14-42

IN THE

United States Court of Appeals

FOR THE

Second Circuit

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; NEW YORK CIVIL LIBERTIES UNION; and NEW YORK CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs–Appellants,

– v. –

JAMES R. CLAPPER, in his official capacity as Director of National Intelligence; KEITH B. ALEXANDER, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service; CHARLES T. HAGEL, in his official capacity as Secretary of Defense; ERIC H. HOLDER, in his official capacity as Attorney General of the United States; and JAMES B. COMEY, in his official capacity as Director of the Federal Bureau of Investigation,

Defendants–Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS–APPELLANTS

Christopher T. Dunn
Arthur N. Eisenburg
New York Civil Liberties Union
Foundation
125 Broad Street, 19th Floor
New York, NY 10004
Phone: (212) 607-3300
Fax: (212) 607-3318
aeisenberg@nyclu.org

Jameel Jaffer
Alex Abdo
Patrick Toomey
Brett Max Kaufman
Catherine Crump
American Civil Liberties Union
Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
Fax: (212) 549-2654
jjaffer@aclu.org

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. Plaintiffs have standing to challenge the phone-records program........ 2

II. Plaintiffs' statutory claims are not precluded. 7

III. Section 215 does not authorize the phone-records program........ 11

A. Section 215 does not authorize the government to collect phone records at all........ 11

B. Even if Section 215 authorizes the government to collect phone records, it does not authorize the government to collect such records in bulk. 14

IV. The phone-records program violates the Fourth Amendment........ 17

A. *Smith v. Maryland* does not control this case. 17

B. The phone-records program is unreasonable........ 21

V. The phone-records program violates the First Amendment. 24

VI. The district court erred in denying Plaintiffs' motion for a preliminary injunction........ 27

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

Cases

Amidax Trading Grp. v. S.W.I.F.T. SCRL, 671 F.3d 140 (2d Cir. 2011) 3

Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011) 28

Ark. Dairy Coop. Ass'n v. USDA, 573 F.3d 815 (D.C. Cir. 2009) 11

Bailey v. United States, 133 S. Ct. 1031 (2013) 22

Block v. Cmty. Nutrition Inst., 467 U.S. 340 (1984) 11

Bowen v. Mich. Acad. of Family Practices, 476 U.S. 667 (1986) 9, 13

Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013) 6

Council for Urological Interests v. Sibelius, 668 F.3d 704 (D.C. Cir. 2011) 11

D. Ginsburg & Sons, Inc. v. Popkin, 285 U.S. 204 (1932) 14

Demarest v. Manspeaker, 498 U.S. 184 (1991) 16

Doe v. Gonzales, 449 F.3d 415 (2d Cir. 2006) 10

Doe v. Mukasey, 549 F.3d 861 (2d Cir. 2008) 9

Evergreen Ass'n, Inc. v. City of N.Y., 740 F.3d 233 (2d Cir. 2014) 30

FEC v. Political Contributions Data, Inc., 943 F.2d 190 (2d Cir. 1991) 18

Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539 (1963) 30

In re Stoltz, 315 F.3d 80 (2d Cir. 2002) 14

Katz v. United States, 389 U.S. 347 (1967) 20

Klayman v. Obama, 957 F. Supp. 2d 1 (D.D.C. 2013).................... 4, 25, 26, 27

Koretoff v. Vilsack, 614 F.3d 532 (D.C. Cir. 2010) 11

Kyllo v. United States, 533 U.S. 27 (2001) 5

Laird v. Tatum, 408 U.S. 1 (1972) 6

Local 1814, Int'l Longshoremen's Ass'n v. Waterfront Comm'n of N.Y. Harbor, 667 F.2d 267 (2d Cir. 1981) 3, 8, 29

Maryland v. King, 133 S. Ct. 1958 (2013) 26

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199 (2012) 12

Mincey v. Arizona, 437 U.S. 385 (1978) 22

Minnesota v. Carter, 525 U.S. 83 (1998) 5

N.Y. Times Co. v. Gonzales, 459 F.3d 160 (2d Cir. 2006)....................7, 29

NAACP v. Alabama, 357 U.S. 449 (1958)....................8, 30

Nat'l Ass'n of Letter Carriers, AFL–CIO v. U.S. Postal Serv., 604 F. Supp. 2d 665 (S.D.N.Y. 2009)....................3

Natural Res. Def. Council v. Hodel, 865 F.2d 288 (D.C. Cir. 1988) 9

NLRB v. Catholic Bishop of Chi., 440 U.S. 490 (1979) 18

RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065 (2012)....................14

Rakas v. Illinois, 439 U.S. 128 (1978)....................6

Sackett v. EPA, 132 S. Ct. 1367 (2012) 11

Shelton v. Tucker, 364 U.S. 479 (1960) 30

Smith v. Maryland, 442 U.S. 735 (1979) 1, 19

Talley v. California, 362 U.S. 60 (1960) 8

United States v. Jones, 132 S. Ct. 945 (2012) 20

United States v. Knotts, 460 U.S. 276 (1983) 20

United States v. Lawson, 410 F.3d 735 (D.C. Cir. 2005) 5

United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010) 20

United States v. Place, 462 U.S. 696 (1983) 6

Statutes

5 U.S.C. § 702 8

18 U.S.C. § 2708 12

18 U.S.C. § 2709 17

18 U.S.C. § 2712 .... 12, 15

50 U.S.C. § 1861 9

Other Authorities

Alex Marthews & Catherine Tucker, *Government Surveillance and Internet Search Behavior* (Mar. 24, 2014) 7

David S. Kris, *On the Bulk Collection of Tangible Things*, 1 Lawfare Res. Paper Series, no. 4, Sept. 29, 2013. 28

Interview by Steve Inskeep, NPR, with John C. Inglis, Deputy Director, NSA (Jan. 10, 2014) 24

Opp. Br. for United States, *In re Elec. Privacy Info. Ctr.*, No. 13-58, 2013 WL 5702390 (U.S. Oct. 11, 2013)....................9

President's Review Group on Intelligence and Communications Technologies, *Liberty and Security in a Changing World* (Dec. 12, 2013) 18, 28

Privacy and Civil Liberties Oversight Board, *Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court* (Jan. 23, 2014) 18, 27

White House, Office of the Press Secretary, *The Administration's Proposal for Ending the Section 215 Bulk Telephony Metadata Program* (Mar. 27, 2014)....................23

INTRODUCTION

The government's ongoing collection of Plaintiffs' phone records is unlawful. Section 215 cannot be used to collect call records. Even if it could, the phone-records program involves collection on a scale far beyond what Section 215 permits. Moreover, because Section 215 uses the same language as many administrative-subpoena statutes, adopting the government's construction of Section 215 means accepting that the government could conduct collection on this unprecedented scale under many other authorities. It is simply not credible that Congress intended to authorize so sweeping a surveillance program by using the same language it has used in so many other contexts—much less that the authority to conduct such surveillance has always been latent in numerous administrative-subpoena statutes. Yet that is the theory the government asks this Court to endorse.

The phone-records program would be foreclosed by the Constitution even if it were authorized by statute. It is unreasonable within the meaning of the Fourth Amendment. It also violates the First Amendment by unjustifiably intruding on Plaintiffs' associational privacy and by chilling communications that are central to Plaintiffs' work. The government contends that Plaintiffs' Fourth Amendment claim is controlled by *Smith v. Maryland*, 442 U.S. 735 (1979), but that case involved the collection of a single criminal suspect's call records over a period of several days; it did not involve dragnet surveillance, which—as the Supreme Court

has recognized—raises constitutional questions of an entirely different order. Further, the First Amendment requires that governmental intrusions into associational privacy be narrowly tailored. A program that places millions of Americans under permanent surveillance cannot possibly satisfy that standard.

Plaintiffs are likely to succeed on the merits, but other factors weigh in favor of preliminary relief here as well. The program is causing irreparable injury to Plaintiffs' privacy and associational rights. Further, both the balance of equities and the public interest weigh in favor of injunctive relief. Since Plaintiffs commenced this action, the Privacy and Civil Liberties Oversight Board ("PCLOB"), the President's Review Group on Intelligence and Communications Technologies ("PRG"), and even the President himself have concluded that the government can track the associations of suspected terrorists without collecting Americans' phone records in bulk. Granting preliminary relief would mitigate Plaintiffs' injuries without compromising any legitimate governmental interest.

ARGUMENT

I. Plaintiffs have standing to challenge the phone-records program.

The district court was correct that Plaintiffs have standing to challenge the phone-records program because "there is no dispute the Government collected telephony metadata related to the ACLU's telephone calls." SPA017. The government's collection of Plaintiffs' call records inflicts an injury sufficient to

support standing for all of Plaintiffs' claims. *See, e.g.*, *Nat'l Ass'n of Letter Carriers, AFL–CIO v. U.S. Postal Serv.*, 604 F. Supp. 2d 665, 675 (S.D.N.Y. 2009) (Chin, J.) (holding that postal employees had standing to bring suit under the Fourth Amendment where they challenged the government's collection of their medical records from health-care providers); *Local 1814, Int'l Longshoremen's Ass'n v. Waterfront Comm'n of N.Y. Harbor*, 667 F.2d 267, 271 (2d Cir. 1981) ("First Amendment rights are implicated whenever government seeks from third parties records of actions that play an integral part in facilitating an association's normal arrangements for obtaining members or contributions."); *see also Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140 (2d Cir. 2011) (observing that a plaintiff seeking to establish standing to challenge government surveillance "need only establish that its information was obtained by the government").

The government argues, as it did below, that Plaintiffs cannot establish standing without showing that the government "reviews" the records it collects. Gov't Br. 21–22. But Plaintiffs have complained not only about the government's review of their records but about its acquisition of the records in the first instance. *See, e.g.*, JA018 (Compl. ¶ 1 ("The practice is akin to snatching every American's address book—with annotations detailing whom we spoke to, when we talked, for how long, and from where.")); JA026 (Compl. ¶ 35). Though the government's subsequent use of Plaintiffs' records aggravates their injuries, Plaintiffs need not

establish anything about the government's use of their records in order to challenge the government's initial collection of them.[1]

In fact, the government's argument that there is no case or controversy until an analyst "reviews" the information the government has collected, Gov't Br. 21, is not simply wrong, but radically so. Consider the implications: If the collection of information could not give rise to a case or controversy, the Constitution would permit the government to copy every email, record every phone call, and make a permanent record of every person's physical movements—all without ever having to justify its actions to any court. The Constitution would be engaged, if at all, only when the government decided to review the data it had collected. The government supplies no authority for the proposition that the Constitution is indifferent to the government's accumulation of vast quantities of sensitive information about Americans' lives—let alone for the proposition that such surveillance does not even trigger Article III.[2]

---

[1] In any event, the government *has* reviewed Plaintiffs' records. Every time the NSA queries the phone-records database, it reviews Plaintiffs' records to determine whether Plaintiffs or their contacts are connected to a phone number that the NSA deems suspicious. *See* JA131–132, 136; *see also Klayman v. Obama*, 957 F. Supp. 2d 1, 28 & n.38 (D.D.C. 2013).

[2] At one point, the government appears to go even further, contending that there is no case or controversy unless Plaintiffs' records are actually *responsive* to one of the government's queries. Gov't Br. 24. That contention is meritless. A person whose luggage is inspected has been searched even if the inspection turns up no contraband. A person whose home is subjected to thermal-imaging has been

Insofar as the government argues that Plaintiffs lack standing because the collection of their phone records does not amount to a search, Gov't Br. 22, 25, the government conflates the standing inquiry with the substantive constitutional one. *See, e.g.*, *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (stating that definition of Fourth Amendment rights "is more properly placed within the purview of substantive Fourth Amendment law than within that of standing"); *United States v. Lawson*, 410 F.3d 735, 740 n.4 (D.C. Cir. 2005); *accord Rakas v. Illinois*, 439 U.S. 128, 139 (1978). The government improperly asks the Court to assume at the standing stage what is disputed on the merits.

The cases the government cites do not support its argument. The government's reliance on *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), is misplaced because in that case the plaintiffs could not establish that their information had been collected. *Id.* at 1147–49; SPA017–018. The government's reliance on *Laird v. Tatum*, 408 U.S. 1 (1972), is also misplaced. In that case, the plaintiffs complained not about the collection of their information but about the possibility that the collected information would be misused in the future. *See id.* at 13. In addition, the *Laird* Court had no occasion to consider the plaintiffs' standing

---

searched even if the scan does not show that the person is growing marijuana. *Cf. Kyllo v. United States*, 533 U.S. 27 (2001). Whether a search has occurred—and, certainly, whether an Article III injury has been inflicted—does not turn on whether the search produces information that the government regards as useful or incriminating.

to bring a claim under the Fourth Amendment, as the case involved only an alleged violation of the First Amendment. *See id.* at 3.[3]

The government's argument that Plaintiffs lack standing to raise a First Amendment claim is also incorrect. The government contends that Plaintiffs' claims of chill are speculative, Gov't Br. 22–24, but Plaintiffs—unlike the plaintiffs in *Laird*—assert a direct intrusion into their associational privacy, not just a chilling effect. Compl. ¶¶ 3, 35. Again, this intrusion and the resulting injury are complete when the government collects Plaintiffs' call records—regardless of whether the surveillance ultimately dissuades any third party from communicating with them. *See N.Y. Times Co. v. Gonzales*, 459 F.3d 160, 163 (2d Cir. 2006) (addressing merits of newspaper's challenge to third-party subpoena for phone records). Plaintiffs suffer a further injury because of the program's chilling effect on their contacts and sources. JA018, JA024, JA026 (Compl. ¶¶ 3, 26–27, 35.) The

---

[3] The government suggests that the National Security Agency's ("NSA") automated searches of phone records are like dog-sniffs for contraband and thus do not implicate the privacy of those whose records are not responsive to the queries. Gov't Br. 24–25. This fundamentally misunderstands the dog-sniff doctrine, which turns *not* on the fact that a dog is conducting the search—after all, the dog is acting as an agent of the government, *see United States v. Place*, 462 U.S. 696, 706 (1983)—but on the fact that the search turns up only *contraband*, in which there is no reasonable expectation of privacy. *See, e.g.*, *id.* at 707 ("A 'canine sniff' by a well-trained narcotics detection dog, however, . . . does not expose noncontraband items that otherwise would remain hidden from public view . . . ."). Here, by contrast, the searches of Plaintiffs' phone records are of their constitutionally protected associations.

government seems to believe that there is something implausible about the notion that the NSA's surveillance might chill lawful expression and association, but "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association," *NAACP v. Alabama*, 357 U.S. 449, 462 (1958); *see also Local 1814*, 667 F.2d at 273; *Talley v. California*, 362 U.S. 60, 64 (1960); Br. for *Amicus Curiae* PEN American Center, Inc. in Supp. of Pls. at 22–23.[4]

II. Plaintiffs' statutory claims are not precluded.

As Plaintiffs have explained, Pls.' Br. 29–38, the district court failed to give appropriate significance to the Administrative Procedure Act's ("APA") broad waiver of sovereign immunity for suits that seek "relief other than money damages," 5 U.S.C. § 702.

In defending the district court's opinion, the government contends that Congress "made no provision" for the injunctive relief that Plaintiffs seek here. Gov't Br. 28. But this defense only replicates the district court's error. Congress authorized Plaintiffs to seek injunctive relief when it enacted the APA, which

[4] A recent academic study based on publicly available data concerning Google searches found that public awareness of pervasive NSA surveillance has caused a significant and measurable impact on the behavior of internet users both inside and outside the United States. *See generally* Alex Marthews & Catherine Tucker, *Government Surveillance and Internet Search Behavior* (Mar. 24, 2014), http://ssrn.com/abstract=2412564.

"provide[d] broadly for judicial review of [agency] actions, affecting as they do the lives and liberties of the American people." *Natural Res. Def. Council v. Hodel*, 865 F.2d 288, 318 (D.C. Cir. 1988). The question here is not whether Congress has expressly authorized judicial review—it has done so through the APA—but whether there is "clear and convincing evidence of a contrary legislative intent [to] restrict access to judicial review." *Bowen v. Mich. Acad. of Family Practices*, 476 U.S. 667, 671 (1986) (quotation marks omitted).

There is no such evidence. Nothing in the text of the statute suggests that Congress intended to foreclose suits by the subjects of Section 215 orders—the statute does not address such suits at all. Nor does anything in the *structure* of the statute suggest that Congress intended to withdraw the APA's waiver of sovereign immunity. The government infers such intent from the statute's provisions relating to secrecy, Gov't Br. 27, but the government fails to acknowledge that the statute expressly contemplates that the Foreign Intelligence Surveillance Court ("FISC") will set aside secrecy orders in some cases, *see* 50 U.S.C. § 1861(f)(2)(C)(iii); *see also Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008) (holding that non-disclosure orders issued under almost-identical provisions of national-security-letter statute can be upheld only if they survive First Amendment scrutiny); *Doe v. Gonzales*, 449 F.3d 415, 422–23 (2d Cir. 2006) (Cardamone, J., concurring) (explaining that non-disclosure orders can be constitutional only if they are limited in scope and

duration). The government cites no evidence—let alone "clear and convincing evidence"—of a congressional understanding that Section 215 orders must always and forever be secret.[5]

The government also infers preclusive intent from the fact that Congress expressly provided a right of judicial review to the *recipients* of Section 215 orders. Gov't Br. 26–27. As Plaintiffs have already explained, however, it is emphatically not the case that Congress's decision to extend a right of judicial review to one group necessarily precludes claims by all others. Pls.' Br. 34-38; *see also Sackett v. EPA*, 132 S. Ct. 1367, 1373 (2012). To determine whether others may avail themselves of judicial review, courts have looked to factors including (i) whether recognizing a right of judicial review would permit an end-run around administrative-review requirements; (ii) whether the statute in question was intended to protect the class of individuals asserting the right of judicial review; and (iii) whether Congress had extended a cause of action to another group whose

[5] The government cites section 1861(f)(2)(D) for the proposition that Foreign Intelligence Surveillance Act "limits the judicial review of [Foreign Intelligence Surveillance Court] orders under Section 215," but that provision has no application here because Plaintiffs are challenging the conduct of executive officials, not seeking modification of the FISC orders that authorize the phone-records program. *See also* Opp. Br. for United States at 21, *In re Elec. Privacy Info. Ctr.*, No. 13-58, 2013 WL 5702390 (U.S. Oct. 11, 2013) ("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 proceeding to which the plaintiff was not a party.").

interests were aligned with that class. Pls.' Br. 35–36. The government contends that these factors are irrelevant, Gov't Br. 29 ("the operative legal principle is . . . not fact-specific"), but the courts have looked to them over and over again, *see, e.g.*, *Sackett*, 132 S. Ct. at 1374; *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 348 (1984); *Council for Urological Interests v. Sibelius*, 668 F.3d 704, 710 (D.C. Cir. 2011); *Koretoff v. Vilsack*, 614 F.3d 532, 536–40 (D.C. Cir. 2010); *Ark. Dairy Coop. Ass'n v. USDA*, 573 F.3d 815, 823 (D.C. Cir. 2009).

The government also infers preclusive intent from the fact that Congress has expressly authorized damages suits for violations of provisions other than Section 215. Gov't Br. 28 (discussing 18 U.S.C. § 2712). That Congress has authorized *damages* suits for *some* kinds of statutory violations, however, is not evidence that Congress intended to preclude *injunctive* suits for *other* kinds of statutory violations. Pls.' Br. 30–31; *see also Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2207–09 (2012) (finding no preclusion where plaintiff was "bringing a different claim, [and] seeking different relief," from the one that Congress had made available to another class of litigants). Further, the fact that Congress has *expressly* withdrawn the APA's waiver of sovereign immunity for other surveillance provisions, *see, e.g.*, 18 U.S.C. § 2708, makes it even less plausible that it intended to *implicitly* withdraw the waiver for violations of Section 215.

Finally, the government argues that Plaintiffs' claims are precluded because the alternative is to allow challenges by "virtually any customer of a company that received a FISC order." Gov't Br. 30. If many people can file suits like this one, however, it is only because the government has misconstrued the statute to permit dragnet surveillance. *See* Section III.B, *infra*. Moreover, finding Plaintiffs' statutory claims to be precluded would not address the "problem" of multiple challenges, because individuals whose records have been collected by the NSA have constitutional claims as well as statutory ones, and not even the government contends that those constitutional claims are precluded.

In sum, nothing in the text or structure of the statute overcomes the APA's "strong presumption" in favor of judicial review, *Bowen*, 476 U.S. at 670.

III. Section 215 does not authorize the phone-records program.

A. Section 215 does not authorize the government to collect phone records at all.

The Stored Communications Act ("SCA") supplies an exhaustive list of the authorities that can be used to collect phone records, and Section 215 is not among them. In other contexts the government has acknowledged that the list of authorities set out in the SCA is exhaustive, and that it would be improper to infer additional exceptions to the SCA's "background rule of privacy." Pls.' Br. 18–20.

The government observes that the phrase "any tangible things" is broad enough to encompass call records. Gov't Br. 38–41. This is undoubtedly true.

Plaintiffs' argument, however, is not that the phrase "any tangible things" in itself excludes call records. Plaintiffs' argument is that any court construing Section 215 alongside the SCA must "eliminate the contradiction" between the two provisions by "constru[ing]" the specific provision to be an "exception to the general one," as the Supreme Court has held the "general/specific canon" to require, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (quotation marks omitted); *see also In re Stoltz,* 315 F.3d 80, 93 (2d Cir. 2002). The government contends that Plaintiffs are wrong to suggest that the SCA "is an implicit exception to, or limit on, the expansive authorization" in Section 215, Gov't Br. 38—but, again, that is precisely what the canon requires in this situation, *see D. Ginsburg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932) ("General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." (emphasis added)); *RadLAX*, 132 S. Ct. at 2071.

Curiously, the government ascribes weight to the clarification by Congress in 2006 that other types of records (such as educational records, tax records, and medical records) regulated by specific statutes fall within the general purview of Section 215, Gov't Br. 39, but it ignores the absence of such clarifying language directed at call records. *See* Pls.' Br. 19–20. That call records are not among the

categories of records listed in Section 215 only underscores that the "general/specific" canon should apply as usual here.[6]

The government warns the Court that Plaintiffs' construction of Section 215 and the SCA would leave the government with "no means" to issue even targeted demands for telephone-subscriber information under Section 215. Gov't Br. 37. The government is correct. But Congress has, of course, given the government other authorities under which such targeted demands may be issued—they are listed in the SCA. *See also* Br. for *Amici Curiae* Senator Ron Wyden, Senator Mark Udall & Senator Martin Heinrich in Supp. of Pls.–Appellants 12–17.[7]

---

[6] The government contends that Plaintiffs cannot complain that the phone-records program violates the SCA because Plaintiffs "concede" that a damages suit is "the exclusive remedy" for violations of that Act. Gov't Br. 37. Plaintiffs have made no such concession. Section 2712(d) states that the damages remedies set out in section 2712(a) are the "exclusive remedy against the United States for any claims within the purview of this section," but the claims within the purview of section 2712 are *damages* claims, not injunctive claims such as Plaintiffs'. In any event, even if section 2712(d) foreclosed injunctive claims for violation of the SCA, Plaintiffs' Complaint challenges "the government's dragnet acquisition of Plaintiffs' telephony records *under Section 215*." JA018 (Compl. ¶ 1 (emphasis added)). The SCA is relevant here only because it sheds light on the scope of Section 215.

[7] The government states that "[i]t would be passing strange" if Congress had allowed the government to obtain call records through national security letters, which do not require prior judicial review, while foreclosing the government from obtaining call records under Section 215. Gov't Br. 40–41; *see* SPA027. But as Plaintiffs have already explained, Pls.' Br. 20; *see also* PCLOB Report 94, there are multiple reasons why Congress might have written the statutes as it did. Even if Congress's reasons were more obscure, it would be improper to disregard the plain language of the statute, as the government does, unless giving effect to the plain

B. Even if Section 215 authorizes the government to collect phone records, it does not authorize the government to collect such records in bulk.

Section 215 does not authorize the government to collect phone records in bulk. The statute expressly limits the scope of the tangible things the government may obtain under it. Pls.' Br. 21–22. Moreover, the statute uses the same terms used in many administrative-subpoena statutes. Pls.' Br. 24 n.5, 25. Those statutes have never been construed to permit surveillance on the scale the government is conducting here. Nor has any court upheld a grand-jury subpoena that sought records on this scale—or on anything approaching it. This is true even though many administrative and criminal investigations involve issues relating to national security, foreign intelligence, and terrorism. Pls.' Br. 22–24. Notably, in public-relations documents, the government itself has characterized Section 215's scope as "narrow." *See, e.g.*, Office of the Director of National Intelligence, *Section 215 of the Foreign Intelligence Surveillance Act* ("*DNI Factsheet*"), http://icontherecord.tumblr.com/topics/section-215 ("Section 215 contains a number of safeguards that protect civil liberties, beginning with its narrow scope.").

---

language would produce a result "*demonstrably* at odds" with the intentions of its drafters. *Demarest v. Manspeaker*, 498 U.S. 184, 191 (1991) (emphasis added) (quotation marks omitted). Giving effect to the plain language would not produce such an effect here.

Because many other statutes use the same terms as Section 215, adopting the construction of Section 215 the government urges here would have dramatic implications far beyond the present context. The government fails to grapple with these implications. Thus, in defense of its construction of Section 215, the government appeals to the "significant statutory protections Congress built into Section 215." Gov't Br. 35. Many of the statutes that use the same "relevance" standard used in Section 215, however, do not include the "safeguards" the government identifies. For example, the national-security-letter statute, 18 U.S.C. § 2709, does not require prior judicial review or minimization. To accept the government's construction of Section 215 is to accept that the government can collect all Americans' call records, indefinitely, *without* the safeguards the government cites.

The government's other arguments are also without merit. Observing that Congress rejected proposals "to limit the use of Section 215 to obtain records pertaining to individuals suspected of terrorist activity," the government argues that Congress must have intended to allow the government to collect records about everyone. Gov't Br. 34. But the fact that Congress rejected a "narrow, retrospective approach," *id*., does not mean that it intended to create that kind of sweeping power.

The government also argues, without citation, that the "reasonable grounds" standard in Section 215 requires that the Court defer to "the government's reasonable judgments concerning matters that may be relevant." Gov't Br. 32. By requiring that the FISC approve Section 215 requests for records, however, Congress plainly intended that there be an independent judicial assessment of relevance. Notably, in other contexts the government has argued that the judicial review requirement means that Section 215 is "actually more protective of privacy than the authorities for ordinary grand jury subpoenas." *DNI Factsheet*.[8]

Finally, the government presses the argument that Congress ratified the phone-records program when it reauthorized Section 215 in 2010 and 2011. Gov't Br. 35–37. It advances this argument even though it concedes that the FISC did not issue any opinion explaining its basis for authorizing the program until 2013; that the government never shared its own legal analysis of the program with Congress; that many members of Congress did not know about the program at all; and that even those members of Congress who knew about the program were foreclosed from conferring with staff, exchanging views with each other, or disclosing even the existence of the program to their constituents. Pls.' Br. 26–29. The courts have

[8] Even if the government offered a plausible construction of Section 215, the doctrine of constitutional avoidance would militate against adopting it. Pls.' Br. 38 n.10; *see NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490 (1979) ("[A]n act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."); *FEC v. Political Contributions Data, Inc.*, 943 F.2d 190, 191 (2d Cir. 1991).

never applied the legislative-ratification doctrine in any context even remotely resembling this one.

IV. The phone-records program violates the Fourth Amendment.

A. *Smith v. Maryland* does not control this case.

The Supreme Court has yet to decide the question presented by this case: whether the Fourth Amendment permits the government to collect hundreds of millions of Americans' phone records in bulk, indefinitely. The government argues that Plaintiffs' Fourth Amendment claim is foreclosed by the Supreme Court's decision in *Smith v. Maryland*, 442 U.S. 735, but *Smith* did not present the question presented here, and the Supreme Court's more recent cases only confirm that *Smith* does not have the broad reach the government now attributes to it.

As Plaintiffs have explained, Pls.' Br. 39–45, *Smith* resolved a narrow question with a narrow ruling. It held that the Fourth Amendment was not implicated by the government's collection of a single criminal suspect's phone records over a period of several days. *Smith* did not address the question of dragnet surveillance. Indeed, just four years after it decided *Smith*, the Supreme Court explicitly recognized that the distinction between targeted surveillance and dragnet surveillance is a constitutionally significant one. *See* Pls.' Br. 41 (discussing *United States v. Knotts*, 460 U.S. 276 (1983). More recently, in *United States v. Jones*, 132 S. Ct. 945 (2012), five Justices observed that a different form of dragnet

surveillance—the long-term tracking of an individual in public—amounted to a search under the Fourth Amendment. *See* Pls.' Br. 41–42; *see also United States v. Maynard*, 615 F.3d 544, 557 (D.C. Cir. 2010), *aff'd sub nom. Jones*, 132 S. Ct. 945.

Thus, while it is undoubtedly true that "*Smith* remains the law," Gov't Br. 44, *Smith* does not control this case. To decide the Fourth Amendment issue presented here, the Court must answer a question that the Supreme Court has never confronted—whether the government's bulk collection of Plaintiffs' call records invades a reasonable expectation of privacy. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). It does. As Plaintiffs have explained, the records at issue here are extraordinarily revealing. Collectively, they supply the government with a comprehensive log of Americans' telephone communications. And embedded in the records is a wealth of detail about Americans' familial, political, professional, religious, and intimate associations. Pls.' Br. 43; *see also* JA049–058 (Felten Decl. ¶¶ 38–64); PCLOB, *Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court* 156–58 (Jan. 23, 2014), http://bit.ly/1d01flI ("PCLOB Report"); PRG, *Liberty and Security in a Changing World* 110–17 (Dec. 12, 2013), http://1.usa.gov/1cBct0k ("PRG Report").

The government argues that Plaintiffs lack a constitutional privacy interest in their phone records because the records are held by third parties. Gov't Br. 43–44. However, as Plaintiffs have explained, Pls.' Br. 45, the third-party doctrine has never operated with this kind of rigidity. Indeed, were the simple transfer of information to a third party enough on its own to extinguish an expectation of privacy, then even the content of our calls and the text of our emails would be entirely unprotected by the Fourth Amendment. That is not the law—and not even the government really believes that it is. The government concedes, as it must, that certain information—like the content of phone calls, for example—retains Fourth Amendment protection despite the fact that it has been surrendered to third parties. That an individual has yielded his records to a third party may be relevant to the *Katz* analysis, but it is not—and has never been—determinative. Pls.' Br. 45 (citing cases).

The government contends that removing constitutional protection for all information conveyed to third parties would "facilitate compliance with the Constitution." Gov't Br. 43. While it is undoubtedly true that the government would find it easier to honor the Constitution if the Constitution imposed fewer restrictions on it, the Constitution exists to protect individual rights, not governmental efficiency. *Cf. Bailey v. United States*, 133 S. Ct. 1031, 1041 (2013) ("'[T]he mere fact that law enforcement may be made more efficient can never by

itself justify disregard of the Fourth Amendment.'" (quoting *Mincey v. Arizona*, 437 U.S. 385, 393 (1978))).

The government's argument that the phone-records program does not implicate privacy because the records collected by the government "do[] not include the identity of any particular subscriber," Gov't Br. 45, is also incorrect. Phone numbers are every bit as identifying as names. Indeed, they are more so: there are at least five individuals named "James Clapper" living in or near Washington, D.C.,[9] and dozens more throughout the country.[10] But there is only one individual in the world with the exact phone number of the lead defendant in this case. Phone numbers are, in other words, unique identifiers, JA043 (Felten Decl. ¶ 19 & n.14); JA304 (Suppl. Felten Decl. ¶¶ 3–4), in the same way that our social-security numbers and DNA sequences are. It is therefore unsurprising that the government itself treats phone numbers as private when responding to Freedom of Information Act requests. *See, e.g.*, Pls.' Br. 45 n.12.

More generally, the government's focus on the phone-records program's supposed limitations is a distraction. If the government is right about *Smith*, nothing precludes it from eliminating virtually all of those limitations. It could

---

[9] White Pages, http://www.whitepages.com/name/James-Clapper/Washington-DC (last visited Apr. 21, 2014).

[10] White Pages, http://www.whitepages.com/name/James-Clapper (last visited Apr. 21, 2014).

collect subscribers' names. It could review all of the phone records it collects, not just those within two hops of a target. It could review the records without any court involvement. It could keep the records indefinitely. And it could disseminate them to any other agency (or private company or individual, for that matter). Moreover, it could do all of this—bulk collection, bulk review, bulk retention, and bulk dissemination—for every category of information that it believes to be analogous to the phone numbers dialed in *Smith*. In its brief, the government asserts that it can collect the following categories of records in bulk without any constitutional restriction whatsoever: email metadata; text-message metadata; email that has arrived at a recipient; and even names, addresses, birthdates, and passwords sent to internet service providers. Gov't Br. 44. This is the true reach of the government's argument. If the government is right that *Smith* controls this case, then all of the restrictions it emphasizes are constitutionally superfluous—they are simply a matter of executive or legislative grace.

B. The phone-records program is unreasonable.

The phone-records program violates the Fourth Amendment's warrant clause. Even if an exception to that clause applied, the program would be unconstitutional because it is unreasonable. Pls.' Br. 46–52.

The government invokes the special-needs doctrine, but that doctrine applies only where compliance with the warrant clause would be impracticable. Pls.' Br.

47. It would not be impracticable for the government to acquire the phone records it seeks—including those within several hops of its surveillance targets—on an individualized basis. Pls.' Br. 50–52. The government has yet to offer any response to Professor Felten's straightforward explanation that it can conduct a one-, two-, or even three-hop analysis of its surveillance targets' phone calls through targeted demands. JA305–306 (Suppl. Felten Decl. ¶¶ 6–8). Instead, the government claims a marginal advantage to possessing at the outset all of the records it might one day want to review. Gov't Br. 50; *see also Klayman*, 957 F. Supp. 2d at 39–40 ("A closer examination of the record, however, 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."). The record does not support the contention, however, that a more narrowly targeted program would be less efficient. JA305–306 (Suppl. Felten Decl. ¶¶ 6–8). In any event, efficiency alone cannot be determinative. If it were, the Fourth Amendment would have no force at all.

The government's "reasonableness" argument also fails to grapple with recent developments. Since Plaintiffs filed this suit, the PCLOB, the PRG, and the President himself have concluded that the government can accomplish its aims using individualized court orders. *See* Pls.' Br. 50–51; White House, Office of the Press Secretary, *The Administration's Proposal for Ending the Section 215 Bulk*

Telephony Metadata Program (Mar. 27, 2014), http://1.usa.gov/1gS2HK0. The government emphasizes that the President intends to "maintain[] th[e] capabilit[ies]" of the program, Gov't Br. 52 (quotation marks omitted), but this is beside the point. The important point is that the President—like many others—has concluded that the program's capabilities can be maintained without bulk collection.

Thus, the question here is whether the government's unprecedented phone-records dragnet is reasonable even though the President himself has acknowledged that it is unnecessary. To ask the question is to answer it. On one side of the constitutional balance, the privacy intrusion is substantial—even, in some respects, unprecedented. The program places Americans under pervasive monitoring by aggregating their phone records indefinitely and by subjecting their records to routine searches. On the other side of the balance—"the promotion of legitimate governmental interests," *Maryland v. King*, 133 S. Ct. 1958, 1970 (2013)—the government conflates its interest in combatting terrorism, which is substantial, with the incremental benefit (if any) offered by the phone-records program. *See* Pls.' Br. 49–52. As Judge Leon observed in *Klayman*, "the Government does *not* cite a single instance in which analysis of the NSA's bulk metadata collection actually stopped an imminent attack, or otherwise aided the Government in achieving any objective that was time-sensitive in nature." 957 F. Supp. 2d at 40. Instead, the

government asks the Court to defer to its own vague, conclusory, and unsupported claims that the program is "valuable," Gov't Br. 52, and to disregard the substantial evidence—and the President's acknowledgement—that the phone-records program is not necessary. *Compare* Gov't Br. 52–53, *with* Pls.' Br. 50–51.[11]

"[N]o court has ever recognized a special need sufficient to justify continuous, daily searches of virtually every American citizen without any particularized suspicion." *Klayman*, 957 F. Supp. 2d at 39. This Court should not be the first.

V. The phone-records program violates the First Amendment.

The government responds to Plaintiffs' First Amendment claim, *see* Pls.' Br. 53–59, with three arguments. None has merit.

First, the government argues that the burden imposed by the phone-records program on Plaintiffs' First Amendment rights is not "direct" or "substantial." Gov't Br. 54. That is wrong. As an initial matter, both direct and indirect burdens

[11] The government states that "the record does not support the conclusion that the program collects 'virtually all telephony metadata' about telephone calls made or received in the United States." Gov't Br. 7. If the program does not sweep up substantially all phone records of every American, it is even less effective than the government lets on. *See, e.g.*, Interview by Steve Inskeep, NPR, with John C. Inglis, Deputy Director, NSA (Jan. 10, 2014), http://n.pr/1k9w2Dk ("You want to know that you've essentially got the whole pile. If you're looking for a needle in the haystack you need the haystack.").

on First Amendment rights must withstand exacting scrutiny where those burdens are substantial. *See, e.g.*, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2813 (2011) (invalidating public-financing scheme that indirectly but substantially burdened political speech). In this case, however, there is no doubt that the burden is both direct and substantial. It is direct because the very purpose of the program is to allow the government to monitor associations, and the government accomplishes this goal by collecting a record of every single one of Plaintiffs' telephonic associations "on an ongoing daily basis." JA122. The burden is substantial because the government collects information about every one of Plaintiffs' phone calls; because even the mere fact of many of these communications is sensitive or confidential, *see* JA023–024 (Compl. ¶¶ 25–27); JA076–077 (German Decl. ¶¶ 12–13, 23–24); JA085–086 (Shapiro Decl. ¶ 4); JA091 (Dunn Decl. ¶¶ 5–6); and because the program discourages whistleblowers and others who would otherwise communicate with Plaintiffs from contacting them, *see* JA023–024, JA026 (Compl. ¶¶ 25–27, 35); JA081–083 (German Decl. ¶¶ 28–32). The associational dragnet at issue here is far broader, and far more intrusive, than the one that this Court invalidated in *Local 1814*, 667 F.2d 267.

Second, the government states that the program does not "single[] out plaintiffs or others in any way." Gov't Br. 55. The government apparently views the program's indiscriminate nature as its saving grace. This is exactly backwards.

Government conduct that substantially burdens First Amendment rights must be narrowly tailored, *see* Pls.' Br. 53, not all-encompassing.

Finally, the government argues that the phone-records program complies with the First Amendment because it does not violate the Fourth Amendment. Gov't Br. 55 n.13. As Plaintiffs have explained, *see* Pls.' Br. 54–55, this Court has already rejected that peculiar logic. There is certainly no serious argument that the third-party doctrine applies to First Amendment claims. The First Amendment analysis looks only to the *nature* of the information sought by the government. *See, e.g.*, *N.Y. Times Co.*, 459 F.3d at 167–68 (finding First Amendment interests implicated by subpoena to third-party provider for reporters' telephone records); *Local 1814*, 667 F.2d at 269 (similar for union members' payroll records). If the two pillars of the government's argument are sound—that is, if the third-party doctrine bars Plaintiffs' Fourth Amendment claim and the First Amendment supplies no more protection than the Fourth—then the Constitution says nothing at all about the government's bulk collection of sensitive associational information. More broadly, were it true that the First and Fourth Amendments are coextensive in this context, many seminal Supreme Court cases involving compelled disclosure would have been resolved differently. *See, e.g.*, *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *NAACP*, 357 U.S. 499.

VI. The district court erred in denying Plaintiffs' motion for a preliminary injunction.

For the reasons above, Plaintiffs are likely to succeed on the merits of their claims. They will also suffer irreparable harm if a preliminary injunction is not granted, because the NSA's ongoing collection of their phone records infringes their privacy and discourages whistleblowers and others from associating with them. Indeed, under this Court's case law, the Court is entitled to *presume* irreparable harm. Pls.' Br. 60. The government cites cases involving copyright, patent, and other statutory claims to argue that this presumption does not apply, *see* Gov't Br. 56, but the presumption applies where *constitutional* violations are alleged, as here. *See, e.g.*, *Evergreen Ass'n, Inc. v. City of N.Y.*, 740 F.3d 233, 245 (2d Cir. 2014).

The balance of hardships and the public interest also counsel in favor of granting preliminary relief. Each day brings new and irreparable incursions into Plaintiffs' constitutionally protected privacy and associational rights. The preliminary relief Plaintiffs seek would not prejudice the government because, as discussed above, the government need not collect Plaintiffs' records in order to obtain the call records of suspected terrorists and their contacts. *See, e.g.*, JA305–306 (Suppl. Felten Decl. ¶¶ 6–8); PCLOB Report 146 (stating that there is "little evidence that the unique capabilities provided by the NSA's *bulk* collection of telephone records actually have yielded material counterterrorism results that could

not have been achieved without the NSA's Section 215 program"); PRG Report 104 ("Our review suggests that the information contributed to terrorist investigations by the use of section 215 telephony meta-data was not essential to preventing attacks and could readily have been obtained in a timely manner using conventional section 215 orders.").

Finally, the government dramatically overstates the difficulty of implementing the requested injunction. As Professor Felten explains in his supplemental declaration, "[t]here are a number of ways that the government could efficiently and effectively quarantine the ACLU's call records." JA308 (Suppl. Felten Decl. ¶ 15); *see id.* (providing full explanation). Indeed, the government appears already to have developed a method that allows it to exclude particular numbers from queries of the phone-records database. *See id.* (quoting David S. Kris, *On the Bulk Collection of Tangible Things* 13–14, 1 Lawfare Res. Paper Series, no. 4, Sept. 29, 2013. ("NSA technicians may access the metadata to make the data more useable—e.g., to create a 'defeat list' to block contact chaining through 'high volume identifiers' presumably associated with telemarketing or similar activity.").

CONCLUSION

For the reasons stated above, this Court should reverse the judgment below and remand for entry of a preliminary injunction.

Dated: April 24, 2014

Respectfully submitted,

/s/ Jameel Jaffer

Jameel Jaffer
Alex Abdo
Patrick Toomey
Brett Max Kaufman
Catherine Crump
American Civil Liberties Union
Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
Fax: (212) 549-2654
jjaffer@aclu.org

Christopher T. Dunn
Arthur N. Eisenberg
New York Civil Liberties Union
Foundation
125 Broad Street, 19th Floor
New York, NY 10004
Phone: (212) 607-3300
Fax: (212) 607-3318
aeisenberg@nyclu.org

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Rule 32(a)(7)(B) because it contains 6,871 words, excluding the portions of the brief exempted by Rule 32(a)(7)(B)(iii), and that it complies with typeface and type style requirements of Rule 32(a)(5)-(6) because it is printed in a proportionally spaced 14-point font, Times New Roman.

/s/ Jameel Jaffer
Jameel Jaffer
Attorney for Plaintiffs–Appellants