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-00851-RJL
LARRY KLAYMAN, *et al.*, Plaintiffs, v. BARACK OBAMA, President of the United States, *et al.*, Defendants.	Civil Action No. 1:13-cv-00881-RJL

GOVERNMENT DEFENDANTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTIONS

The Government Defendants respectfully submit this supplemental brief in opposition to Plaintiffs' motions for preliminary injunctions, as the Court permitted the parties to do at the conclusion of the November 18, 2013, hearing.

I. REVIEW OF PLAINTIFFS' STATUTORY CLAIM IS IMPLIEDLY PRECLUDED, BUT NOT THEIR CONSTITUTIONAL CLAIMS.

As discussed during the hearing, the Court lacks jurisdiction over Plaintiffs' statutory claim, but not their constitutional claims.

In their moving papers, and now in their recently amended complaints, Plaintiffs aver in an eighth claim for relief that the alleged National Security Agency ("NSA") intelligence-

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gathering programs violate the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*., because they exceed the statutory authority set forth in Section 215 of the USA-PATRIOT Act. The Court lacks subject matter jurisdiction over this statutory claim, however, because Congress impliedly precluded APA review of such claims. *See* Gov't Defs.' Opp. at 26-31.

The issue of preclusion goes to the Court's jurisdiction because, where review is expressly or impliedly precluded, the APA's waiver of sovereign immunity does not apply so as to allow a claim against the Government. "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). As a general matter, section 702 of the APA grants the Government's consent to suit in actions "seeking relief other than money damages," such as the injunctive relief sought in the instant complaints. This consent is subject to a number of significant exceptions, however, two of which apply here. First, section 702 provides that "[n]othing herein … confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. Second, mirroring the first exception, the APA provides that its chapter on judicial review, including section 702, does not apply "to the extent that … statutes preclude judicial review." 5 U.S.C. § 701(a)(1). Gov't Defs.' Opp. at 27-28. Thus, although the waiver in section 702 generally applies in injunctive actions, other statutory provisions that expressly or impliedly preclude review of a claim, or forbid the relief sought, operate as exceptions that place the claim beyond the reach of section 702's waiver, and, therefore, beyond the court's jurisdiction. *See Texas Alliance for Home Care Servs. v. Sebelius*, 681 F.3d 402, 408, 411 (D.C. Cir. 2012); *Ass'n of Civilian Technicians v. FLRA*, 283 F.3d 339, 341 (D.C. Cir. 2002).

Several statutory provisions demonstrate that Congress did not intend persons such as Plaintiffs, who claim to be subscribers and users of electronic communications services, to challenge the statutory basis of the alleged NSA intelligence-gathering programs implicated by these cases. Section 215, and Section 702 of the Foreign Intelligence Surveillance Act ("FISA"), both specifically authorize challenges to production orders and directives only by recipients of those orders and directives (such as telecommunications service providers), and only before the petition review pool of the Foreign Intelligence Surveillance Court ("FISC"), not in district court. 50 U.S.C. §§ 1861(f)(1), (f)(2)(A)(i); 1881a(h)(4). Congress explicitly stated that the FISC petition review pool "shall have jurisdiction to review petitions filed pursuant to section 1861(f)(1) or 1881a(h)(4) of this title." *Id.* § 1803(e)(1). Congress provided for further review of the resulting FISC's decisions in the FISA Court of Review and the Supreme Court, again not in district court. *Id.* §§ 1861(f)(3), 1881a(h)(6).

Significantly, Congress considered whether to extend a right of judicial review of Section 215 orders to third parties and declined to do so in order to effectuate the secrecy needed to successfully carry out FISA's foreign intelligence purposes. Gov't Defs.' Opp. at 28-29. Congress also made its intent crystal clear by providing that a Section 215 order "shall remain in effect" unless it has been "explicitly modified or set aside consistent with" Section 215's own judicial review provisions. 50 U.S.C. § 1861(f)(2)(D). This "detailed mechanism for judicial consideration of particular issues at the behest of particular persons" means that "judicial review of those issues at the behest of other persons" is "impliedly precluded." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984). *See also* Gov't Defs.' Opp. at 28-30.

In addition, 18 U.S.C. § 2712 grants consent to sue the United States for violations of three specified provisions of the FISA—but not Section 215 or FISA Section 702—and provides

only for money damages, not injunctive relief. As the court held in *Jewel v. NSA*, 2013 WL 3829405, at *12 (N.D. Cal. July 23, 2013), section 2712, "by allowing suits against the United States only for damages based on three provisions of [FISA], impliedly bans suits against the United States that seek injunctive relief under any provision of FISA." *See* Gov't Defs.' Opp. at 30-31. In short, these statutes—Section 215, FISA Section 702, and 18 U.S.C. § 2712—reflect a Congressional intent that third parties such as Plaintiffs, who claim to be subscribers of electronic communications services, should not have a right to challenge the statutory authority of the intelligence-gathering programs at issue here.

There is no similar jurisdictional bar to review of Plaintiffs' constitutional challenges to those programs, however.[1] As discussed at oral argument, courts require a heightened showing of Congressional intent to preclude review of constitutional claims, so as "to avoid the serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988); *see also Elgin v. Dep't of the Treasury*, 132 S. Ct. 2126, 2132 (2012). Because Congress did not provide third parties with the right to raise constitutional challenges to Section 215 orders or Section 702 directives in the FISC, this heightened standard applies here. *Elgin*, 132 S. Ct. at 2132. The Government has not argued that the heightened standard has been met here, and, for that reason, has not maintained the Court lacks jurisdiction to hear Plaintiffs' constitutional claims.

[1] In general, no constitutional or procedural bar prohibits a plaintiff from seeking injunctive relief that, if granted, would conflict with an order previously entered in another action to which the plaintiff was not a party. *See Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008); *Martin v. Wilks*, 490 U.S. 755, 761 (1989).

II. PLAINTIFFS' SUPPLEMENTAL FILINGS STILL MAKE NO SHOWING OF INJURY SUFFICIENT TO ESTABLISH THEIR STANDING.

Because reaching the merits of Plaintiffs' non-precluded claims would force the Court to decide whether actions taken by a coordinate Branch of the Federal Government in the field of intelligence gathering are unconstitutional, the Court's application of Article III's standing requirements must be "especially rigorous." *Amnesty Int'l v. Clapper*, 133 S. Ct. 1138, 1147 (2013). Nothing in Plaintiffs' reply, or the affidavits filed with it, is sufficient to support their standing under the circumstances of these cases.

As the Government Defendants have already shown, because Plaintiffs offer no proof that their communications have ever been or will be "overheard or obtained" by NSA, the asserted "impact[ ]" of the NSA's alleged programs on Plaintiffs' "ability to communicate via telephone, e-mail, or otherwise" is a reflection only of subjective fears on Plaintiffs' part and is insufficient to establish cognizable injury. Gov't Defs.' Opp. at 23-24. In their reply, Plaintiffs argue that the collection of information about their communications itself "constitutes a gross invasion of their privacy." Pls.' Reply at 21; *see id*. at 22 (asserting a "direct intrusion into [Plaintiffs'] associational privacy"). But Plaintiffs still offer no proof whatsoever to substantiate their assumption that the contents of their telephonic and electronic communications, or metadata about those communications, have ever been collected by the NSA. *See generally id.* at 21-26; *see also* Gov't Defs.' Opp. at 21-23.[2]

[2] Plaintiffs submit the Affidavit of David M. Siler (ECF No. 38 in case no. 13-851; ECF No. 31 in case no. 13-881) in an apparent effort to substantiate their claim that the NSA has collected information about or information contained in their electronic communications. In his affidavit, Mr. Siler infers that a disk that he was told "the military" had given the Stranges during a briefing on their son's death was the source of "multiple viruses, spyware and keystroke loggers" that he removed from the Stranges' home computer. Siler Aff. ¶¶ 7-15. (Nowhere in his affidavit does Mr. Siler attest that he ever examined the disk in question.) Like Plaintiffs' declarations about unexplained text messages and other technological intrusions, this alleged

Plaintiff Klayman, in a supplemental affidavit (ECF No. 31-2 in case no. 13-851), for the first time asserts that he must engage in costly and time-consuming travel to the locations of his current and potential clients, rather than speak with them by telephone, for fear that privileged and confidential communications "will be breached and compromised and disclosed to [the] government…." Klayman Supp. Aff. ¶¶ 12-14; *see also* Pls.' Reply at 25-26. An identical claim of injury was presented, and rejected, in *Amnesty International*. There, the plaintiffs challenging the constitutionality of FISA Section 702 "assert[ed] that they [were] suffering ongoing injuries that are fairly traceable [to Section 702] because the risk of surveillance … require[d] them to take costly and burdensome measures to protect the confidentiality of their communications," including "travel so that they can have in-person conversations." 133 S. Ct. at 1150-51. The Supreme Court held that this claim of injury was "unavailing," because the plaintiffs "[could] not manufacture standing by inflicting harm on themselves based on fears of hypothetical future harm that is not certainly impending." *Id.* at 1151; *see also id.* at 1152 (citing *Laird v. Tatum*, 408 U.S. 1, 10-15 (1972)). So, too, in these cases.

Mr. Klayman also attests that "potential clients are hesitant to contact [him]," and that he is "contacted almost daily by people who do not want to discuss … sensitive information

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infection of the Stranges' computer bears no likeness to the alleged NSA data-collection programs at issue in these cases, and provides no basis on which to conclude that Plaintiffs' communications (or information about them) have ever been acquired in the course of these programs. *See* Gov't Defs.' Opp. at 23 n.11.

Rakas v. Illinois, 439 U.S. 128, 139 (1978) is of no aid to Plaintiffs. *See* Pls.' Reply at 22-23. *Rakas* made clear that it did not turn on the "irreducible constitutional minimum" of establishing injury in fact, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), but dealt with the "substantive question" whether a person aggrieved by a search or seizure (such as a criminal defendant against whom seized evidence is introduced) may assert the Fourth Amendment rights of a third party. 439 U.S. at 132-33 & n.2. Because Plaintiffs have not shown that a search or seizure of information about their communications has occurred, they cannot demonstrate the injury required to bring a Fourth Amendment claim (or any other claim) in federal court.

candidly because they say [they] have reason to believe that the [NSA] is storing and monitoring their communications." Klayman Supp. Aff. ¶¶ 14-16. A like assertion of injury was also rejected in *Amnesty International*, and must be rejected here, because any such disinclination of third parties "to speak with [Plaintiffs]" based on those "parties' subjective fear of surveillance" is not fairly traceable to the alleged conduct of the Government. 133 S. Ct. at 1152 n.7 (citing *Laird*, 408 U.S. at 10-14).

III. RECENTLY RELEASED AUTHORITY SUPPORTS THE LAWFULNESS OF THE NSA'S BULK METADATA COLLECTION.

Finally, two recently released judicial decisions, *[Redacted]*, Dkt. No. PR/TT [redacted], Opinion and Order (F.I.S.C. [redacted]) (declassified and released on November 18, 2013) (Exh. A, hereto) ("*[Redacted]*"), and *United States v. Moalin*, 2013 WL 6079518 (S.D. Cal. Nov. 14, 2013), lend further support to the lawfulness of the NSA intelligence-gathering programs at issue in these cases.

In the recently released FISC opinion, Judge Kollar-Kotelly concluded that bulk collection of Internet metadata satisfied the relevance requirement of FISA's pen/trap provision, 50 U.S.C. § 1842, because bulk collection of the metadata was necessary for the NSA to employ analytical techniques that generate useful leads for FBI counter-terrorism investigations. *[Redacted]*, Opinion & Order at 47-49; *see id.* at 40-46. Judge Kollar-Kotelly also held that bulk collection of Internet metadata comported with the Fourth Amendment, concluding that the reasoning of *Smith v. Maryland*, 442 U.S. 735 (1979), is as applicable to Internet metadata as it was, in *Smith*, to dialed telephone numbers. *Id.* at 58-66. She further held that because the purpose of the bulk metadata acquisition was to identify terrorist operatives and prevent terrorist attacks, and not to curtail First Amendment activities, the proposed collection, subject to appropriate safeguards, did not violate the First Amendment. *Id.* at 66-69.

The recently issued decision in *Moalin* involved a motion for a new trial brought by a defendant convicted of providing material support to terrorists. 2013 WL 6079518, *1. The defendant argued that NSA's (acknowledged) collection of metadata about his telephone calls, which were then used to link him to a Somali terrorist organization, violated his rights under the Fourth Amendment. The court rejected this argument, holding that, under *Smith*, the defendant had no reasonable expectation of privacy in metadata about his phone calls. In so concluding, the court relied on recent decisions applying *Smith*'s holding to non-content information in a variety of telephonic and electronic communications records, *id.* at *6, and declined to rely on Justice Sotomayor's concurrence in *United States v. Jones*, 132 S. Ct. 945, 954-64 (2012), as a basis for recognizing a reasonable expectation of privacy in such information. *Id.* at *7-8.

CONCLUSION

For these reasons, and those stated in the Government Defendants' initial opposition brief and at oral argument, Plaintiffs' motions for preliminary injunctions should be denied.

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Respectfully submitted,

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