No. 14-35555

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANNA JO SMITH,

Plaintiff and Appellant,

v.

BARACK OBAMA, in his official capacity as PRESIDENT OF THE UNITED STATES OF AMERICA, 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, JAMES B. COMEY, in his official capacity as DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION

Defendants and Appellees.

Appeal from the United States District Court
District of Idaho
The Honorable B. Lynn Winmill, Chief District Judge, Presiding
Case No. 2:13-cv-00257-BLW

BRIEF FOR *AMICI CURIAE* SENATOR RON WYDEN, SENATOR MARK UDALL, AND SENATOR MARTIN HEINRICH IN SUPPORT OF PLAINTIFF-APPELLANT, URGING REVERSAL OF THE DISTRICT COURT

All parties have consented. FRAP 29(a)

CHARLES S. SIMS
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036
Telephone: 212-969-3000
Facsimile: 212-969-2900

Counsel for *Amici Curiae Senator Ron Wyden, Senator Mark Udall and Senator Martin Heinrich*

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INTEREST OF AMICI CURIAE[1]

Amici curiae Ron Wyden, Mark Udall, and Martin Heinrich are United States Senators and members of the Senate Select Committee on Intelligence. Senator Wyden has represented the state of Oregon since 1996. Senator Udall has represented the state of Colorado since January 2009. Senator Heinrich has represented the state of New Mexico since January 2013. Together with a number of other Senators, Senators Wyden, Udall, and Heinrich have introduced bipartisan legislation to reform the nation's surveillance laws, including the Foreign Intelligence Surveillance Act. *Amici* submit this brief to provide important context for the Court's consideration of plaintiffs' claims and to underscore the larger implications of this case.

INTRODUCTION

Nothing in the text of section 215 of the Patriot Act, codified at 50 U.S.C. 1861, would apprise any fair reader that it authorizes the government's bulk call-records program. The provision authorizes applications for orders "requiring the

[1] All the parties have consented to the filing of this brief. Undersigned counsel prepared this brief under the supervision of *amici*. Neither a party nor a party's counsel contributed money to fund the preparation or submission of this brief, and no money was contributed for the preparation or submission for the brief by any third party. *Amici* submitted a brief raising similar arguments in *First Unitarian Church of Los Angeles v. National Security Agency*, No. 3:13-3287 (N.D. Cal. 2013), where they were represented by plaintiffs' counsel in this case. *Amici* also submitted another similar brief, through undersigned counsel, in *ACLU v. Clapper*, No. 14-42 (2d Cir. 2014).

production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution," and gives as examples of the kinds of orders provided for "library circulation records, library patron lists, book sales records, book customer lists, firearms sales records, tax return records, educational records, or medical records containing information that would identify a person . . . ." *Id*. Each of those examples suggests narrow, individualized orders – not a program of bulk collection of information concerning vast numbers of law-abiding Americans.

As members of the Senate Select Committee on Intelligence, *amici* Senators Wyden and Udall have for years participated in the oversight of government surveillance conducted under the Patriot Act that they knew would astonish most Americans. They sought to warn the public about those activities as best they could without disclosing classified information. They also co-sponsored an amendment to the Patriot Act's reauthorization that sought to address the problem of government officials "secretly reinterpret[ing] public laws and statutes" and "describ[ing] the execution of these laws in a way that misinforms or misleads the public." *See* 157 Cong. Rec. S3360 (daily ed. May 25, 2011) (introducing SA 384

to S. 990, 112th Cong. § 3 (2011)); *see also* 157 Cong. Rec. S3386 (daily ed. May 26, 2011) (statement of Sen. Wyden) ("The fact is anyone can read the plain text of the PATRIOT Act. Yet many Members of Congress have no idea how the law is being secretly interpreted by the executive branch."); 157 Cong. Rec. S3258 (daily ed. May 24, 2011) (statement of Sen. Udall) ("Congress is granting powers to the executive branch that lead to abuse, and, frankly, shield the executive branch from accountability").[2]

Now that the government's bulk call-records program has been documented and exposed, the executive branch has retreated from frequently repeated claims about its necessity and expressed an intent to end government bulk collection under section 215. Press Release, FACT SHEET: The Administration's Proposal for Ending the Section 215 Bulk Telephony Metadata Program (Mar. 27, 2014), http://www.whitehouse.gov/the-press-office/2014/03/27/fact-sheet-administration-s-proposal-ending-section-215-bulk-telephony-m ("*White House Press Release*"). While Senators Udall, Heinrich and Wyden broadly support a policy aimed at ending the government's indiscriminate collection of telephony metadata, they

[2] Colleagues of *amici* raised similar concerns. *See, e.g.*, Sen. Richard Durbin, Remarks at the Senate Judiciary Committee Executive Business Meeting at 68:00 (Oct. 1, 2009), http://1.usa.gov/1fPvpwb ("Section 215 is unfortunately cloaked in secrecy. Some day that cloak will be lifted, and future generations will ask whether our actions today meet the test of a democratic society: transparency, accountability, and fidelity to the rule of law and our Constitution."); 155 Cong. Rec. S9563 (daily ed. Sept. 17, 2009) (statement of Sen. Feingold).

share a concern that there is no plan to suspend the bulk collection of Americans' phone records in the absence of new legislation, which is not necessarily imminent.

Meanwhile, the government continues to defend its bulk call-record collection program vigorously against statutory and constitutional challenges in the courts. *Amici* submit this brief to respond to the government's argument that its collection of bulk call records is necessary to defend the nation against terrorist attacks. *Amici* make one central point: as members of the committee charged with overseeing the National Security Agency's surveillance, *amici* have reviewed this surveillance extensively and have seen no evidence that the bulk collection of Americans' phone records has provided any intelligence of value that could not have been gathered through means that caused far less harm to the privacy interests of millions of Americans. The government has at its disposal a number of authorities that allow it to obtain the call records of suspected terrorists and those in contact with suspected terrorists. It appears to *amici* that these more targeted authorities could have been used to obtain the information that the government has publicly claimed was crucial in a few important counterterrorism cases.

In assessing the lawfulness of the government's bulk call-records program, it is also important to understand the implications of the government's interpretation of section 215. That interpretation could authorize bulk collections of information far beyond the call records at issue in this case, such as financial or medical

records, or even records indicating the location of ordinary Americans. The Court should reject the government's contention that its use of the statute is cabined by the supposedly unique characteristics of call records.

Because the government's call-records program needlessly intrudes upon the privacy rights of hundreds of millions of Americans, providing the executive branch with information that U.S. citizens have no intention of providing to the government, *amici* believe the bulk collection of these phone records should be ended.

ARGUMENT

I. *AMICI* HAVE SEEN NO EVIDENCE THAT THE BULK COLLECTION OF AMERICANS' PHONE RECORDS HAS PROVIDED USEFUL INTELLIGENCE UNOBTAINABLE THROUGH LESS INTRUSIVE MEANS.

A. *Amici* have seen no evidence that the bulk collection of Americans' phone records under section 215 is uniquely necessary to the national security of the United States.

The executive branch has claimed in public and in newly declassified submissions to the Senate Select Committee on Intelligence ("SSCI") that the bulk collection of Americans' phone call records (telephony metadata) is a vital national security program that is uniquely valuable in protecting the American people, that its aims cannot be achieved through alternative means, and that it has been effective in preventing terrorist activity against Americans. *Amici* have reviewed

the bulk-collection program extensively, and none of these claims withstands scrutiny.

Since the executive branch began using section 215 to collect the phone records of Americans in bulk, it has asserted to the members of Congress to whom it revealed that collection that the program was necessary to protect national security because it uniquely enables the government to track the associations of suspected terrorists. For example, as votes in both chambers of Congress on the reauthorization of the Patriot Act approached in 2009, the Department of Justice made available to members of the SSCI and the House Permanent Select Committee on Intelligence ("HPSCI") a report on the NSA's bulk collection under section 215. *See* Letter from Ronald Weich, Assistant Attorney General, to Silvestre Reyes, Chairman, HPSCI at 1 (Dec. 14, 2009), ("2009 Weich Letter"). The report represented that the "NSA's bulk collection programs provide important tools in the fight against terrorism" that are "unique in that they can produce intelligence not otherwise available to NSA." *See Report on the National Security Agency's Bulk Collection Programs Affected by USA PATRIOT Act Reauthorization* at 1, http://1.usa.gov/1i31wui ("2009 NSA Report").[3]

[3] The executive branch has made similar representations to Congress in other settings. *See, e.g.*, *Report on the National Security Agency's Bulk Collection Programs for USA PATRIOT Act Reauthorization* (attached to Letter from Ronald Weich, Assistant Attorney General, to Dianne Feinstein, Chairman, & Saxby

The executive branch has made the same assurances to the Foreign Intelligence Surveillance Court ("FISC") in its applications for orders renewing the bulk phone-records program. In December 2008, the executive branch asserted to the FISC that "having access to the call detail records 'is vital to NSA's counterterrorism intelligence mission' because '[t]he only effective means by which NSA analysts are able continuously to keep track of [redacted] and all affiliates of one of the aforementioned entities [who are taking steps to disguise and obscure their communications and identities], is to obtain and maintain an archive of metadata that will permit these tactics to be uncovered.'" Order at 2, *In re Production of Tangible Things*, No. BR 08-13 (FISC Mar. 2, 2009) (alterations in original) (quoting NSA declaration submitted to FISC on December 11, 2008), http://1.usa.gov/14DDhzd; *see also In re Production of Tangible Things*, No. BR 13-109, 2013 WL 5741573, at *7 (FISC Aug. 29, 2013) (discussing government assertions of necessity).

Chambliss, Vice Chairman, SSCI (Feb. 2, 2011), http://1.usa.gov/1i38XSh); Joint Statement for the Record by Michael Leiter, Director, National Counterterrorism Center, & [Redacted], Associate Deputy Director for Counterterrorism, Signals Intelligence Directorate, NSA, Before the HPSCI Closed Hearing on Patriot Act Reauthorization at 2 (Oct. 21, 2009), http://1.usa.gov/1i3bP1u. Many of these documents also made representations about the value and importance of the NSA's bulk email-records collection program that later proved to be inaccurate. *See infra* notes 8–9.

In the months following the government's official declassification of the bulk phone-records program, government officials told the American public much the same thing. Immediately after the bulk phone-records collection program was disclosed, a White House spokesman defended it as a "critical tool in protecting the nation from terror threats." Siobhan Gorman, Evan Perez & Janet Hook, *U.S. Collects Vast Data Trove*, Wall St. J., June 7, 2013, http://on.wsj.com/16RgOAf; *see Administration White Paper: Bulk Collection of Telephony Metadata Under Section 215 of the USA PATRIOT Act* at 12 (Aug. 9, 2013), https://www.aclu.org/files/natsec/nsa/20130816/Section%20215%20-%20Obama%20Administration%20White%20Paper.pdf ("*215 White Paper*") ("[F]or Section 215 to be effective in advancing its core objective, the FBI must have the authority" to engage in bulk collection). And executive-branch officials have repeatedly made similar public claims.[4]

[4] *See, e.g.*, *Potential Changes to the Foreign Intelligence Surveillance Act: Hearing Before the H. Permanent Select Comm. on Intelligence*, 113th Cong. at 55:40 (Oct. 29, 2013), http://www.c-spanvideo.org/program/AgencyPro ("Oct. 29 HPSCI Hearing") (statement of John C. Inglis, Deputy Director, NSA) ("It needs to be the whole haystack."); Decl. of FBI Ass't Dir. John Giacalone (Jan 24, 2014) ("Giacalone Decl.") ¶ 23, Appellant's Excerpts of Record (Hereinafter "ER") 74 ("Bulk metadata analysis sometimes provides information earlier than the FBI's other investigative methods and techniques."); *Oversight of the Administration's Use of FISA Authorities: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. at 59:00 (July 17, 2013), http://c-spanvideo.org/program/ISAO ("July 17 HJC Hearing") (statement of James M. Cole, Deputy Attorney General) (similar).

More recently and under intense public scrutiny, the government has gradually retreated from its most aggressive claims about the need for the bulk collection of call-records and moved to rein in the program, with a view to ending it entirely.[5] At the government's request, on February 5, 2014, the FISC imposed new limitations on the government's ability to use telephony metadata collected in bulk by requiring, absent an emergency, judicial approval of the terms used to search through bulk metadata and by limiting searches to two, rather than three, "hops" from the search term used. *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, BR 14-01 (FISC Feb. 5, 2014). The FISC noted that the government recognized that the bulk collection program implicated legitimate privacy concerns and sought to "reassur[e] the public that adequate protection is afforded to information concerning United States persons that is being acquired pursuant to a FISC order." *Id*.

[5] *See also, e.g.*, Brief for the United States in Opp'n, *In re Elec. Privacy Info. Ctr.*, No. 13-58, 2013 WL 5702390, at *31 (U.S. Oct. 11, 2013) (without bulk collection of phone records under section 215, "it *may not be* feasible for the NSA to identify chains of communications that cross different telecommunications networks . . . ." (emphasis added)); Giacalone Decl. ¶ 9, ER68 ("experience has shown that NSA metadata analysis, *in complement with* other FBI investigatory and analytical capabilities, produces information pertinent to FBI counter-terrorism investigations, *and can contribute* to the prevention of terrorist attacks" (emphases added)); *White House Press Release*.

Later, on March 27, 2014, President Obama proposed ending section 215 bulk collection of telephone metadata altogether. *White House Press Release* 1. In light of the fact that the executive branch now seeks to scrap section 215 bulk telephone record collection entirely, the notion that this program is uniquely important for protecting U.S. national security is simply no longer plausible.[6]

While *amici* are committed to working towards enacting legislation that would statutorily prohibit bulk collection of telephone records by the government, they are also concerned "that in the absence of new legislation, there is no plan to suspend the bulk collection of Americans' phone records." Letter from Sens. Mark

[6] Other observers who have seen all the pertinent evidence have expressed a similar skepticism over the necessity of the program. The district court for the District of Columbia – which recently issued a preliminary injunction against the program insofar as the two plaintiffs before it were concerned – found that "the Government does *not* cite a single instance in which analysis of 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." *Klayman v. Obama*, 957 F. Supp. 2d 1, 40 (D.D.C. 2013); *see also* Privacy & 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* at 11 (Jan. 23, 2014), http://www.pclob.gov/SiteAssets/Pages/default/PCLOB-Report-on-the-Telephone-Records-Program.pdf ("[T]he Section 215 program has shown minimal value in safeguarding the nation from terrorism."); *Liberty and Security in a Changing World: Report and Recommendations of The President's Review Group on Intelligence and Communications Technologies* at 104 (Dec. 12, 2013), http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf ("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.").

Udall, Ron Wyden & Martin Heinrich, to President Barack Obama at 1 (June 20, 2014) ("June 2014 Obama Letter"), http://www.scribd.com/doc/230500659/Udall-Wyden-Heinrich-Urge-President-to-End-Bulk-Collection-While-Congress-Works-to-Pass-Real-Surveillance-Reform. It is clear that the bulk collection of telephone metadata is not necessary to safeguard U.S. security and legitimate privacy interests continue to be violated as long as the government continues to indiscriminately stockpile call records. Accordingly, *amici* have urged the President to use his executive powers to end the dragnet collection of millions of Americans' phone records immediately and without waiting for Congressional action. June 2014 Obama Letter 1; Letter from Sens. Mark, Udall, Ron Wyden & Martin Heinrich, to President Barack Obama (Jan. 9, 2014), http://www.heinrich.senate.gov/download/letter-to-white-house-to-make-common-sense-constitutional-reforms-to-nsa-surveillance-protect-privacy. However, the Executive Branch has thus far declined to dismantle bulk collection entirely until Congress passes new legislation, and the existing program survives, with no clear end in sight. *White House Press Release* 2.

B. The government possesses a number of legal authorities with which it may obtain the call records of suspected terrorists and those in contact with suspected terrorists.

Amici have consistently argued that the bulk phone-records program needlessly tramples on Americans' privacy rights, particularly in light of the

authorities available to the government that can also be used to acquire call records of suspected terrorists and those in contact with suspected terrorists in a targeted manner. *See* Press Release, Sen. Martin Heinrich, Udall, Heinrich Back Effort To End Dragnet Collection of Phone Data & Add Meaningful Oversight of Surveillance Programs (Oct. 29, 2013), http://1.usa.gov/182XcHE; Press Release, Sen. Mark Udall, Surveillance Reform Package Ends Bulk Collection of Phone Records, Creates Constitutional Advocate for Secret Court (Sept. 25, 2013), http://1.usa.gov/1bBGLku ("Udall Reform Release"). Even the valid claims by intelligence officials about certain useful information obtained through the bulk phone-records program fail to explain why the government could not have simply obtained this information directly from phone companies using more calibrated legal instruments. A number of legal authorities would have allowed the government to do so.

For example, the Stored Communications Act permits the government to obtain precisely the same call records that are now acquired through bulk collection under section 215 when they are "relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703 (d). Individualized orders for phone records, as opposed to orders authorizing bulk collection, can also be obtained

under section 215. 50 U.S.C. § 1861.[7] National security letters, which do not require a court order, can also be used by the government to obtain call records for intelligence purposes. *See* 18 U.S.C. § 2709. The government can also acquire telephony metadata on a real-time basis by obtaining orders from either regular federal courts or the FISC for the installation of pen registers or trap-and-trace devices. *See* 18 U.S.C. §§ 3122, 3125; 50 U.S.C. § 1842. And the government may also seek call records using standard criminal warrants based on probable cause. *See* 18 U.S.C. § 2703 (c)(A); Fed. R. Crim. P. 17(c). The government can use many of these authorities without any more evidence than what is currently required to use the bulk phone-records database, with less impact on the privacy interests of innocent Americans.

The executive branch has sometimes argued that the bulk collection of phone records is unique because it allows the NSA to "quickly identify the network of contacts that a targeted number or address is connected to." 2009 NSA Report 5; *see id.* ("Importantly, there are no intelligence collection tools that, independently or in combination, provide an equivalent capability."). As an initial matter, in

[7] *Amici* understand that there is an ongoing legal debate regarding whether 18 U.S.C. § 2702 (a)(3), which prohibits the disclosure of call records to the government subject to several limited exceptions, permits the use of section 215 to obtain call records at all. *Amici* take no position on that legal question for the purposes of this brief, but note that the FISC currently permits such use. *See In re Production of Tangible Things*, No. BR 08-13, 2008 WL 9475145, at *3 (FISC Dec. 12, 2008).

exigent circumstances, the government already enjoys the authority to issue emergency authorizations or national security letters to obtain these records quickly. *See* 50 U.S.C. § 1843; 18 U.S.C. § 2709. More fundamentally, the FISC orders governing the bulk phone-records program permit the NSA's querying of the bulk phone-records database only when "there are facts giving rise to a reasonable, articulable suspicion (RAS) that the selection term to be queried is associated with" a "foreign terrorist organization," Primary Order at 7, *In re Application of the FBI for an Order Requiring the Production of Tangible Things from [Redacted]*, No. BR 13-80 (FISC Apr. 25, 2013). Intelligence officials have indicated that the NSA queried the phone-records database with fewer than 300 such "selection terms" in 2012. *215 White Paper* 4, https://www.aclu.org/files/natsec/nsa/20130816/Section%20215%20-%20Obama%20Administration%20White%20Paper.pdf. The RAS standard and the relatively few "selection terms" used by the NSA demonstrate that the government could obtain targeted court orders or issue national security letters on a case-by-case basis in lieu of querying bulk-collected data.

For cases in which intelligence agencies wish to conduct "two-hop analysis" of the network of a particular suspect, *amici* believe that the relevant phone records could be obtained from the phone companies using the legal authorities discussed above. An individual order for the phone records of a suspected terrorist and

anyone in contact with that suspect could be served on multiple phone companies simultaneously and be expected to produce the same results as a query of a bulk phone-records database.

In addition, even though the NSA's current five-year retention period for phone records exceeds the retention period mandated by federal regulation, the NSA has been unable to identify instances in which the government gained valuable information from phone records that the companies themselves did not continue to possess. *See* Press Release, Sens. Ron Wyden & Mark Udall, Wyden, Udall Issue Statement on Effectiveness of Declassified NSA Programs (June 19, 2013), http://1.usa.gov/1brNWxz, ("Wyden-Udall Effectiveness Release"). Moreover, the government recognized the validity of this conclusion by declining to incorporate a data-retention mandate in its proposal to end the bulk phone records collection program, instead indicating that under its plan phone companies would simply retain records "for the length of time they currently do today," which is often significantly less than five years. *White House Press Release* 1.

The government has also recognized that "numerous technical architectures" other than bulk collection by the government are "viable" means to accomplish the same ends as the bulk phone-records program. Oct. 29 HPSCI Hearing at 55:05, http://www.c-spanvideo.org/program/AgencyPro (statement of John C. Inglis). All of these acknowledgments support *amici*'s consistent warnings that the bulk

phone-records program goes far beyond what is required to protect national security.[8]

Respect for Americans' privacy is not a matter of convenience, but a Constitutional imperative. Despite years of receiving classified briefings and asking repeated questions of intelligence officials in both private and public settings, *amici* have seen no evidence that bulk collection accomplishes anything that other less intrusive surveillance authorities could not. Bulk collection is not only a significant threat to the constitutional liberties of Americans, but a needless one.[9]

C. *Amici* have seen no evidence that bulk collection was necessary to obtain information critical to specific counterterrorism investigations.

Even in the two cases that intelligence officials have been able to identify in which the bulk phone-records program provided any useful information about an individual involved in terrorist activity, it has not been demonstrated that bulk collection was necessary to the outcomes. In both of these cases, *amici* believe the

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[8] *See* Press Release, Sen. Martin Heinrich, Heinrich Statement on National Security Agency Phone Records Program (June 6, 2013), http://www.heinrich.senate.gov/newsroom/statements-and-speeches/heinrich-statement-on-national-security-agency-phone-records-program.

[9] *See* Press Release, Sen. Martin Heinrich & Sen. Tom Udall, Udall, Heinrich Back Effort to End Dragnet Collection of Phone Data & Add Meaningful Oversight of Surveillance Programs (Oct. 29, 2013), http://1.usa.gov/182XcHE; Wyden-Udall Effectiveness Release, http://1.usa.gov/1brNWxz.

government could have used its more targeted authorities to obtain the phone records it claims were valuable.[10]

For example, the executive branch has publicly claimed that the bulk phone-records program was critical to the government's disruption of a plot to bomb the New York City subway system. *See, e.g.*, July 17 HJC Hearing at 36:50, http://c-spanvideo.org/program/ISAO (statement of Stephanie Douglas, Executive Assistant Director, National Security Division, FBI); *see also, e.g.*, HPSCI, *54 Attacks in 20 Countries Thwarted by NSA Collection* at 1 (July 23, 2013), http://1.usa.gov/182Zk1W ("*54 Attacks*"). In particular, intelligence officials have claimed that a query of the bulk phone-records database for numbers linked to known terrorism suspect Najibullah Zazi returned a previously unknown number belonging to another known terrorism suspect, Adis Medunjanin. *See* July 17 HJC Hearing at 36:50, http://c-spanvideo.org/program/ISAO (statement of Stephanie Douglas). However, since the government had already identified Mr. Zazi as a terrorism suspect prior to querying the bulk phone-records database, it had all the evidence that it needed to obtain the phone records of Mr. Zazi and his associates

[10] *See* 159 Cong. Rec. S6056 (daily ed. July 30, 2013) (statement of Sen. Wyden) ("What I don't see . . . is any evidence that the U.S. Government needed to operate a giant domestic phone records surveillance program in order to catch these individuals."); *accord* July 31 SJC Hearing (statement of Sen. Patrick Leahy), http://www.judiciary.senate.gov/imo/media/doc/7-31-13LeahyStatement.pdf.

using an individualized section 215 order or other legal authorities. *See supra* Part I.B. The executive branch has provided neither *amici* nor the public with any evidence that bulk collection produced any information of unique value in preventing the subway plot.

The executive branch has also pointed to the case of Basaaly Moalin, a San Diego man convicted of sending $8,500 to support al-Shabaab in Somalia. The intelligence community has indicated that information from the bulk phone-records database "established a connection between a phone number known to be used by an extremist overseas . . . and an unknown San Diego–based number" that belonged to Mr. Moalin. *54 Attacks* 2, http://1.usa.gov/182Zk1W. Yet there is no shortage of authorities under which the United States can conduct surveillance on a "phone number known to be used by an extremist overseas" and other phone numbers in contact with that phone number. *See supra* Part I.B. To claim that Mr. Moalin's case is a "but-for" example of the value of the bulk phone-records collection program, July 31 SJC Hearing at 1:37:50, http://cspanvideo.org/program/ ISAO (statement of John C. Inglis), is simply at odds with the available evidence. Worse, it appears to be a misleading exaggeration that has distorted the public record.

Finally, the executive branch and others have also repeated the claim that "[i]f we had had [the bulk phone-records] program in place at the time [of the

September 11, 2001 attacks,] we would have been able to identify" the phone number of one of the hijackers, Khalid al-Mihdhar. *Oversight of the Federal Bureau of Investigation: Hearing Before the H. Comm. on the Judiciary* at 26, 113th Cong. (June 13, 2013), http://www.justice.gov/iso/opa/ola/witness/06-13-13-fbi-mueller-testimony-re-oversight-of-the-fbi.201385141.pdf (statement of Robert S. Mueller, III, Director, FBI); *see* 2009 Weich Letter 2, http://1.usa.gov/1i38XSh. Just as in the cases of Mr. Medunjanin and Mr. Moalin, however, it appears that Mr. al-Mihdhar's phone number could also have been obtained by the government using a variety of alternate means. Before September 11, the government was surveilling a safe house in Yemen but failed to realize that Mr. al-Mihdhar, who was in contact with the safe house, was actually inside the United States. *See, e.g.*, Nat'l Comm'n on Terrorist Attacks Upon the U.S., *9/11 Commission Report* 266, 270, 272 (2004), http://govinfo.library.unt.edu/911/report/911Report.pdf. The government could have used any number of authorities to determine whether anyone in the United States was in contact with the safe house that it was already targeting. It did not need a record of every American's phone calls to establish that simple connection.

The three cases discussed above—the three cases most heavily cited by government officials to justify the existence of the bulk phone-records program—make clear that there appears to be nothing uniquely valuable about the program,

and that existing alternative legal authorities are sufficient to accomplish the United States' legitimate intelligence objectives without systematically infringing on the privacy rights of hundreds of millions of Americans.

Of note, intelligence officials have repeatedly asserted that additional examples, which remain secret, show that the bulk phone-records collection program has "contributed to" or "provided value in" the investigation of a total of twelve different "homeland-related terrorist events." *Media Leaks Facts & Context (Long Version)* at 3 (Aug. 1, 2013), http://1.usa.gov/17wwh38 ("*Facts & Context*"). *Amici* have reviewed all twelve of these examples, and have yet to see any evidence that the bulk phone-records program provided any information that was materially useful to any terrorism cases other than those involving Mr. Moalin and Mr. Medjunanin. In the opinion of *amici*, the claim that the bulk phone-records collection program has "contributed to" twelve different counterterrorism investigations would not withstand public scrutiny, unless it were accompanied by new evidence that has not been provided to *amici*.

II. THE GOVERNMENT'S LEGAL INTERPRETATION OF SECTION 215 IS OVERBROAD.

Amici also are concerned that the district court's rationale for dismissing plaintiffs' Fourth Amendment challenge is not limited to telephony metadata and goes much too far, eliminating any Fourth Amendment claim for the bulk, routinized collection of any records (including hospital and doctor's records, or all

credit card and checking account data) that was collected, stored or seen by third party providers or billers, even if the statute lacked any link to international terrorism at all. Congress did not intend – and the Fourth Amendment would in any event not permit – such an overbroad claim of authority.

Amici have previously warned that the government's authority to collect information on law-abiding Americans is essentially limitless:

> the Patriot Act's surveillance authorities are not limited to phone records. . . . [and] could be used to collect other types of records in bulk as well, including information on credit card purchases, medical records, library records, firearm sales records, financial information and a range of other sensitive subjects.

Press Release, Sens. Ron Wyden & Mark Udall, Wyden, Udall Statement on the Disclosure of Bulk Email Records Collection Program (July 2, 2013), http://1.usa.gov/1bs6wWa ("Wyden-Udall Bulk Email Release"); *see* Sen. Ron Wyden, Remarks as Prepared for Delivery for the Center for American Progress Event on NSA Surveillance (July 23, 2013) http://www.wyden.senate.gov/news/blog/post/wyden-on-nsa-domestic-surveillance *(*"Wyden CAP Speech").[11]

[11] *Accord* Press Release, Sen. Martin Heinrich, Heinrich Says FISA Improvements Act Doesn't Go Far Enough To Protect American Privacy Rights (Oct. 31, 2013), http://1.usa.gov/175by9z; Letter from Sen. Ron Wyden & Sen. Mark Udall to Eric Holder, Attorney General, at 2 (Mar. 15, 2012), http://www.scribd.com/doc/85512347/Senators-Ron-Wyden-Mark-Udall-Letter-to-Attorney-General-Holder.

Amici have not issued these warnings lightly. As disclosed in July 2013, two of *amici* were involved in bringing an NSA bulk-collection program focused on internet metadata to an end. *See* Wyden–Udall Bulk Email Release, http://1.usa.gov/1bs6wWa ("[W]e spent a significant portion of 2011 pressing intelligence officials to provide evidence of [the program's] effectiveness. They were unable to do so, and the program was shut down that year."). Recent disclosures have produced even more reasons to heed *amici*'s words of caution. For example, one document released through a Freedom of Information Act lawsuit publicly revealed that the executive branch has interpreted its authority under section 215 to allow the collection of information about Americans' locations. *See* Letter from [Redacted], Attorney, Office of General Counsel, NSA, to SSCI at 1 (Apr. 1, 2011), http://1.usa.gov/1gWqiy0. And FISC opinions continue to refer to still-undisclosed "secret law" interpreting crucial statutory terms in FISA related to bulk collection as well as addressing the compatibility of bulk collection with the Fourth Amendment. *See In re Production of Tangible Things*, 2013 WL 5741573, at *6 (FISC "has previously examined the issue of relevance for bulk collections. *See [Redacted]*.").

Amici have long warned that Americans would be "stunned," "angry," and "alarmed" if they were to see the government's secret interpretation of section 215. 157 Cong. Rec. S3386, 3389 (daily ed. May 26, 2011) (statements of Sen. Wyden

& Sen. Udall). The disclosures to date about the NSA's activities have been significant, and they will surely be transformative.[12] But the government's claimed authorities are vast, and the Court should treat with skepticism the argument that the unique characteristics of call records cabin the government's use of the statute.

Moreover, seizing on section 215 to justify the collection of metadata on a huge volume of phone calls made daily in the United States necessarily leads to results that Congress and the Supreme Court cannot possibly be thought to have sanctioned.

As a close reading demonstrates, the district court's rationale for dismissing plaintiffs' Fourth Amendment claim rests on a broad reading of *Smith v. Maryland*, 442 U.S. 735 (1979) and its Ninth Circuit progeny. *Smith v. Obama*, No. 2:13-CV-257, 2014 U.S. Dist. LEXIS 76344 (D. Idaho June 3, 2014); ER1-8.

Even as the district court relied on *Smith*, it correctly recognized the existence of "a looming gulf between *Smith* and this case." *Smith*, 2014 U.S. Dist. LEXIS 76344, at *7; ER5. The *Smith* case involved the investigation of a single crime, and the collection of the phone records of a suspected robber over a two-day time period. The district court quoted the *Klayman v. Obama* opinion to

[12] *See* Uniting and Strengthening America by Fulfilling Rights and Ending Eavesdropping, Dragnet-collection, and On-line Monitoring Act, S. 1599 / H.R. 3361, 113th Cong. (2013); Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. (2013).

underscore the danger of expanding *Smith* so far as to encompass telephone records collected in bulk over a much longer period of time: "people in 2013 have an entirely different relationship with phones than they did thirty-four years ago . . . . 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." *Smith*, 2014 U.S. Dist. LEXIS 76344, at *11; ER7 (quoting *Klayman v. Obama*, 957 F. Supp. 2d 1, 36 (D.D.C. 2013)).

It is hard to imagine that this Court would agree that a congressional statute requiring bulk submission to the government of hospital and medical records, or of credit card billing and checking accounts, passed (or was not even subject to) Fourth Amendment review without a tie to international terrorism, merely on the rationale that private records held by a third party are categorically beyond Fourth Amendment protection. It would appear, then, that the reasonableness (and hence the constitutionality) of such orders necessarily rests on the balance between harm to privacy interests and governmental need – one informed by the considerations and failures-of-evidence canvassed above in Point I – and not simply on the *Smith v. Maryland* third-party rationale alone. As Justice Sotomayor recently wrote concurring in *United States v. Jones*, 132 S. Ct. 945, 957 (2012), making secrecy (even from telephone providers, internet providers, and entities such as pharmacies or hospitals) a sine qua non of Fourth Amendment protection

> is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. . . . I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. . . . I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.

CONCLUSION

For all the foregoing reasons, the Court should reverse the judgment below and remand for further proceedings.

Respectfully Submitted,

September 9, 2014

PROSKAUER ROSE LLP

/s/ Charles S. Sims
Charles S. Sims
Proskauer Rose LLP
New York, New York 10036
Telephone: (212) 969-3950
Facsimile: (212) 969-2900
csims@proskauer.com

Attorneys for Amici Curiae
Senator Ron Wyden,
Senator Mark Udall, and
Senator Martin Heinrich

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 5,836 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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September 9, 2014

PROSKAUER ROSE LLP

/s/ Charles S. Sims
Charles S. Sims
New York, New York 10036
Telephone: (212) 969-3950
Facsimile: (212) 969-2900
csims@proskauer.com

Attorneys for Amici Curiae
Senator Ron Wyden,
Senator Mark Udall, and
Senator Martin Heinrich

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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/s/ Charles S. Sims
Charles S. Sims