ORAL ARGUMENT NOT YET SCHEDULED

No. 13-5064

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, *et al.*,

Plaintiffs-Appellants,

v.

DEPARTMENT OF JUSTICE,

Defendant-Appellee.

On Appeal from the
United States District Court
for the District of Columbia
No. 1:08-cv-1157 (ABJ)

REPLY BRIEF FOR APPELLANTS

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November 12, 2013

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GLOSSARY

DOJ Brief..... Brief for Defendant-Appellee Department of Justice

Exemption 7(C) ..... 5 U.S.C. § 552(b)(7)(C)

FOIA..... Freedom of Information Act

JA..... Joint Appendix

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SUMMARY OF ARGUMENT

The parties agree that this Court's task is to determine whether the government has carried its burden of demonstrating that disclosure of the requested public docket numbers about six federal criminal prosecutions that ended in dismissals or acquittals "could reasonably be expected to constitute an unwarranted invasion of personal privacy" under 5 U.S.C. § 552(b)(7)(C) ("Exemption 7(C)").

Because the invasion of privacy that would be involved in disclosing that these six individuals have been publicly prosecuted is insignificant, it does not outweigh the clear public interest — already recognized by this Court — in learning about the government's use of this possibly-unconstitutional investigative technique. The government therefore has not carried its burden.

1. Any invasion of privacy here is insignificant, because a person cannot hide the fact that he or she was publicly indicted for a federal crime from anyone who wishes to learn it. New or prospective employers, landlords, neighbors, co-workers or social acquaintances need only search the Internet or the PACER Case Locator to find that fact. Thus, the only information that will actually be uncovered by disclosure of the requested docket numbers is the fact that warrantless cell phone tracking was used in the cases at issue. That is not a personal fact about an individual, and its disclosure would work no invasion of privacy.

2. This Court has already concluded, in this case, that the public interest in finding out about the government's use of warrantless cell phone tracking is significant. That is the law of the case, and the prosecutions now at issue present that public interest just as much as the prosecutions that were at issue in the earlier appeal. The government's novel "incremental interest" theory — that the production of some records responsive to a FOIA request relieves the government of the obligation to produce other responsive records — finds no support in the statute or the decisions of this Court, and would lead to arbitrary and inconsistent results in FOIA litigation.

3. For these reasons, the requested docket numbers should be disclosed. But if the Court concludes that they are not categorically

disclosable, the government should be required to produce facts relevant to the privacy/public interest balance that are available only to it, such as whether a particular case was highly publicized or involved a motion to suppress evidence obtained through warrantless cell phone tracking. The government's attempt to require Plaintiffs to produce such facts — which they obviously cannot do — should be rejected; it is the government that bears the burden of justifying any withholding under FOIA.

ARGUMENT

I. Individuals Who Have Been Publicly Indicted for Federal Crimes Do Not Have a Strong Privacy Interest in Keeping Secret the Fact That They Have Been Publicly Indicted for Federal Crimes.

On the privacy side of the balance, a person who has been publicly indicted for a federal crime does not have a strong privacy interest in keeping that fact secret, for the simple reason that that fact *cannot* be kept secret in the modern world.

For better or worse, the time is long gone when a person could saddle a horse and ride west, leaving his personal history behind. And the federal government has played a significant role bringing about that change. One must have a Social Security Number to work;[1] one must have a government-

[1] *See* U.S. Internal Revenue Service, *Hiring Employees* (September 2013), www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Hiring-Employees.

issued photo ID that meets federal standards of accuracy to travel by almost any means of transportation except hitchhiking.[2] A person's identity is fixed, and the fact of a person's federal indictment is available on the Internet to anyone who wishes to learn of it.

The government asserts that an acquitted defendant's "reintegration into the community" will be undermined "if these individuals are confronted with fresh questions about their stale criminal charges." Brief for Defendant-Appellee ("DOJ Brief") at 20-21. It is unlikely that any of the six defendants whose cases are involved here needs "reintegration into the community."[3] But even assuming that one does, any prospective employer, or landlord, or date, or any new neighbor or co-worker, need only Google the person's name to find the government's own press release announcing his indictment, or articles on the Internet archives of local news media reporting the charges or

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[2] *See* REAL ID Act, 49 U.S.C. § 30301 note.

[3] We pointed out in our opening brief that only "a small fraction of defendants are detained pretrial for such an extended time that they may need to reintegrate into the community." Brief for Appellants at 28 n.28. The government responds that "it is simply wrong to say categorically that defendants whose charges were dismissed were never incarcerated; some may have been held in prison as pretrial detainees." DOJ Brief at 25. But that is exactly what we said.

If any of the six defendants whose cases are relevant here were detained pretrial, the government knows and easily could have said so. Its silence suggests that none were, and therefore that none needs "reintegration into the community."

the trial. And even if there were no press releases or news reports, for a few pennies anyone can search the government's own PACER Case Locator, which is "a national index for U.S. district, bankruptcy, and appellate courts" that allows "*nationwide* searches to determine whether or not a party is involved in federal litigation." http://www.pacer.gov/pcl.html (emphasis added). Or a person can use any of the numerous commercial services that will perform a nationwide search for criminal records for a small fee. *See, e.g., Run a Criminal Records Check - Get Confidential Results Instantly*, https://www.intelius.com/criminal-records.html.

Thus, where it actually counts in a person's life, a public federal criminal indictment is no secret. The government's assertion that refusal to disclose the docket numbers of cases that involved warrantless cell phone tracking will somehow protect the defendants' ability to "reintegrat[e] into the community," DOJ Brief at 20, or shield them from public knowledge that they were indicted, is not credible. There can be no unwarranted invasion of personal privacy in the release of such docket numbers because there is no existing privacy to invade.

If Plaintiffs made a FOIA request for a list of the docket numbers and case captions of all public federal criminal prosecutions in the District of Columbia in 2012, the request surely would be granted — indeed, there

would be no need for a FOIA request, since a person could obtain that list simply by querying the D.D.C. PACER system for docket numbers 12-cr-0001 to 12-cr-9999. Thus, the only information that is *actually* being shielded from public knowledge by the government's refusal to disclose the requested docket numbers is the fact that warrantless cell phone tracking was used in these cases. But that is not a personal fact about the defendants; disclosure of that fact will not invade their personal privacy at all. And knowledge that warrantless cell phone tracking was used in a particular defendant's case certainly will have no effect on that person's "reintegration into the community."

The cases relied upon by the government only emphasize the weakness of its position. It cites four decisions of this Court, none of which are even relevant; in three of them the irrelevance is spotlighted by the government's own parenthetical descriptions, which are reprinted here following the citations: *King v. Dep't of Justice*, 830 F.2d 210, 233 (D.C. Cir. 1987) ("We have admonished repeatedly that disclosing the identity of *targets* of law-enforcement *investigations* can subject those identified to embarrassment and potentially more serious reputational harm"), DOJ Brief at 16 (emphasis added) (internal quotation marks omitted); *Bast v. Dep't of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981) ("the 7(C) exemption

recognizes the stigma potentially associated with law enforcement *investigations* and affords broader privacy rights to *suspects*"), DOJ Brief at 16 (emphasis added); *Fund for Constitutional Gov't v. Nat'l Archives & Records Service*, 656 F.2d 856, 866 (D.C. Cir. 1981) ("holding that release of information about individuals '*investigated but not charged* with a crime' 'represents a severe intrusion on the privacy interests of the individuals in question . . .'"), DOJ Brief at 16 (emphasis added). As the government's own summaries demonstrate, these cases all involved people who were investigated *but not charged*; none suggests that a person publicly indicted for a crime is in the same privacy boat as a person investigated but never charged.

The government's description of the fourth case it cites from this Court makes the decision appear to be relevant: *Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990) ("individuals have a strong interest . . . in not being associated unwarrantedly with *alleged* criminal activity."). DOJ Brief at 15-16 (internal quotation marks and citation omitted) (emphasis and ellipsis by the government). But the government's description is misleading because its ellipsis eliminated the key words. The full quotation refers to the "'strong interest' of individuals, whether they be *suspects, witnesses, or investigators*, 'in not being associated unwarrantedly with alleged criminal

activity.'" *Fitzgibbon*, 911 F.2d at 767 (emphasis added). Of course Plaintiffs' FOIA request has nothing to do with *suspects, witnesses, or investigators*. The relevant portion of the *Fitzgibbon* decision involved two individuals whose names appeared in certain FBI records; neither had been charged with a crime. *See id*. at 766-68. *Fitzgibbon,* therefore, is also inapposite here.

The government also cites a district court case from Illinois with a parenthetical description indicating that the case supports the government: *Brady-Lunny v. Massey*, 185 F. Supp. 2d 928, 932 (C.D. Ill. 2002) ("[P]roviding a list of inmates' names here would be an unreasonable invasion of privacy. Some of the inmates under federal control are merely . . . [pretrial] detainees who have not been . . . convicted of crimes. Releasing their names to the press or any other information seeker would stigmatize these individuals and cause what could be irreparable damage to their reputations."). DOJ brief at 16 (alterations by DOJ). But here again, DOJ's ellipses hide key words showing that the case does not support the government's position at all. The full quotation is: "[P]roviding a list of inmates' names here would be an unreasonable invasion of privacy. Some of the inmates under federal control are merely *witnesses and detainees who have not been charged with or convicted of crimes*. Releasing their names to

the press or any other information seeker would stigmatize these individuals and cause what could be irreparable damage to their reputations." *Brady-Lunny v. Massey*, 185 F. Supp. 2d at 932 (emphasis added). The district court expressed no concern for the privacy of publicly indicted defendants.[4]

Later in its brief, the government discusses three district court cases that it says permitted the government to withhold case names and case numbers. *See* DOJ Brief at 29-33. The district court reviewed these cases and found that "each of those decisions is distinguishable for one reason or another." *ACLU v. Dep't of Justice*, 698 F. Supp. 2d 163, 166 (D.D.C. 2010), JA 32. The best interpretation of these cases is that where a requester fails to demonstrate that there is a public interest in disclosure, even a minimal privacy interest justifies withholding. *Long v. Dep't of Justice*, 450 F. Supp. 2d 42, 69-70 (D.D.C. 2006) (privacy interest prevailed relative to overbroad rationales that failed to demonstrate how disclosure would advance the public interest); *Harrison v. Executive Office for U.S. Attorneys*, 377 F. Supp. 2d 141, 148 (D.D.C. 2005) ("Plaintiff has not identified a public benefit to disclosure"); *Leadership Conference on Civil Rights v.*

[4] The government reads the italicized words as indicating that some of the inmates had been convicted. *See* DOJ Brief at 33-34. We do not see how they can plausibly be read that way. "Witnesses and detainees" describes the universe of individuals referred to by the court, and they are by definition not convicts.

Gonzales, 404 F. Supp. 2d 246, 257 (D.D.C. 2005) (dealing not with case names and docket numbers, but with "local police arrest reports, bail bond information and affidavits by and concerning private individuals that were filed in court"). But as this Court already held in this case, there is a strong public interest in disclosure here. *ACLU v. Dep't of Justice*, 655 F.3d 1, 12-16 (D.C. Cir. 2011), JA 49-54; *see also* Part II, *infra*. The government is correct that "whether or not a public interest exists says nothing about the existence or strength of a privacy interest." DOJ Brief at 30. But whether or not a public interest exists says everything about whether releasing certain records could reasonably be expected to constitute an *unwarranted* invasion of personal privacy, and that was the question before the district courts in the three cases the government cites, and the basis for their decisions.

The government also argues that Plaintiffs' intention to review the docket sheets of these six cases and to contact the defendants' counsel to learn more about the role that cell phone tracking played in these cases is a reason to deny Plaintiffs' FOIA request, on the ground that "this kind of unsolicited contact is a classic example of the type of unwarranted invasion of privacy that Exemption 7(C) guards against." DOJ Brief at 21. But the government made the same argument in the earlier appeal and this Court

rejected it, for reasons that apply equally here. *ACLU v. Dep't of Justice*, 655 F.3d at 11-12, JA 48-49.

Finally, the government argues that because "individuals are presumed innocent until proven guilty beyond a reasonable doubt," records relating to acquitted criminal defendants should be treated the same, for FOIA purposes, as records relating to people who were never arrested or charged. DOJ Brief at 19. But while an acquitted defendant and a person who was never arrested or charged with a crime are obviously alike in that neither can be sent to prison, they are obviously different in that one has been the subject of a public prosecution and the other has not. It is the difference, not the similarity, that is relevant for purposes of this FOIA request. As Plaintiffs have shown above, the fact of federal criminal prosecution in the 21st Century world of the Internet and PACER is not just technically but *actually* public knowledge,[5] and the only non-public fact that will be uncovered by disclosing the requested docket numbers is the use of warrantless cellphone tracking. The presumption of innocence, central as it

[5] This absence of "practical obscurity" distinguishes this case from *Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 762 (1989), on which the government continues to rely, even though this Court explained at length in the earlier appeal why it was not controlling here. *See ACLU v. Dep't of Justice*, 655 F.3d at 8, JA 45. Additionally, the "rap sheets" requested in *Reporters Committee* would shed no light on governmental activities, whereas the information sought here would.

is to our system of criminal justice, provides no answer to the question whether disclosure of the use of warrantless cellphone tracking in a particular defendant's case could reasonably be expected to constitute an unwarranted invasion of his or her personal privacy.

> In the earlier appeal of this case, this Court concluded that
>
> > the disclosure at issue here . . . would compromise more than a de minimis privacy interest, [but] it would not compromise much more. Neither the specific list actually at issue, nor information that might be derived from the docket information on that list, will disclose personal information that is not already publicly available and readily accessible to anyone who might be interested in it. Nor will disclosure under FOIA make that information any more accessible than it already is through publicly available computerized databases. At most, it will simply provide one more place in which a computerized search will find the same person's name and conviction—and even that is only on the assumption that someone takes the docket information from the list, looks up the underlying cases, and then puts that underlying information on the internet.

ACLU v. Dep't of Justice, 655 F.3d at 12, JA 49 (footnote omitted). Except for replacing the word "conviction" with "indictment" — both of which are equally matters of public record — nothing about the disclosure at issue in this second appeal is any different. The privacy interest therefore remains the same — not much more than de minimis.[6]

[6] In the earlier appeal, this Court noted that "both parties agree that the disclosure of information regarding acquittals, dismissal of charges, or sealed cases raises greater privacy concerns than the disclosure of information regarding public convictions or public pleas," *ACLU v. Dep't of*

II. The Public Interest in Disclosure is at Least as Great Here as it was in the Prior Appeal.

This Court has already determined that there is "a significant public interest in disclosure" of the government's use of warrantless cell phone tracking, *ACLU v. Dep't of Justice*, 655 F.3d at 12, JA 49, because disclosure "would 'shed[] light on [the government's] performance of its statutory duties,'" and therefore "'falls squarely within [FOIA's] statutory purpose.'" *Id*. at 16, JA 54 (quoting *Reporters Committee*, 489 U.S. at 773) (alterations by this Court).

There is no basis on which to argue that the use of cell phone tracking in cases not resulting in conviction will shed any *less* light on the government's activities than its use of cell phone tracking in cases resulting in conviction, and the government does not make that argument. It follows that the same significant public interest that was present in the earlier appeal is present here. That is the law of the case. *See LaShawn A. v. Barry*, 87

Justice, 655 F.3d at 17, JA 54. "But," the Court recognized, "whether that is enough of a distinction to justify withholding under Exemption 7(C) is a harder question." *Id*., JA 55.

Information regarding sealed cases certainly raises greater privacy concerns, and Plaintiffs have not pursued release of that information. For the reasons explained in this section of the brief, however, the privacy interests of publicly indicted individuals who were not convicted raise privacy concerns that are only marginally greater than those of individuals who were convicted, and there is not enough of a distinction to justify different treatment for purposes of Exemption 7(C).

F.3d 1389, 1393 (D.C. Cir. 1996) (en banc) ("[T]he *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result.*") (emphases in original). That should be the end of the matter.

Additionally, as Plaintiffs explained in their opening brief, docket numbers of cases resulting in dismissal or acquittal are actually more likely to result in learning useful information about what the government is up to than cases resulting in conviction, because they are more likely to have involved suppression hearings in which the facts about the use of cell phone tracking were explored. *See* Brief for Appellants at 33-34.

In nevertheless arguing that the public interest in disclosure of the docket numbers now at issue is "negligible," DOJ Brief at 34, the government relies on a novel theory that even when the public interest in disclosure is substantial, the release of *some* responsive records should absolve an agency of the obligation to release others. That theory finds no basis in the Freedom of Information Act, in the decisions of this Court, or in logical reasoning.

A. The government's novel "incremental interest" theory has no basis in law.

The government argues that a FOIA requester "must show that the 'incremental value' gained from releasing . . . withheld [documents] is

substantial." DOJ Brief at 34-35 (quoting *Schrecker v. Dep't of Justice*, 349 F.3d 657 (D.C. Cir. 2003)). There is no such provision in the statute, and there is no such doctrine in the case law. The production of some records responsive to a FOIA request does not somehow make the production of other responsive records optional.

There have been approximately 200 FOIA cases decided by this Court since its November 18, 2003 decision in *Schrecker*.[7] The phrase "incremental value" has not been used in even *one* reported FOIA opinion of the Court in that decade.

The phrase has been used in one separate opinion; there, Judge Rogers understood it to mean exactly the opposite of what the government now tries to make it mean: even if the "absolute value" of the requested information is small, it must nevertheless be released if it adds *any* incremental value of public interest. *Consumers' Checkbook, Center for the Study of Services v. HHS*, 554 F.3d 1046, 1060 (D.C. Cir. 2009) (Rogers, J., concurring and dissenting) ("even though the requested data will only partially reveal physicians' experience levels, the data has 'incremental value' for ascertaining the quality of services performed . . . ."). The docket numbers

[7] A Westlaw search for decisions after November 18, 2003, containing the phrase "Freedom of Information Act" or the acronym "FOIA" in the CTADC database found 213 cases, although not every found case was a FOIA case. (Search performed November 9, 2013.)

at issue plainly meet the "incremental value" test, as understood by Judge Rogers.[8]

Plaintiffs' opening brief explained how the case cited by *Schrecker* as authority for its reference to incremental value, *King v. Dep't of Justice*, 830 F.2d 210, 234 (D.C. Cir. 1987), shows that the phrase did not mean what the government now tries to make it mean. *See* Brief for Appellants at 35 n.33. The fact that the government's "incremental value" test has not been mentioned in a single reported majority opinion of this Court in the decade since *Schrecker* — even though many of those approximately 200 cases must have involved efforts to obtain release of *additional* documents, as that is a very common scenario in FOIA litigation — demonstrates that this Court did not intend to create, and has not created, the test the government now seeks to rely on.

Plaintiffs' opening brief also noted that it was difficult to understand how the government's proposed "incremental value" test could be squared with the Freedom of Information Act, as it is "certainly not the law that an agency can disclose, say, 60% of the records responsive to a FOIA request

[8] The phrase has also been used once in an unreported opinion in which the requested records were ordered released despite the government's privacy objection. The Court's memorandum gave no indication that "incremental value" was a test that a FOIA request had to pass. *Lardner v. Dep't of Justice*, No. 09–5337, 398 F. App'x 609, 2010 WL 4366062 (D.C. Cir. 2010).

and then shift the burden to the requester to somehow demonstrate that the other 40% will add 'incremental value' to the response." Brief for Appellants at 35. Further, "[p]ermitting such a practice would seriously undercut the purposes of FOIA because it would, as a practical matter, give agencies discretion to withhold the more important or embarrassing responsive records, as plaintiffs would have no way to demonstrate that the withheld records contained 'incremental value.'" *Id*.

Tellingly, the government does not deny or disclaim that these would be the consequences of its proposed test, but embraces them, claiming that *Schrecker* "establishes precisely such a sliding scale." DOJ Brief at 39. However, this is contrary to the fundamental principle of FOIA, that "[a]t all times[,] courts must bear in mind that FOIA mandates a strong presumption in favor of disclosure," and that its nine "statutory exemptions, which are exclusive, are to be narrowly construed." *ACLU v. Dep't of Justice*, 655 F.3d at 5, JA 42 (internal quotations and citations omitted; second alteration by the Court). Nothing in the Freedom of Information Act suggests that its drafters intended the courts to create an extra-textual Exemption 10, permitting the denial of valid FOIA requests on the ground that they have been honored in part.[9]

[9] The government asserts that one district court has applied its purported "incremental value" test. *See* DOJ Brief at 39-40, citing *Citizens for*

B. The government's "incremental value" theory would lead to arbitrary and inconsistent results.

Adopting the government's "incremental value" theory would mean that the happenstance of which FOIA request reaches a court first, or is considered by a court first, often would determine whether it is granted. For example, if a requester sought the docket numbers of cases involving warrantless cell phone tracking in which the defendants had not been convicted (on the theory that those cases would most likely disclose factfindings on motions to suppress evidence), and that request was granted because the privacy interest was small and the public interest great, and then another requester sought the docket numbers of cases involving warrantless cell phone tracking in which the defendants had been convicted, the government's theory apparently would result in the second request being denied even though it is identical to the request that this Court granted in the

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Responsibility & Ethics in Washington v. Dep't of Justice, 822 F. Supp. 2d 12 (D.D.C. 2011). That is not correct. To the contrary, the district court in that case found that the plaintiff had been provided with *all* of the records that served the public interest:

> What has been redacted is simply the personal information identifying *who* made the requests, which is not a matter that has *any* bearing on CREW's stated public purpose. And how much money a private citizen—even a prisoner—was offered by a private media concern reveals *nothing* about "what their government is up to."

Id. at 22 (second and third emphases added).

earlier appeal of this case. Or, if the record in the earlier appeal of this case had included the fact that there were some cases involving acquittals or dismissals, so that this Court did not remand but ruled as to both categories, the government's theory might result in the docket numbers of whichever category was considered first being released, and the docket numbers of whichever category was considered second being held exempt. Such results bear no relation to the statutory criteria, and make no sense — except from the viewpoint of arbitrarily minimizing disclosure, contrary to FOIA's "basic policy that disclosure, not secrecy, is the dominant objective of the Act." *ACLU v. Dep't of Justice*, 655 F.3d at 5, JA 42 (internal quotation marks and citations omitted).

III. The Government's Attempt to Shift the Burden of Proof to Plaintiffs Should be Rejected.

Under FOIA, when the government declines to disclose a document "the burden is on the agency to sustain its action," and "the court shall determine the matter de novo," *i.e.*, without deference to the agency's determination. 5 U.S.C. § 552(a)(4)(B); *see also ACLU v. Dep't of Justice*, 655 F.3d at 5, JA 42.

Yet this Court recognized long ago that the statutory assignment of the burden of proof to the government would be virtually meaningless if the

government were allowed to remain the sole party in possession of relevant information: "This lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution. . . . The simple fact is that existing customary procedures foster inefficiency and create a situation in which the Government need only carry its burden of proof against a party that is effectively helpless …." *Vaughn v. Rosen*, 484 F.2d 820, 824, 826 (D.C. Cir. 1973). The Court concluded that "[i]t is vital that some process be formulated that will (1) assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information." *Id.* at 826.

The Court therefore invented what is now known as the *Vaughn* index, which (when conscientiously prepared) provides the court with a useful tool to evaluate the government's claims about the contents of a disputed record. *See id*. at 826-28.

But the contents of a disputed record are not necessarily the only relevant facts, as this case illustrates. Plaintiffs showed in their opening brief how other facts could be highly relevant to the question whether a particular defendant's privacy would be invaded in an unwarranted manner

by disclosing the fact of his indictment (assuming the Court has not already concluded that disclosure could not reasonably be expected to constitute an unwarranted invasion of personal privacy regardless of these facts). For example, if there had been a highly publicized trial, or a successful motion to suppress evidence created by warrantless cell phone tracking, those facts would carry weight in the balance between the public interest and the privacy interest. *See* Brief for Appellants at 39-44.

The government's response is reminiscent of its position in *Vaughn v. Rosen*, where it believed it was entitled to prevail in FOIA litigation simply by providing an affidavit that "set forth in conclusory terms the Director's opinion that the [records] were not subject to disclosure under the FOIA." 484 F.2d at 823. The government says requiring it to put facts in the record would be unprecedented, *see* DOJ Brief at 44, but of course a *Vaughn* index was unprecedented until *Vaughn*. And the government concedes that this Court has required it to disclose "whether the individuals who are the subject of the withheld records are alive or deceased." *Id*. That was also unprecedented until the Court first required it. The government does not attempt to explain why that should be the *only* relevant fact it can ever be required to disclose, particularly when other potentially important facts, such as the existence *vel non* of press releases or suppression motions, are equally

easy for the government to disclose, and equally impossible for Plaintiffs to know.[10]

Humorously, the government asserts that Plaintiffs should bear the burden of production of these facts, *see* DOJ Brief at 45, 47-48, although the government well knows that Plaintiffs are "effectively helpless" to do so, *Vaughn*, 484 F.2d at 826, and the statute plainly provides that the government bears the burden of proof in a *de novo* proceeding in the district court.

Finally, the government argues that the facts are irrelevant, because it is "*categorically* withholding information about all prosecutions that ended in acquittal or dismissal." DOJ Brief at 51 (emphasis in original). It is true that if the Court agrees with the government that the requested docket numbers are categorically exempt from disclosure — even the docket number of a case involving a highly-publicized trial and a motion to suppress warrantless cell phone tracking evidence — then these additional facts are not relevant. By the same token, they are not relevant if the Court agrees with Plaintiffs that the requested docket numbers are categorically subject to disclosure. But if the Court finds that a categorical rule does not

[10] It seems almost certain that the government has expended far more effort in arguing why it should not have to disclose these facts than it would have expended in disclosing them.

suffice to determine whether disclosure of docket numbers of individual cases could reasonably be expected to constitute an unwarranted invasion of the personal privacy of an individual, then facts pertinent to individual cases are relevant.

If the Court determines that consideration of facts is required, the government urges a remand. DOJ Brief at 45 n.8. But no remand is required, because the government had the opportunity (and was asked) to produce these facts in the district court and in this Court, and declined to do so. Having deliberately failed to carry its burden of proof, it is not entitled to a do-over. *See* Brief for Appellants at 44-45.

CONCLUSION

For the reasons stated above and in Appellants' opening brief, the judgment of the district court should be reversed and the case remanded with instructions to enter summary judgment for Plaintiffs and order disclosure of the docket numbers of the six cases at issue.

Respectfully submitted,

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November 12, 2013

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,285 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Arthur B. Spitzer
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November 12, 2013

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing REPLY BRIEF FOR APPELLANTS upon counsel for the Defendant-Appellee via this Court's electronic filing system, this 12th day of November, 2013.

Arthur B. Spitzer
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Counsel for Appellants