveals that the Government’s interest is a bit more nuanced—it is not merely to investigate potential terrorists, but rather, to do so *faster* than other investigative methods might allow.”). Moreover, as the United States District Court for the Southern District

of New York found, “[t]he effectiveness of bulk telephony metadata collection cannot be seriously disputed. Offering examples is a dangerous stratagem for the Government because it discloses means and methods of intelligence gathering. Such disclosures can only educate America’s enemies. Nevertheless, the Government has acknowledged several successes in Congressional testimony and in declarations that are part of the record in this case.” *ACLU*, 959 F. Sup. 2d at 755.

CONCLUSION

For the reasons stated above, Plaintiffs’ motion for summary judgment should be denied.

Dated: May 9, 2014

Respectfully Submitted,

STUART F. DELERY
Assistant Attorney General
JOSEPH H. HUNT
Director, Federal Programs Branch
ANTHONY J. COPPOLINO
Deputy Branch Director

/s/ James J. Gilligan
JAMES J. GILLIGAN
Special Litigation Counsel
james.gilligan@usdoj.gov
MARCIA BERMAN
Senior Trial Counsel
BRYAN DEARINGER
RODNEY PATTON
JULIA BERMAN
Trial Attorneys

U.S Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W., Room 6102
Washington, D.C. 20001
Phone: (202) 514-3358
Fax: (202) 616-8470

Counsel for the Government Defendants

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

LARRY KLAYMAN, *et al.*,

Plaintiffs,

v.

BARACK OBAMA, President of the
United States, *et al.*,

Defendants.

Civil Action No.
1:13-cv-0851-RJL

**DECLARATION OF TERESA H. SHEA, SIGNALS INTELLIGENCE
DIRECTOR, NATIONAL SECURITY AGENCY**

I, Teresa H. Shea, for my declaration in the above-captioned case, do hereby state and declare as follows:

1. I am the Director of the Signals Intelligence Directorate (SID) at the National Security Agency (NSA), an intelligence agency within the Department of Defense. I am responsible for, among other things, protecting NSA Signals Intelligence (SIGINT) activities, sources, and methods against unauthorized disclosures.

2. I submit this declaration to discuss the transition ordered by the President to the NSA's bulk telephony metadata program (carried out under Section 215 of the USA-PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001)) to preserve the program's needed capabilities while enhancing the program's protections against the potential for abuse. I also address certain speculation about the program's scope. My statements herein are based upon my personal knowledge of SIGINT collection and NSA operations, and the information available to me in my capacity as SIGINT Director.

**TRANSITION TO THE SECTION 215 TELEPHONY METADATA
PROGRAM ORDERED BY THE PRESIDENT**

3. On January 17, 2014, following a review of the Nation's Signals Intelligence programs, the President announced a series of reforms designed to preserve the Intelligence Community's capabilities to detect and prevent threats by foreign terrorist organizations through the penetration of their communications, while enhancing protections for individual privacy as intelligence capabilities developed to meet the threat of international terrorism continue to advance. A transcript of the President's remarks is available at <http://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence>.

4. Regarding the Section 215 telephony metadata program, the President ordered a transition during which the Intelligence Community and the Attorney General were to develop options for a new approach that can match the program's capabilities without the Government continuing to hold the bulk telephony metadata. The President also directed: (1) that the Government work with the Foreign Intelligence Surveillance Court (FISC) to require, during the transition period, advance findings by FISC judges of "reasonable, articulable suspicion" that selectors (such as telephone numbers) used to query the database are associated with foreign terrorist organizations (except in emergency situations, in which case FISC approval is to be sought retrospectively); and (2) that query results available to NSA analysts be limited to metadata within two "hops" (degrees of contact) of suspected terrorist selectors, not three as previously allowed.

5. The Government (including NSA) took immediate steps to put these two changes into effect. Among these steps, the Government filed a motion with the FISC to amend its January 3, 2014, Primary Order approving the Section 215 telephony metadata program. The Government's motion proposed two changes to the previously approved minimization procedures: First, the Government proposed a change that (except in cases of emergency) would

require it to obtain permission from the FISC to use a proposed selector as a “seed” to query the telephony metadata, based on a finding by the FISC that the selector to be used satisfies the “reasonable, articulable suspicion” standard. Second, the Government proposed limiting the results of each query to metadata that are within two, rather than three, “hops” of the approved selector used to conduct the query. On February 5, 2014, the FISC granted the Government’s motion to implement these two changes to the Section 215 program. *In re Application of the FBI for an Order Requiring the Production of Tangible Things from [Redacted]*, Dkt. No. BR14-01 (F.I.S.C. Feb. 5, 2014) (publicly released, unclassified version) (Enclosure A).

6. On March 27, 2014, the President announced that, after having considered options presented to him by the Intelligence Community and the Attorney General, he will seek legislation to replace the Section 215 telephony metadata program. Statement by the President on the Section 215 Bulk Metadata Program, <http://www.whitehouse.gov/the-press-office/2014/03/27/statement-president-section-215-bulk-metadata-program>. The President stated that his goal is to “establish a mechanism to preserve the capabilities we need without the Government holding this bulk metadata” to “give the public greater confidence that their privacy is appropriately protected,” while maintaining the intelligence tools needed “to keep us safe.” Instead of the Government obtaining business records of telephony metadata in bulk, the President proposed that telephony metadata should remain in the hands of telecommunications companies. The President stated that “legislation will be needed to permit the Government to obtain information with the speed and in the manner that will be required to make this approach workable.” Under such legislation, the Government would be authorized to obtain telephony metadata from the companies pursuant to individualized orders from the FISC. The President explained that, in the meantime, the Government would seek from the FISC a 90-day

reauthorization of the existing Section 215 program, with the two modifications already approved by the FISC in February.

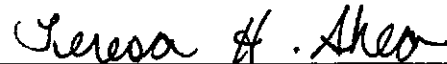
7. On March 28, 2014, the FISC issued a new Primary Order approving the Government's application to reauthorize the program, with the modifications described above, for approximately another 90 days (through June 20, 2014). The FISC's action brought to 37 the number of times the FISC (by 16 different judges) has authorized the NSA's bulk collection of telephony metadata under Section 215 of the USA-PATRIOT Act.

SCOPE OF THE SECTION 215 TELEPHONY METADATA PROGRAM

8. Although there has been speculation that the NSA, under this program, acquires metadata relating to all telephone calls to, from, or within the United States, that is not the case. The Government has acknowledged that the program is broad in scope and involves the collection and aggregation of a large volume of data from multiple telecommunications service providers, but as the FISC observed in a decision last year, the program has never captured information on all (or virtually all) calls made and/or received in the U.S. *See In re Application of the FBI for an Order Requiring the Production of Tangible Things from [Redacted]*, Dkt. No. BR13-109, Amended Mem. Op. at 4 n.5 (F.I.S.C. Aug. 29, 2013) (public unclassified version) ("The production of all call detail records of all persons in the United States has never occurred under this program."). And while the Government has also acknowledged that one provider was the recipient of a now-expired April 25, 2013, Secondary Order from the FISC, the identities of the carriers participating in the program (either now, or at any other time) otherwise remain classified.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: May 1, 2014



Teresa H. Shea
Signals Intelligence Director
National Security Agency

EXHIBIT B

~~TOP SECRET//SI//NOFORN~~

UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

IN RE APPLICATION OF THE FEDERAL
BUREAU OF INVESTIGATION FOR AN
ORDER REQUIRING THE PRODUCTION OF
TANGIBLE THINGS

~~Under Seal~~

Docket No. BR 14-01

OPINION AND ORDER

On January 22, 2014, [REDACTED]

[REDACTED] filed a
Petition pursuant to 50 U.S.C. § 1861(f)(2)(A) and Rule 33 of the Foreign Intelligence
Surveillance Court ("FISC" or "the Court") Rules of Procedure "to vacate, modify, or
reaffirm" a production order issued [REDACTED] January 3, 2014 ("Petition"). After
conducting the initial review required by Section 1861(f)(2)(A)(ii) and FISC Rule 39, the
Court determined that the Petition is not frivolous and issued a Scheduling Order
pursuant to FISC Rule 39(c) on January 23, 2014. Pursuant to the Scheduling Order, the
United States filed its Response to the Petition on February 12, 2014 ("Response"). The
Petition is now ripe for review. For the reasons set forth below, the Court concludes

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

that the Petition provides no basis for vacating or modifying the production order. Accordingly, that order is affirmed and remains in full force and effect until it expires by its own terms on March 28, 2014.

I. BACKGROUND

On January 3, 2014, this Court issued a Primary Order approving the Government's application pursuant to Section 501 of the Foreign Intelligence Surveillance Act of 1978, codified at 50 U.S.C. § 1861, as amended ("FISA"), for orders requiring the production to the National Security Agency ("NSA"), in bulk and on an ongoing basis, of non-content call detail records or "telephony metadata" created by certain telecommunications carriers [REDACTED] ("January 3 Primary Order"). Jan. 3 Primary Order at 3.¹ [REDACTED] served with one of the resulting production orders on the same date and has complied with the order, as it has with previous orders requiring the bulk production of telephony metadata. See Pet. at 2; id. Exh. 1 (copy of Jan. 3, 2014 "Secondary Order" issued [REDACTED]). The Primary Order and Secondary Order expire on March 28, 2014, at 5:00 p.m. Eastern Time. See Jan. 3 Primary Order at 18; Pet. Exh. 1 (Secondary Order) at 4.

FISA permits the recipient of a production order issued under Section 1861 to

¹ The January 3 Primary Order is available in redacted form at <http://www.uscourts.gov/uscourts/courts/fisc/br14-01-primary-order.pdf>.

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

"challenge the legality of that order by filing a petition" with this Court. 50 U.S.C. § 1861(f)(2)(A)(i); see also FISC Rule 33(a).² It further provides that "[a] judge considering a petition to modify or set aside a production order may grant such petition only if the judge finds that such order does not meet the requirements of this section or is otherwise unlawful." 50 U.S.C. § 1861(f)(2)(B). If the judge does not modify or set aside the production order, the judge must "immediately affirm such order, and order the recipient to comply therewith." Id.; see also FISC Rule 41(b). The judge must also provide a "written statement . . . of the reasons" for modifying, setting aside, or affirming the production order. 50 U.S.C. § 1861(f)(2)(a)(iii); FISC Rule 41(a).

In its Petition [REDACTED] Klayman v. Obama, Civil Action No. 13-0851 (RJL) (D.D.C. June 6, 2013), a suit in which the plaintiffs assert, among other things, that a production order issued to Verizon by this Court in Docket No. BR 13-80, [REDACTED] is

² Such a petition must be filed "under seal." 50 U.S.C. § 1861(f)(5). After it is filed, the petition must "immediately" be assigned to one of the three FISC judges who reside within 20 miles of the District of Columbia. 50 U.S.C. § 1861(f)(2)(A)(ii); see also FISC Rule 38(a). Within 72 hours, the assigned judge must conduct an initial review of the petition. 50 U.S.C. § 1861(f)(2)(A)(iii); see also FISC Rule 39(a). If the assigned judge concludes that the petition is frivolous, he or she must "immediately deny the petition and affirm the production order." 50 U.S.C. § 1861(f)(2)(A)(ii); see also FISC Rule 39(b). If the assigned judge determines that the petition is not frivolous, the judge must "promptly consider the petition." 50 U.S.C. § 1861(f)(2)(A)(ii); see also FISC Rule 39(c).

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

unconstitutional. See Pet. at 2. On December 16, 2013, Judge Richard J. Leon issued a Memorandum Opinion in Klayman, a copy of which is attached as Exhibit 2 to the Petition, holding that the plaintiffs are likely to succeed on their claim that the bulk collection of call detail records authorized by the production order issued to Verizon in FISC Docket No. BR 13-80 is "an unreasonable search under the Fourth Amendment." See id. (citing Klayman v. Obama, 957 F. Supp. 2d 1, 41 (D.D.C. 2013)). Judge Leon ordered that the Government cease collection of "any telephony metadata associated with [the plaintiffs'] personal Verizon accounts" and destroy any such metadata in its possession, but he stayed the order pending appeal. See id. (citing Klayman, 957 F. Supp. 2d at 43).

[REDACTED] the Petition "arises entirely from [REDACTED] Judge Leon's Memorandum [Opinion]," and, specifically, his conclusion that Supreme Court's decision in Smith v. Maryland, 442 U.S. 735 (1979), is "inapplicable to the specific activities mandated by the [Section] 1861 order at issue in the Klayman litigation." Id. at 3-4. [REDACTED] in its Petition that this Court may have "considered and rejected" Judge Leon's analysis in issuing the January 3, 2014 production order, but that the Secondary Order [REDACTED] does not refer to Judge Leon's decision and that [REDACTED] not been provided with the Court's

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

underlying legal analysis.” *Id.* at 4. [REDACTED] asks this Court to “vacate, modify, or reaffirm the current production order in light of the Memorandum Opinion issued in *Klayman*.” *Id.*³ [REDACTED] it is complying with the production order and “will continue to comply fully with that order unless otherwise directed by the Court.” *Id.*

The Government asserts in its Response that

[t]he Primary Order in the above-captioned docket number makes clear that the Court, in entertaining and ultimately ruling upon the Government’s application, carefully considered not only the opinions entered by Judges Eagan and McLaughlin of this Court in docket numbers BR 13-109 and BR 13-158, respectively,^[4] and the decision issued by the United States District Court for the Southern District of New York in *American Civil Liberties Union v. Clapper*, [959] F. Supp. 2d [724] . . . (Dec. 27, 2013), but also [Judge Leon’s Memorandum Opinion in *Klayman*].

³ Prior to the filing of [REDACTED] “no holder of records who ha[d] received an Order to produce bulk telephony metadata” or any other tangible things pursuant to Section 1861 “ha[d] challenged the legality of such an Order.” *In Re Application of the FBI for an Order Requiring the Production of Tangible Things*, Docket No. BR 13-109, 2013 WL 5741573, at *5 (FISA Ct. Aug. 29, 2013) (hereinafter “Aug. 29, 2013 Amended Op.”).

⁴ See Aug. 29, 2013 Amended Op., 2013 WL 5741573 (Eagan, J.); *In Re Application of the FBI for an Order Requiring the Production of Tangible Things*, Docket No. BR 13-158, Memorandum (FISA Ct. Oct. 11, 2013) (McLaughlin, J.), available at <http://www.uscourts.gov/uscourts/courts/fisc/br13-158-memo-131018.pdf> (hereinafter “Oct. 11, 2013 Mem.”).

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

Response at 3 (citing Jan. 3 Primary Order at 2 n.1).⁵ In light of that statement, the Government asserts that "it is appropriate for the Court to affirm its January 3, 2014 Secondary Order [REDACTED] and to order [REDACTED] compliance with that production order." Id.

II. ANALYSIS

[REDACTED] not contest that the production order at issue here is consistent with the requirements of Section 1861. See Petition at 2-4. The only question raised in the Petition is whether the production order is unlawful under the Fourth Amendment in light of Judge Leon's December 16 opinion in Klayman. See id. at 4. It is true, as the Government observes in its Response, that the Court stated in the January 3 Primary Order that it had carefully considered Judge Leon's opinion in Klayman before issuing the requested production orders. See Jan. 3 Primary Order at 2 n.1. Nevertheless, [REDACTED] has filed a Petition under Section 1861(f), the undersigned Judge must consider the issue anew.

A. Standing.

Before turning to the Fourth Amendment issue raised [REDACTED] the Court must first address the question of standing. In challenging the production order,

⁵ The Government apparently did not share the Primary Order with [REDACTED] until [REDACTED] had filed its Petition. See Pet. at 4.

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

 not its own Fourth Amendment rights, but those of its customers. See Pet. at 3-4. Litigants ordinarily cannot assert the rights of third parties in an Article III court. See In Re Directives Pursuant to Section 105B of FISA, 551 F.3d 1004, 1008 (FISA Ct. Rev. 2008) (citing Hinck v. United States, 550 U.S. 501, 510 n.3 (2007), and Warth v. Seldin, 422 U.S. 490, 499 (1975)). But, as the Foreign Intelligence Surveillance Court of Review explained in addressing a similar challenge brought under a similar but now expired provision of FISA, “that prudential limitation may in particular cases be relaxed by congressional action.” Id. (citing Warth, 422 U.S. at 501).⁶ “Thus, if Congress, either expressly or by fair implication, cedes to a party the right to bring suit based on the legal rights or interests of others, that party has standing to sue; provided, however, that constitutional standing requirements are satisfied.” Id. (citing Warth, 422 U.S. at 500-01).

To have standing under Article III of the Constitution, “the suitor must plausibly

⁶ In In Re Directives, the Court of Review concluded that a service provider that had received a “directive” pursuant to the Protect America Act (“PAA”) – a now-expired provision of FISA that was codified at 50 U.S.C. § 1805a-c – had standing to assert the Fourth Amendment rights of its customers in a petition filed with the FISC. 551 F.3d at 1008-09. The PAA authorized the Executive Branch to direct communications service providers to assist it in acquisitions targeting persons located outside the United States. Id. at 1006. It also provided that the recipient of a directive “may challenge the legality of that directive” in a petition to the FISC. Id. (quoting now-expired 50 U.S.C. § 1805b(h)(1)(A)).

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

allege that it has suffered an injury, which was caused by the defendant, and the effects of which can be addressed by the suit.” *Id.* (citing *Warth*, 422 U.S. at 498-99). The Court is satisfied [REDACTED] has Article III standing here. Like [REDACTED] [REDACTED] “faces an injury in the nature of the burden that it must shoulder” to provide the Government with call detail records. *Id.* That injury is “obviously and indisputably caused by the [G]overnment” through the challenged Secondary Order, and this Court is capable of redressing the injury by vacating or modifying the order. *See id.*

The Court is also satisfied that Congress has [REDACTED] as the recipient of a Section 1861 production order, the right to bring a challenge in this Court to enforce the rights of its customers. As noted above, FISA states that the recipient of a Section 1861 production order “may challenge the legality of that order by filing a petition” with the FISC. 50 U.S.C. § 1861(f)(2)(A)(i). As with the similar provision at issue in *In Re Directives*, Section 1861(f) “does nothing to circumscribe the types of claims of illegality that can be brought.” *In Re Directives*, 551 F.3d at 1009 (discussing now-expired 50 U.S.C. § 1805b(h)(1)(A)), the PAA provision described above in note 6). Indeed, it provides that this Court may modify or set aside a production order “if the judge finds that such order does not meet the requirements of this section or is

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

otherwise unlawful” thus suggesting that Congress intended to permit the recipients of production orders to bring a range of challenges. 50 U.S.C. § 1861(f)(2)(B) (emphasis added). The Court therefore concludes that Section 1861(f) “grants an aggrieved service provider a right of action and extends that right to encompass claims brought by it on the basis of [its] customers’ rights.” In Re Directives, 551 F.3d at 1009 (reaching the same conclusion regarding the similar language of the PAA).

B. The Fourth Amendment.

Turning now to the merits of the Fourth Amendment issue, this Court finds Judge Leon’s analysis in Klayman to be unpersuasive and concludes that it provides no basis for vacating or modifying the Secondary Order issued [REDACTED] January 3, 2014. The Fourth Amendment provides that:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

U.S. Const., Amend. IV. For purposes of the Fourth Amendment, a “search” occurs when the Government violates a person’s reasonable expectation of privacy, see Smith, 442 U.S. at 740 (citing cases), or when the Government physically intrudes on a protected area for the purpose of acquiring information, United States v. Jones, 132 S.

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

Ct. 945, 951 (2012).

1. *Smith v. Maryland and its Progeny.*

In Smith, investigators acting without a warrant caused the telephone company to install a pen register at its offices to record the numbers dialed on the home phone of Smith, who was suspected of robbing and then harassing a woman through anonymous phone calls. Smith, 442 U.S. at 737. The pen register confirmed that the calls had originated from Smith's phone. Id. The dialing information was used to obtain a warrant to search Smith's home, and he was later convicted. Id. at 737-38. The Supreme Court rejected Smith's claim that the use of the pen register violated the Fourth Amendment, holding that it was not a search. Id. at 745-46. The Court explained that:

[w]hen he used his phone, [Smith] voluntarily conveyed numerical information to the telephone company and "exposed" that information to its equipment in the ordinary course of business. In so doing, [Smith] assumed the risk that the company would reveal to police the numbers he dialed.

Id. at 744. The Court observed that it "consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." Id. at 743-44 (citing other cases applying the same third-party disclosure principle). Other courts have relied on Smith in concluding that the Fourth

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

Amendment does not apply to “trap and trace” devices, which function like pen registers but record the originating numbers of incoming calls, or to information such as the date, time, and duration of calls. *See, e.g., United States v. Reed*, 575 F.3d 900, 914 (9th Cir. 2009); *United States Telecom Ass’n v. FCC*, 227 F.3d 450, 454, 459 (D.C. Cir. 2000); *United States v. Hallmark*, 911 F.2d 399, 402 (10th Cir. 1990).

The information [REDACTED] produces to NSA as part of the telephony metadata program is indistinguishable in nature from the information at issue in *Smith* and its progeny. It includes dialed and incoming telephone numbers and other numbers pertaining to the placing or routing of calls, as well as the date, time, and duration of calls. *See* Pet. Exh. 1 (Secondary Order) at 2.⁷ It does not include the “contents” of any communications as defined in 18 U.S.C. § 2510; the name, address, or financial information of any subscriber or customer; or cell site location information. *See id.* Accordingly, two judges of this Court (in addition to the judge who issued the January 3 Primary Order in this docket) and two federal district courts have recently concluded

⁷ The Secondary Order states that “[t]elephony metadata includes comprehensive communications routing information, including but not limited to session identifying information (e.g., originating and terminating telephone number, International Mobile Subscriber Identity (IMSI) number, International Mobile station Equipment Identity (IMEI) number, etc.), trunk identifier, telephone calling card numbers, and time and duration of call.” Pet. Exh. 1 (Secondary Order) at 2 (italics in original).

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

that Smith is controlling with respect to the bulk telephony metadata produced to NSA. See Clapper, 959 F. Supp. 2d at 749-52 (Pauley, J.); United States v. Moalin, Case No. 10cr4246 JM, 2013 WL 6079518, at *7-*8 (S.D. Cal. Nov. 18, 2013) (Miller, J.); Oct. 11, 2013 Mem. at 4-5 (McLaughlin, J.); Aug. 29, 2013 Amended Op., 2013 WL 5741573, at *2-*3 (Eagan, J.).

2. *Judge Leon's Analysis in Klayman.*

Judge Leon acknowledged in Klayman that "what metadata *is* has not changed over time. As in *Smith*, the *types* of information at issue [here] are relatively limited: phone numbers dialed, date, time, and the like." 957 F. Supp. 2d at 35 (italics in original). He nevertheless declined to follow Smith, providing four reasons why, in his view, the NSA telephony metadata program "is so different from a simple pen register that *Smith* is of little value in assessing whether [it] constitutes a Fourth Amendment search." Id. at 32. First, Judge Leon asserted that the pen register in Smith lasted only thirteen days, with no indication from the Supreme Court "that it expected the Government to retain those limited phone records once the case was over." Id. The NSA program, on the other hand, "involves the creation and maintenance of a historical database containing *five years'* worth of data," and might "go on for as long as America is combating terrorism, which realistically could be forever!" Id. (italics and

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

exclamation point in original).

Second, Judge Leon asserted, “the relationship between the police and the phone company in *Smith* is *nothing* compared to the relationship that has apparently evolved over the last seven years between the Government and the telecom companies.” *Id.* (italics in original). The pen register in *Smith* involved the phone company’s response to a “one time, targeted request for data regarding an individual,” whereas the NSA program involves the daily production of metadata, in bulk. *Id.* at 33. While people might expect phone companies to “occasionally provide information to law enforcement,” Judge Leon expressed doubt that “citizens expect all phone companies to conduct what is effectively a joint intelligence-gathering operation with the Government.” *Id.*

Third, Judge Leon asserted, “the almost-Orwellian technology” that enables the Government to store and analyze phone metadata following its acquisition is “unlike anything that could have been conceived in 1979.” *Id.* According to Judge Leon, the Government uses the “most advanced twenty-first century tools, allowing it to ‘store such records and efficiently mine them for information years into the future,’” and to do so cheaply and surreptitiously, thus evading the “ordinary checks that constrain abusive law enforcement practices: limited police . . . resources and community

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

hostility.” Id. (quoting Jones, 132 S. Ct. at 956 (Sotomayor, J., concurring)).

Fourth, and “*most importantly*,” according to Judge Leon, “the nature and quantity of the information contained in people’s telephony metadata [today] is much greater” than it was at the time of Smith. Id. at 34 (italics in original). Because more people use phones (and, in particular, cellular telephones) and use them more frequently now than in 1979, Judge Leon asserted that the “the metadata from each person’s phone ‘reflects a wealth of detail about her familial, political, professional, religious, and sexual associations,’” that “could not have been gleaned from a data collection in 1979.” Id. at 36 (quoting Jones, 132 S. Ct. at 955 (Sotomayor, J., concurring)). “Records that once would have revealed a few scattered tiles of information about a person now reveal an entire mosaic—a vibrant and constantly updating picture of the person’s life.” Id. (citing United States v. Maynard, 615 F.3d 544, 562-63 (D.C. Cir. 2010), aff’d sub nom United States v. Jones, 132 S. Ct. 945 (2012)).

3. Smith Remains Controlling Notwithstanding Klayman.

This Court respectfully disagrees with Judge Leon’s reasons for deviating from Smith. To begin with, Judge Leon focused largely on what happens (and what could happen) to the telephony metadata after it has been acquired by NSA – e.g., how long the metadata could be retained and how the Government could analyze it using

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

sophisticated technology. Smith and the Supreme Court's other decisions applying the third-party disclosure principle make clear that this focus is misplaced in assessing whether the production of telephony metadata constitutes a search under the Fourth Amendment.

Smith reaffirmed that the third-party disclosure principle – i.e., the rule that “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties,” Smith, 442 U.S. at 743-44 (citing cases) – applies regardless of the disclosing person's assumptions or expectations with respect to what will be done with the information following its disclosure. The Supreme Court emphasized:

“This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”

Smith, 442 U.S. at 744 (quoting United States v. Miller, 425 U.S. 435, 443 (1976))

(emphasis added). Because the disclosing person assumes the risk of further disclosure by the third party, the Court explained it is “unreasonable” for him “to expect his . . . records to remain private.” Id. The Supreme Court's other third-party disclosure cases are also clear and consistent on this point. See Miller, 425 U.S. at 443 (citing United States v. White, 401 U.S. 745, 752 (1971); Hoffa v. United States, 385 U.S. 293, 302 (1966);

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

Lopez v. United States, 373 U.S. 427 (1963)); see also S.E.C. v. Jerry T. O'Brien, Inc., 467 U.S. 735, 743 (1984) ("It is established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities.") (emphasis added).⁸

Applying this rationale, the Supreme Court rejected Smith's contention that he had a legitimate expectation of privacy in the dialing information for the incriminating phone calls because they were local calls for which the phone company would not have recorded such information in the ordinary course of business:

The fortuity of whether or not the phone company in fact elects to make a quasi-permanent record of a particular number dialed does not in our view, make any constitutional difference. Regardless of the phone company's election, petitioner voluntarily conveyed to it information that it had the facilities for recording and that it was free to record. In these circumstances, petitioner assumed the risk that the information would be

⁸ Bond v. United States, 529 U.S. 334 (2000), cited by Judge Leon, see 957 F. Supp. 2d at 33 n.47, did not involve the disclosure of information to a third party and does not support a different approach here. In Bond, the Supreme Court held that a law enforcement agent conducted a search of a bus passenger's carry-on bag by squeezing it in an effort to determine what was inside. Id. at 338-39. The Court explained that while a bus passenger might expect others to touch or move a carry-on bag he places in the overhead compartment, he does not reasonably expect that others "will feel the bag in an exploratory manner." Id. Unlike the passenger in Bond, who "sought to preserve privacy by using an opaque bag and placing that bag directly above his seat," id. at 338, a telephone user who is making a call fully divulges to the phone company the numbers he dials.

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

divulged to police.

Smith, 442 U.S. at 745.

If a person who voluntarily discloses information can have no reasonable expectation concerning limits on how the recipient will use or handle the information, it necessarily follows that he or she also can harbor no such expectation with respect to how the Government will use or handle the information after it has been divulged by the recipient. Smith itself makes clear that once a person has voluntarily conveyed dialing information to the telephone company, he forfeits his right to privacy in the information, regardless of how it might be later used by the recipient or the Government. See id. Accordingly, Judge Leon's concerns regarding NSA's retention and analysis of the call detail records are irrelevant in determining whether a Fourth Amendment search has occurred.

For the same reason, Judge Leon's assertions regarding citizens' expectations with respect to the "relationship . . . between the Government and the telecom companies," see Klayman, 957 F. Supp. 2d at 32-33, also provide no basis for departing from Smith. Under Smith, Miller, and the other third-party disclosure cases cited above, any such expectations or assumptions on the part of telephone users who have disclosed their dialing information to the phone company have no bearing on the

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

question whether a search has occurred. See Smith, 442 U.S. at 744.⁹

Judge Leon's assertions regarding the nature and quantity of telephony metadata acquired by NSA likewise fail to justify deviating from the clear holding of Smith. Judge Leon acknowledged that the types of information acquired by NSA in the telephony metadata program are "limited" to "phone numbers dialed, date, time, and the like." 957 F. Supp. 2d at 35. He nevertheless stressed that phones today, and, in particular, cell phones, are not just telephones, but "multi-purpose devices" that can be used to access Internet content, and as maps, music players, cameras, text messaging

⁹ The two decisions cited by Judge Leon on this point are not to the contrary. See Klayman, 957 F. Supp. 2d at 33. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989), is not a Fourth Amendment case at all. And Ferguson v. City of Charleston, 532 U.S. 67 (2001), is distinguishable. There, the Court addressed a program involving the nonconsensual urine testing of pregnant women for illegal drugs by a state hospital, which shared positive results with police. See id. at 70-73. The Court examined the relationship between the hospital and the police not in determining whether the urine tests constituted searches within the meaning of the Fourth Amendment (the Court stated that they "indisputably" did, id. at 76), but in assessing whether the purpose of the program was law enforcement or something different. See id. at 82-85. At issue here is whether the NSA telephony metadata program involves a search in the first place.

Furthermore, Judge Leon's suggestion that the NSA telephony metadata program, like the drug testing program in Ferguson, entails "the service provider[s] collect[ion of] information for law enforcement purposes," Klayman, 957 F. Supp. 2d. at 33, is incorrect. As he acknowledges earlier in his opinion, the information produced to NSA consists of "telephony metadata records . . . which the companies create as part of their business of providing telecommunications services to customers." Id. at 15 (emphasis added).

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

devices, and even as “lighters for people to hold up at rock concerts.” *Id.* at 34. Judge Leon asserted that people today therefore have an “entirely different relationship” with their telephones than they did when *Smith* was decided. *Id.* at 36. But none of these additional functions generates any information that is being collected by NSA as part of the telephony metadata program, which as discussed above, involves only non-content records concerning the placing and routing of telephone calls. Accordingly, such changes are irrelevant here.¹⁰

Judge Leon also repeatedly emphasized the total quantity of telephony metadata obtained and retained by NSA.¹¹ That focus is likewise misplaced under settled

¹⁰ Judge Leon also noted that “telephony metadata” for cell phones also “can reveal the user’s location” but stated that “[his] decision . . . does *not* turn on whether the NSA has in fact collected that data as part of the bulk telephony metadata program” *Id.* at 36 n.57 (italics in original). The metadata produced in this matter does not include cell site location information or Global Positioning System (“GPS”) data. *See* Jan. 3 Primary Order at 4; Pet. Exh. 1 (Secondary Order) at 2.

¹¹ *See Klayman*, 957 F. Supp 2d. at 30 (articulating question presented as “whether plaintiffs have a reasonable expectation of privacy that is violated when the Government indiscriminately collects their metadata along with the metadata of hundreds of millions of other citizens” without particularized suspicion) (emphasis added); *id.* at 33 (“The notion that the Government could collect similar data on hundreds of millions of people and retain that data for a five-year period, updating it with new data every day in perpetuity, was at best, in 1979, the stuff of science fiction.”) (emphasis added); *id.* at 33 n.48 (“The unprecedented scope and technological sophistication of the NSA’s program distinguish it not only from the *Smith* pen register, but also from metadata collections performed as part of routine criminal

(continued...)

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

Supreme Court precedent. The Court has repeatedly reaffirmed that Fourth Amendment rights are “personal rights” that “may not be vicariously asserted.” See Rakas v. Illinois, 439 U.S. 128, 133-34 (1978) (citing cases; citations and internal quotation marks omitted); accord Minnesota v. Carter, 525 U.S. 83, 88 (1998). Accordingly, the aggregate scope of the collection and the overall size of NSA’s database are immaterial in assessing whether there any person’s reasonable expectation of privacy has been violated such that a search under the Fourth Amendment has occurred. To the extent that the quantity of the metadata collected by NSA is relevant, it is relevant only on a user-by-user basis. The pertinent question is whether a particular user has a reasonable expectation of privacy in the telephony metadata associated with his or her own calls. For purposes of determining whether a search under the Fourth Amendment has occurred, it is irrelevant that other users’ information is also being collected and that the aggregate amount acquired is very large. Cf. United States v. Dionisio, 410 U.S. 1, 13 (1973) (grand jury subpoena not “rendered unreasonable by the fact that many others were subjected to the same compulsion”).

Properly viewed on a user-by-user basis, the NSA telephony metadata program

¹¹(...continued)
investigations.”) (emphasis added); id. at 34 (citing statistics regarding the number of phones and cell phones in use today, as compared to 1979).

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

is consistent with Supreme Court precedent, which time and technology have not affected. United States v. Miller, the principal precedent relied upon by the Court in Smith, was, notably, a case involving the compelled production of records of customer activities. The Court held that a bank customer had no legitimate expectation of privacy in three-and-a-half months worth of bank records acquired from two banks. Miller, 425 U.S. at 443. The records in question consisted of checks, deposit slips, monthly statements, and financial statements and were turned over to police investigators pursuant to a grand jury subpoena. Id. at 438. Invoking the same principle that would later be relied upon in Smith, the Court explained that the documents in question “contain[ed] only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.” Id. at 442. The Court further stated that “[t]he depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government.” Id. at 433.

It is far from clear to this Court that even years’ worth of non-content call detail records would reveal more of the details about a telephone user’s personal life than several months’ worth of the same person’s bank records. Indeed, bank records are likely to provide the Government directly with detailed information about a customer’s personal life – e.g., the names of the persons with whom the customer has had financial

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

dealings, the sources of his income, the amounts of money he has spent and on what forms of goods and services, the charities and political organizations that he supports – that call detail records simply do not, by themselves, provide. Miller, which was decided in 1976, substantially undermines Judge Leon’s conclusion that Smith does not apply to the NSA telephony metadata program because the metadata from each person’s phone reveals so much about a person “that could not have been gleaned from a data collection in 1979,” when Smith was decided. See Klayman, 957 F. Supp. 2d at 36. Many more personal details could immediately and directly be obtained from bank records such as those in the production approved by the Court in Miller without raising Fourth Amendment concerns.

Moreover, it must be emphasized that the non-content telephony metadata at issue here is particularly limited in nature and subject to strict protections that do not apply to run-of-the-mill productions of similar information in criminal investigations. The call detail records acquired by NSA do not include subscriber names or addresses or other identifying information. See Pet. Exh. 1 (Secondary Order) at 2. Rather, such information can be determined by the Government for any particular piece of metadata only by resorting to other investigative resources or tools, such as grand jury subpoenas or national security letters. Furthermore, pursuant to this Court’s Primary Order, the

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

metadata can only be accessed for analytical purposes after NSA has established a reasonable articulable suspicion (“RAS”) that the number to be used to query the data – the “seed” – is associated with one of the terrorist groups listed in the Order. See Jan. 3 Primary Order at 6-9 & nn. 8-9. Each query is limited to metadata within two (formerly three) “hops” of the seed. See id. at 11-12; Feb. 5, 2014 Order Granting Government’s Motion to Amend the Court’s Primary Order Dated January 3, 2014 (“Feb. 5 Order”), at 3-4, 9.¹² These protections further undercut Judge Leon’s reliance on the perceived intrusiveness of the telephony metadata program as a basis for deviating from Smith.¹³

¹² The February 5 Order is available at <http://www.uscourts.gov/uscourts/courts/fisc/br-14-01-order.pdf>.

¹³ As originally issued by the Court, the January 3 Primary Order – like predecessor orders – required certain designated NSA officials to make the requisite RAS determinations. See Jan. 3 Primary Order at 7. Also like predecessor orders, the January 3 Primary Order permitted the query results to include the metadata for numbers within three “hops” of the querying seed. See id. at 10-11. The Court recently granted the Government’s motion to amend the January 3 Primary Order to preclude NSA, except in the case of an emergency, from querying the repository of telephony metadata without first having obtained a determination by this Court that the RAS standard is satisfied for each querying seed. See Feb. 5 Order at 3-4, 9. The Court also granted the Government’s request to limit query results to metadata for numbers within two “hops” of the querying seed. See id.

Whether the RAS determination requirement is applied with or without direct judicial involvement, it sharply restricts the Government’s access to and use of the collected telephony metadata. The same is true of the restriction on the scope of query results, whether the limit is two or three “hops.” Indeed, because these restrictions limit

(continued...)

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~4. United States v. Jones Does Not Support a Different Conclusion.

The Supreme Court's more recent decision in Jones provides no basis for departing from Smith with respect to the Government's acquisition of non-content telephony metadata. In Jones, law enforcement officers acting without a valid warrant surreptitiously attached a GPS device to the defendant's Jeep and used it to track his location for 28 days. Jones, 132 S. Ct. at 948. The district court denied Jones' motion to suppress in large part, holding that the GPS evidence acquired while the vehicle was on public roads was admissible under United States v. Knotts, 460 U.S. 276, 281 (1983) (use of radio beeper to track defendant's car on public roads did not violate any reasonable expectation of privacy). See id.

Following Jones' conviction, the court of appeals reversed on this point, holding that the use of the GPS device over 28 days was a search under the Fourth Amendment. Maynard, 615 F.3d at 558. In doing so, the court of appeals concluded that Knotts was not controlling and adopted a novel mode of analysis. See id. at 556-66. Rather than assessing the likelihood that Jones' discrete movements over the 28 days had

¹³(...continued)

NSA to looking for information on specific terrorist groups and not other persons, the vast majority of the metadata acquired by NSA is never reviewed by any person. See In Re Application of the FBI for an Order Requiring the Production of Tangible Things, 2013 WL 5741573, at *8 n.23.

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

individually been exposed to the public, the court of appeals — applying a “mosaic” analysis similar to the one later used by Judge Leon in Klayman — considered whether his movements, viewed in the aggregate, were so exposed. See id. at 562. Because it was extremely unlikely that any single member of the public would actually observe the collective whole of Jones’ movements over the course of the GPS tracking, the court of appeals concluded that Jones had a reasonable expectation of privacy that had been violated by the tracking. See id. at 560 (“[T]he whole of a person’s movements over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all those movements is not just remote, it is essentially nil.”). The court of appeals denied the Government’s petition for rehearing en banc, with four judges dissenting. See United States v. Jones, 625 F.3d 766 (D.C. Cir. 2010).

The Supreme Court affirmed the court of appeals, but on different grounds. The Court held in Justice Scalia’s majority opinion that the officers’ conduct constituted a search under the Fourth Amendment because the information at issue was obtained by means of a physical intrusion on the defendant’s vehicle, a constitutionally-protected area. Jones, 132 S. Ct. at 949, 953. The Court declined to address the question whether use of the GPS device, without the physical intrusion, impinged upon a reasonable expectation of privacy, and therefore did not pass on the court of appeals’ novel

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

“mosaic” analysis of that question. Id. at 953-54. The Court cited Smith, but only in passing. See id. at 950. The Court’s opinion does not support Judge Leon’s conclusion that a modern telephone user has a legitimate expectation of privacy in the metadata relating to his calls, which is disclosed to the telephone company for the purpose of completing calls, or that the larger number of calls made in today’s world undermines Smith’s holding.

Judge Leon relied instead on the two concurring opinions in Jones. To be sure, those opinions express the view that the precise, pervasive monitoring by the Government of a person’s location might trigger Fourth Amendment protection even without any physical intrusion. See Jones, 132 S. Ct. at 955-56 (Sotomayor, J., concurring); id. at 962-64 (Alito, J., concurring in the judgment). They also signal that five Justices of the Court may be ready to endorse a new mode of analysis similar to the “mosaic” theory adopted by the court of appeals in Maynard. See id. But the concurring opinions in Jones nevertheless fail to support deviation from Smith in connection with the NSA telephony metadata program.

Of course, the majority opinion in Jones is controlling, and, as discussed above, that opinion does not even reach the reasonable-expectation-of-privacy issue. Moreover, although the two concurring opinions address privacy, they suggest distinct

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

analytical approaches and thus can hardly be read as having adopted a single, coherent principle or methodology for lower courts to apply. Justice Sotomayor's approach – on which Judge Leon appears to have modeled much of his analysis in Klayman, 957 F. Supp. 2d at 36 – looked to “whether police conduct collected so much information that it enabled police to learn about a person's private affairs ‘more or less at will.’” Orin S. Kerr, “The Mosaic Theory of the Fourth Amendment,” 111 Mich. L. Rev. 311, 328 (Dec. 2012) (quoting Jones, 132 S. Ct. at 955-56 (Sotomayor, J., concurring)). Justice Alito's opinion, in which three other Justices joined, focused instead on “whether the investigation exceeded society's expectations for how the police would investigate a particular crime.” Id. (citing 132 S. Ct. at 964 (Alito, J., concurring in the judgment)).¹⁴ These distinct approaches to the expectation-of-privacy question undercut Judge Leon's suggestion that the five concurring Justices in Jones can be viewed as a de facto majority on the issue. See Klayman, 957 F. Supp. 2d at 31 (stating that “five justices found that law enforcement's use of a GPS device to track a vehicle's movements for nearly a month violated Jones's reasonable expectation of privacy”).

Furthermore, Justice Alito's opinion, in which three other Justices joined, does

¹⁴ Notably, each of these approaches also differs from the court of appeals' methodology, which, as discussed above, focused on whether Jones' movements over nearly a month would have been observed by a single member of the public. See Maynard, 615 F.3d at 560.

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

not mention Smith at all. See Jones, 132 S. Ct. at 957-64 (Alito, J., concurring in the judgment). And although Justice Sotomayor stated in her concurring opinion that “it may be necessary to reconsider” the third-party disclosure principle applied in Smith and Miller, which she described as “ill suited to the digital age,” she expressly stated that it was unnecessary for the Court to undertake such a reexamination in Jones. See id. at 957 (Sotomayor, J., concurring) (“Resolution of these difficult questions in this case is unnecessary . . . because the Government’s physical intrusion on Jones’ Jeep supplies a narrower basis for decision.”).¹⁵

¹⁵ Both the opinion of the Supreme Court in Jones and Justice Sotomayor’s concurring opinion mention a brief passage in Knotts reserving the question whether the tracking of a person’s location might become so pervasive or abusive as to require a different approach. See Jones, 132 S. Ct. at 952 n.6; id. at 956 n.* (Sotomayor, J., concurring). The respondent in Knotts had argued that “the result of a ruling for the Government will be that ‘twenty-four hour surveillance of any citizen of this country will be possible without judicial knowledge or supervision.’” Knotts, 460 U.S. at 283 (quoting Brief for Respondent). In response, the Supreme Court asserted that “the ‘reality hardly suggests abuse,’” and that “if such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.” Id. (quoting Zurcher v. Stanford Daily, 436 U.S. 547, 566 (1978)).

Contrary to Judge Leon’s conclusion, see Klayman, 957 F. Supp. 2d at 31-32 & n.46, this passage from Knotts also fails to support his decision to depart from Smith. Unlike Knotts (and Jones), this matter does not involve the electronic tracking of location at all, much less the sort of “twenty-four hour” tracking envisioned by the respondent in Knotts. Instead, this case, like Smith, involves the production of call detail records created by the phone company based on data submitted to it by callers.

(continued...)

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

Smith directly applies to the call detail records produced as part of the NSA telephony metadata program and remains binding even after Jones. Judge Leon's efforts to distinguish Smith are unpersuasive, and his analysis in Klayman is also difficult to reconcile with other Supreme Court decisions, such as Rakas and Carter, which, as discussed above, hold that Fourth Amendment rights are personal and cannot be vicariously asserted. The broader adoption of Judge Leon's approach would raise numerous difficult questions requiring the reexamination of a range of settled Fourth Amendment precedents. See Kerr, "The Mosaic Theory of the Fourth Amendment," 111 Mich. L. Rev. at 328-43; see also Jones, 132 S. Ct. at 954 (asserting that Justice Alito's expectation-of-privacy analysis would lead to "thorny problems").¹⁶ Any such overhaul

¹⁵(...continued)

Smith, which is directly applicable to such information, does not state or suggest that application of the third-party disclosure principle depends upon the quantity of dialing information disclosed by a caller or turned over the Government. Indeed, any such statement or suggestion would be contrary to the logic of the decision – that by voluntarily disclosing dialing information to the phone company, a caller forfeits any legitimate expectation of privacy therein. Smith, 442 U.S. at 744 (citing Miller, 425 U.S. at 442-44)).

¹⁶ A threshold question is which standard should govern; as discussed above, the court of appeals' decision in Maynard and the two concurrences in Jones suggest three different standards. See Kerr, "The Mosaic Theory of the Fourth Amendment," 111 Mich. L. Rev. at 329. Another question is how to group Government actions in assessing whether the aggregate conduct constitutes a search. See id. For example, "[w]hich surveillance methods prompt a mosaic approach? Should courts group across (continued...)

~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

of Fourth Amendment law is for the Supreme Court, rather than this Court, to initiate. While the concurring opinions in Jones may signal that some or even most of the Justices are ready to revisit certain settled Fourth Amendment principles, the decision in Jones itself breaks no new ground concerning the third-party disclosure doctrine generally or Smith specifically. The concurring opinions notwithstanding, Jones simply cannot be read as inviting the lower courts to rewrite Fourth Amendment law in this area. This Court concludes that where the acquisition of non-content call detail records such as dialing information is concerned, Smith remains controlling.¹⁷

III. CONCLUSION

For the foregoing reasons, [REDACTED] asks this Court to modify or set aside the Secondary Order issued to it on January 3, 2014, the Petition is denied.

¹⁶(...continued)
surveillance methods? If so, how?" Id. Still another question is how to analyze the reasonableness of mosaic searches, which "do not fit an obvious doctrinal box for determining reasonableness." Id. Courts adopting a mosaic theory would also have to determine whether, and to what extent, the exclusionary rule applies: Does it "extend over all of the mosaic or only the surveillance that crossed the line to trigger a search?" Id. at 329-30.

¹⁷ Because this Court concludes that Smith is controlling and that the telephony metadata program involves no search under the Fourth Amendment, the Court need not address the question of reasonableness. See Klayman, 957 F. Supp. 2d at 37-42 (holding that plaintiffs are likely to succeed in showing searches that Judge Leon concluded are effected by NSA telephony metadata program are unreasonable).

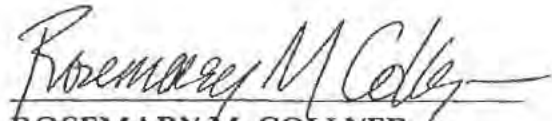
~~TOP SECRET//SI//NOFORN~~

~~TOP SECRET//SI//NOFORN~~

Pursuant to 50 U.S.C. § 1861(f)(2)(B), the Secondary Order is affirmed, [REDACTED] is directed to continue to comply with the Secondary Order until it expires by its own terms.

Since last summer, the Government has declassified and made public substantial details regarding the NSA telephony metadata program. Among other things, substantial portions of this Court's January 3 Primary Order and all predecessor orders have been publicly released. In light of those disclosures and the ongoing public debate regarding this program, both the Government [REDACTED] submit memoranda (or a joint memorandum) stating their views with respect to whether this Court can or should unseal the Petition, the Government's Response, and this Opinion and Order, and whether appropriately redacted versions of these documents should be published pursuant to FISC Rule 62(a). Such memoranda are to be submitted, under seal, no later than 5:00 p.m. Eastern Time on April 10, 2014.

SO ORDERED, this 20th day of March, 2014.


ROSEMARY M. COLLYER
Judge, United States Foreign
Intelligence Surveillance Court

~~TOP SECRET//SI//NOFORN~~

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

LARRY KLAYMAN, *et al.*,

Plaintiffs,

v.

BARACK OBAMA, President of the
United States, *et al.*,

Defendants.

Civil Action No.
1:13-cv-0851-RJL

**GOVERNMENT DEFENDANTS' RESPONSE TO STATEMENT
OF MATERIAL FACTS IN SUPPORT OF PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 7(h), the Government Defendants¹ hereby respond to Plaintiffs' Statement of Material Facts in Support of Plaintiffs' Motion for Partial Summary Judgment (ECF No. 108-1) as follows:

1. On June 5, 2013, *The Guardian*, a British newspaper, reported the first materials leaked by former NSA contract employee Edward Snowden that revealed the existence of U.S. government intelligence collection and surveillance programs on American citizens, regardless of any probable cause they were in communication with terrorists. *See Greenwald, NSA collecting phone records of millions of Verizon customers daily*, GUARDIAN (London), June 5, 2013; Leon Memorandum Opinion, dated Dec. 16, 2013 ("Mem. Op.") at 6.

RESPONSE: Undisputed, but not material, that *The Guardian* published the referenced article, to which the Court is respectfully referred for a complete and accurate statement of its contents. Otherwise the facts asserted in this paragraph, and those stated in the cited article, are

¹ The Government Defendants are defendants Barack Obama, President of the United States, Eric Holder, Attorney General of the United States, Admiral Michael S. Rogers, Director of the National Security Agency (NSA), , insofar as they are sued in their official capacities, together with defendants NSA and the United States Department of Justice (DOJ). Pursuant to Federal Rule of Civil Procedure 25(d), Admiral Rogers is automatically substituted as an official-capacity defendant to this action, but not in his individual capacity, in place of former NSA Director General Keith Alexander.

disputed on the ground that they are based on, or constitute, hearsay inadmissible for the truth of the matters stated therein.

2. *The Guardian's* report disclosed a secret Foreign Intelligence Surveillance Court ("FISC") order, dated April 25, 2013, that required Verizon Business Network Services to produce to the NSA on "an ongoing daily basis . . . all call detail records or 'telephony metadata' create by Verizon for communications (i) between the United States and abroad; or (ii) wholly within the United States, including local telephone calls." Secondary Order, *In re Application of the [FBI] for an Order Requiring the Production of Tangible Things from Verizon Business Network Services, Inc. on Behalf of MCI Communication Services, Inc. d/b/a/ Verizon Business Services*, No. BR 13-80 at 2 (FISC Apr. 25, 2013) ("Secondary Order"); Mem. Op. at 6.

RESPONSE: Undisputed, but not material, that *The Guardian* published the referenced article, to which the Court is respectfully referred for a complete and accurate statement of its contents. Facts asserted in the article are disputed on the ground that they constitute hearsay inadmissible for the truth of the matters stated therein.

Undisputed that the Foreign Intelligence Surveillance Court ("FISC") issued the referenced April 25, 2013, Secondary Order to Verizon Business Network Services, Inc. The Court is respectfully referred to the Secondary Order for a complete and accurate statement of its contents.

3. The Secondary Order "show[ed] . . . that under the Obama administration the communication records of millions of US citizens are being collected indiscriminately and in bulk—regardless of whether they are suspected of any wrongdoing." Greenwald, *supra*; Mem. Op. at 6-7.

RESPONSE: This paragraph is disputed on the basis that it quotes a statement from the article published by *The Guardian*, which is hearsay inadmissible for the truth of the matters stated therein. The Court is respectfully referred to the Secondary Order for a complete and accurate statement of its contents.

4. **The Government Defendants had confirmed and admitted to** the authenticity of the Secondary Order as well as the existence of the Bulk Telephony Metadata Program (“Program”) under which “the FBI obtains orders from the FISC pursuant to Section 215 [of the USA PATRIOT Act] directing certain telecommunications service providers to produce to the NSA on a **daily basis** electronic copies of ‘call detail records.’” Govt.’s Opp’n at 8; Mem. Op. at 7 (emphasis added).

RESPONSE: Not disputed that the Government has confirmed the authenticity of the Secondary Order and the existence of the bulk telephony metadata program carried out under authority of Section 215 of the USA-PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), codified at 50 U.S.C. § 1861. Not disputed that the quoted language appears in the description of the program set forth in the Government Defendants’ Opposition to Plaintiffs’ Motions for Preliminary Injunctions (ECF No. 25) (Gov’t Defs.’ PI Opp.”) at 8–13, to which the Court is respectfully referred for a complete and accurate statement of its contents.

5. The Program is “a ‘counterterrorism program’ under [50 U.S.C. §] 1861[, **conducted for more than seven years**, that] collect[s], compiles, retains, and analyzes certain telephony records, which it characterizes as “business records” created by certain telecommunications companies.” Mem. Op. at 15-16 (emphasis added).

RESPONSE: Undisputed that the Section 215 bulk telephony metadata program is conducted for counter-terrorism purposes; that it has been conducted since May 2006; and that it involves the acquisition, storage, and analysis by the NSA of information contained in business records, created by certain telecommunications companies, known as “call detail records.” Declaration of Teresa H. Shea, Signals Intelligence Director, NSA (Gov’t Defs.’ PI Opp., Exh. C) (ECF No. 25-4) (“Shea Decl.”), ¶¶ 10–16.

To the extent this paragraph is meant to convey any different or conflicting understanding, it is disputed as unsupported by reference to admissible evidence; statements of fact in judicial opinions are hearsay, inadmissible for the truth of the matters stated therein.

6. In principle, but not in practice, the Program is “meant to detect: (1) domestic U.S. phone numbers calling outside of the United States to foreign phone numbers associated with terrorist groups; (2) foreign phone numbers associated with terrorist groups calling into the U.S. to U.S. phone numbers; and (3) ‘possible terrorist –related communications’ between numbers inside the U.S.” Mem. Op. at 20-21.

RESPONSE: Undisputed that the Section 215 bulk telephony metadata program was specifically developed to assist the U.S. Government in detecting communications between known or suspected terrorists who are operating outside of the U.S. and who are communicating with others inside the U.S., as well as communications between operatives who are located within the U.S. Shea Decl. ¶ 10.

To the extent this paragraph is meant to convey any different or conflicting understanding, including but not limited to the assertion that the program is meant to detect terrorist communications “[i]n principle, but not in practice,” it is disputed on the basis that it is unsupported by reference to admissible evidence. The Government Defendants note that the qualifying phrase “[i]n principle, but not in practice” does not appear on the cited pages of the Court’s December 16, 2013, Memorandum Opinion (ECF No. 48) (“Mem. Op.”). In addition, statements of fact in judicial opinions are hearsay, inadmissible for the truth of the matters stated therein.

7. The records collected under the Program consist of “metadata,” which includes information about what phone numbers were used to make and receive calls, when the calls took place, and how long the calls lasted. Mem. Op. at 15.

RESPONSE: Undisputed that the call detail records acquired by the NSA under the Section 215 bulk telephony metadata program contain “metadata,” defined under the FISC orders authorizing the program as “comprehensive communications routing information” including but not limited to “originating and terminating telephone number[s], International Mobile Subscriber Identity (IMSI) number[s], International Mobile Station Equipment Identity (IMEI) number[s], trunk identifier[s], telephone calling card numbers, and time and duration of

call.” *In re Application of the FBI for an Order Requiring the Production of Tangible Things [etc.]*, Dkt. No. BR 13-80, Primary Order (F.I.S.C. Apr. 25, 2013) (Gov’t Defs.’ PI Opp., Exh. E) (ECF No. 25-6) (“Primary Order”) at 3 n.1.

To the extent this paragraph is meant to convey any different or conflicting understanding, it is disputed as unsupported by reference to admissible evidence; statements of fact in judicial opinions are hearsay, inadmissible for the truth of the matters stated therein.

8. Through targeted searches of metadata records, the NSA “tries to discern connections between terrorist organizations and previously unknown terrorist operatives located in the United States.” Mem. Op. at 16.

RESPONSE: Undisputed that through queries of the data using identifiers (e.g., telephone numbers) that are reasonably suspected of being associated with identified international terrorist organizations that are subjects of FBI counterterrorism investigations, NSA analysts attempt to determine whether known or suspected terrorists have been in contact with individuals in the U. S. Shea Decl. ¶¶ 8, 10, 19–20; Declaration of Robert J. Holley (Gov’t Defs.’ PI Opp., Exh. D) (ECF No. 25-5) (Holley Decl.) ¶ 5.

To the extent this paragraph is meant to convey any different or conflicting understanding, it is disputed as unsupported by reference to admissible evidence; statements of fact in judicial opinions are hearsay, inadmissible for the truth of the matters stated therein.

9. The telephone metadata records, which “[telecommunications] companies create and maintain as part of their business of providing telecommunications services to customers[,]” have been continually produced since May 2006 under the FBI’s production orders from the FISC. *See* Mem. Op. at 16.

RESPONSE: Undisputed that the call detail records acquired by the NSA under the Section 215 bulk telephony metadata program are records that the telecommunications companies already generate and maintain in the ordinary course of business for their own pre-existing business purposes (such as billing and fraud prevention). Shea Decl. ¶ 18; Holley Decl. ¶ 10. Undisputed that the program has been conducted since May 2006, and that the FISC orders

issued under the program require the telecommunications service providers to which they are directed to produce call detail records to the NSA on an ongoing daily basis for the duration of each order. Shea Decl. ¶ 13; Holley Decl. ¶¶ 6, 11.

To the extent this paragraph is meant to convey any different or conflicting understanding, it is disputed as unsupported by reference to admissible evidence; statements of fact in judicial opinions are hearsay, inadmissible for the truth of the matters stated therein.

10. The NSA consolidates the metadata records provided by different telecommunications companies into one database and under the FISC's orders, the NSA may retain the records for up to five entire years. Mem. Op. at 16.

RESPONSE: Undisputed that under the FISC orders authorizing the Section 215 bulk telephony metadata program, the NSA consolidates and stores the metadata it acquires in secure networks, and must destroy metadata no later than five years after their initial collection. Shea Decl. ¶¶ 23, 30; Primary Order at 4, 14.

To the extent this paragraph is meant to convey any different or conflicting understanding, it is disputed as unsupported by reference to admissible evidence; statements of fact in judicial opinions are hearsay, inadmissible for the truth of the matters stated therein.

11. When an NSA intelligence analyst runs a query, the quantity of phone numbers captured is very large, potentially and sometimes up to 1,000,000 numbers total. Mem. Op. at 18-19.

RESPONSE: This paragraph is disputed as unsupported by reference to admissible evidence; statements of fact in judicial opinions are hearsay, inadmissible for the truth of the matters stated therein. The Government Defendants also note that the cited portion of the Court's December 16, 2013, Memorandum Opinion discusses a solely hypothetical scenario, Mem. Op. at 18-19, and note further that under current FISC orders, the results of authorized queries of the NSA's database are limited to metadata within two "hops," no longer three, of the

suspected-terrorist selector used to conduct the query. Declaration of Teresa H. Shea (filed herewith) (“*Klayman* Shea Decl.”) ¶¶ 3–5.

12. Since the Program began in May 2006, the FISC has repeatedly issued orders directing telecommunication service providers to produce records in connection with the Program. Mem. Op. at 21.

RESPONSE: Undisputed that beginning in May 2006 and continuing to this day, the FBI has obtained orders from the FISC pursuant to Section 215 directing certain telecommunications service providers to produce all call detail records created by them containing information about communications between telephone numbers, generally relating to telephone calls made between the United States and a foreign country and calls made entirely within the U.S. Shea Decl. ¶¶ 13–14.

To the extent this paragraph is meant to convey any different or conflicting understanding, it is disputed as unsupported by reference to admissible evidence; statements of fact in judicial opinions are hearsay, inadmissible for the truth of the matters stated therein.

13. Fifteen different FISC judges have issued thirty-five orders authorizing the Program and under those orders, the Government defendants must continuously seek renewal of the authority to collect telephony records, which occurs as often as every ninety days. Mem. Op. at 21.

RESPONSE: Undisputed that to date sixteen (16) different FISC judges have on thirty-seven (37) occasions issued orders for the bulk production of telephony metadata to the NSA under the Section 215 program. *Klayman* Shea Decl. ¶ 7; *see also* Shea Decl. ¶ 14; Holley Decl. ¶ 11. Also undisputed that by the terms of the orders they must be renewed approximately every ninety (90) days.

To the extent this paragraph is meant to convey any different or conflicting understanding, it is disputed as unsupported by reference to admissible evidence; statements of fact in judicial opinions are hearsay, inadmissible for the truth of the matters stated therein.

14. The Government Defendants admit that they have failed to comply with the minimization procedures set forth in the orders. Mem. Op. at 21.

RESPONSE: Undisputed, but not material, that since the Section 215 bulk telephony metadata program was initiated, there have been a number of significant compliance and implementation issues that were discovered as a result of internal NSA oversight and inter-agency reviews. Upon discovery, these violations were reported to the FISC and Congress, the NSA remedied the problems, and the FISC reauthorized the program. Even the most serious of these incidents—in which an “alert list” of selectors that had not gone through the process of becoming “RAS” approved was used to query the metadata—involved identifiers that were suspected of being associated with foreign terrorist organizations. Shea Decl. ¶¶ 36–43.

To the extent this paragraph is meant to convey any different or conflicting understanding, it is disputed as unsupported by reference to admissible evidence; statements of fact in judicial opinions are hearsay, inadmissible for the truth of the matters stated therein.

15. The Honorable Reggie Walton of the FISC concluded he had no confidence that the Government was doing its utmost to comply with the court’s orders. Mem. Op. at 21-22.

RESPONSE: Undisputed, but immaterial for purposes of this case, that in March 2009, upon being notified by the Government that the NSA had employed the “alert list” of non-RAS approved identifiers to query the database, Judge Walton, for the FISC, issued an order that prohibited the Government from accessing the metadata for foreign-intelligence purposes except as authorized by the FISC on a case-by-case basis (except in life-threatening situations), stating that the Court no longer had “every confidence that the government [was] doing its utmost to ensure that those responsible for implementation fully comply with the Court’s orders.” *In re Production of Tangible Things [Redacted]*, 2009 WL 9150913, *6, 9 (F.I.S.C. Mar. 2, 2009). Following the completion of an end-to-end review of the NSA’s handling of the metadata and the submission of a report thereon to the FISC, the FISC entered an order in September 2009

once again permitting the NSA to make “RAS” determinations and to query the metadata using RAS-approved identifiers without seeking pre-approval from the FISC. Shea Decl. ¶¶ 37–40.

The Court is respectfully referred to the FISC’s March 2, 2009 order for a complete and accurate statement of its contents.

To the extent this paragraph is meant to convey any different or conflicting understanding, it is disputed as unsupported by reference to admissible evidence; statements of fact in judicial opinions are hearsay, inadmissible for the truth of the matters stated therein.

16. The Honorable John Bates, Presiding Judge of the FISC, found that the Government had misrepresented the scope of its targeting of certain internet communications pursuant to 50 U.S.C. § 1881a. Mem. Op. at 22.

RESPONSE: Undisputed, but immaterial for purposes of this case, that on October 3, 2011, the FISC, by Judge Bates, issued a Memorandum Opinion granting in part and denying in part the Government’s request for authorization to acquire certain telephone and Internet communications pursuant to Section 702 of the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1881a. Undisputed, but immaterial for purposes of this case, that in light of the Government’s disclosure that the NSA’s acquisition of Internet communications through its “upstream” collection under Section 702 was accomplished by acquiring Internet “transactions” containing single or multiple discrete communications, Judge Bates wrote that “[t]he Court is troubled that the government’s revelations regarding NSA’s acquisition of Internet transactions mark the third instance in less than three years in which the government has disclosed a substantial misrepresentation regarding the scope of a major collection program.” *Id.* at 15–16 & n.14. The Court is respectfully referred to Judge Bates’ opinion for a complete and accurate statement of its contents. Available at <http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/915-dni-declassifies-intelligence-community-documents-regarding-collection-under-section-702-of-the-foreign-intelligence-surveillance-act-fisa>.

To the extent this paragraph is meant to convey any different or conflicting understanding, it is disputed as unsupported by reference to admissible evidence; statements of fact in judicial opinions are hearsay, inadmissible for the truth of the matters stated therein.

17. The Government's revelations regarding NSA's acquisition of Internet transactions mark the third instance in less than three years in which the Government disclosed a substantial misrepresentation regarding the scope of a major collection program. Mem. Op. at 23.

RESPONSE: See response to paragraph 16, above.

18. Plaintiffs filed a complaint on June 6, 2013 (*Klayman I*). See Mem. Op. at 8.

RESPONSE: Undisputed.

19. *Klayman I* Plaintiffs Larry Klayman, Charles Strange, and Mary Ann Strange brought suit against the NSA, the Department of Justice ("DOJ"), multiple executive officials, whom include President Barack H. Obama, Attorney General Eric H. Holder, Jr., General Keith B. Alexander, Director of the NSA, and U.S. District Judge Roger Vinson, and Verizon Communications as well as its chief executive officer. Second Am. Compl. ¶¶ 9-19; Mem. Op. at 8.

RESPONSE: Undisputed, but the Court is respectfully referred to the Second Amended Complaint (ECF No. 37), and to the Third Amended Complaint (ECF No. 77) for complete and accurate statements of their contents.

20. Plaintiffs Larry Klayman and Charles Strange are subscribers of Verizon wireless for cellular phone service. Mem. Op. at 3 n.5.

RESPONSE: Undisputed, but immaterial, that as of October 28, 2013, Plaintiffs Klayman and Charles Strange had been subscribers of Verizon Wireless cellular phone service "for many years." Affidavit of Larry Klayman (ECF No. 13-2) ¶ 3; Affidavit of Charles Strange (ECF No. 13-3) ¶ 2.

To the extent this paragraph is meant to convey any different or conflicting understanding, it is disputed as unsupported by reference to admissible evidence; statements of fact in judicial opinions are hearsay, inadmissible for the truth of the matters stated therein.

21. The United States District Court for the District of Columbia (“the Court”) has the authority to evaluate Plaintiffs’ constitutional challenges to the NSA’s conduct. Mem. Op. at 5.

RESPONSE: This paragraph states a conclusion of law to which no response is required.

22. Plaintiffs have standing to challenge the constitutionality of the Government Defendants’ bulk collection and querying of phone record metadata. Mem. Op. at 5.

RESPONSE: This paragraph states a conclusion of law to which no response is required.

23. Plaintiffs have standing to challenge both of the NSA’s Bulk Telephony Metadata Program’s searches: (1) the bulk collection of metadata and (2) the analysis of that data through the NSA’s querying process. Mem. Op. at 36.

RESPONSE: This paragraph states a conclusion of law to which no response is required.

24. The NSA’s bulk telephony metadata collection and analysis violates a reasonable expectation of privacy. Mem. Op. at 47.

RESPONSE: This paragraph states a conclusion of law to which no response is required.

25. A Fourth Amendment search occurred in this case. Mem. Op. at 56.

RESPONSE: This paragraph states a conclusion of law to which no response is required.

26. Plaintiffs have demonstrated a substantial likelihood of success on the merits of their Fourth Amendment claim. Mem. Op. at 5.

RESPONSE: This paragraph states a conclusion of law to which no response is required.

27. Plaintiffs will suffer irreparable harm absent injunctive relief. Mem. Op. at 5.

RESPONSE: This paragraph states a conclusion of law to which no response is required.

28. The public interest weighs heavily in favor of granting an injunction. Mem. Op. at 65.

RESPONSE: This paragraph states a conclusion of law to which no response is required.

29. The NSA's bulk collection program is indeed an unreasonable search under the Fourth Amendment. Mem. Op. at 62.

RESPONSE: This paragraph states a conclusion of law to which no response is required.

Dated: May 9, 2014

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General
JOSEPH H. HUNT
Director, Federal Programs Branch
ANTHONY J. COPPOLINO
Deputy Branch Director

/s/ James J. Gilligan
JAMES J. GILLIGAN
Special Litigation Counsel

MARCIA BERMAN
Senior Trial Counsel
BRYAN DEARINGER
Trial Attorney
RODNEY PATTON
Trial Attorney
JULIA BERMAN
Trial Attorney

U.S Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W., Room 6102
Washington, D.C. 20001
Phone: (202) 514-3358
Fax: (202) 616-8470

Counsel for the Government Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

LARRY KLAYMAN, *et al.*,

Plaintiffs,

v.

BARACK OBAMA, President of the
United States, *et al.*,

Defendants.

Civil Action No.
1:13-cv-0851-RJL

[PROPOSED] ORDER

The above-captioned case is before the Court on the Plaintiffs' Motion for Partial Summary Judgment (ECF No. 108).

The Court having considered the parties' respective submissions in support of and in opposition to Plaintiffs' motion,

IT IS HEREBY ORDERED THAT:

1. Plaintiffs' Motion for Partial Summary Judgment is hereby DENIED.

So ORDERED this _____ day of _____, 2014.

HON. RICHARD J. LEON
UNITED STATES DISTRICT JUDGE