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

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INTRODUCTION

This Court is already thoroughly familiar with this case and its current procedural posture, and appreciates both the importance of the constitutional questions presented and the national security interests at stake. *See Klayman v. Obama*, 957 F. Supp. 2d 1 (D.D.C. 2013). Plaintiffs challenge the constitutionality of the Government's acquisition and analysis of bulk telephony metadata pursuant to Section 215 of the USA-PATRIOT Act, an intelligence program carried out under authority of the Foreign Intelligence Surveillance Court ("FISC") for the purpose of discovering communications with and among unknown terrorist operatives, and preventing terrorist attacks. In granting Plaintiffs' motion for a preliminary injunction, the Court concluded that Plaintiffs have a substantial likelihood of prevailing on their claim that the program violates the Fourth Amendment. Yet at the same time, the Court stayed its injunction

[1] The Government Defendants are defendants Barack Obama, President of the United States, Eric Holder, Attorney General of the United States, and 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.

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

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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 humans 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.

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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. <u>The telephony metadata program is reasonable</u>.

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.

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