EXHIBIT B

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] 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

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.

"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

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[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).

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

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].

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[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.").

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,

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

[redacted]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 Sates, 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

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[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)).

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] "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

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.

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

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 Sates 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).

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

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

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

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);

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

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[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.

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

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

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[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).

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

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[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...)

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

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[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).

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

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

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]

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[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

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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

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[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.

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

"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

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

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[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.

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]

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[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.

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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

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[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
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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.

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[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).

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

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