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1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK
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3 AMERICAN CIVIL LIBERTIES UNION,
3 et al.,
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4 Plaintiffs,
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5 v. 13 Cv. 3994 (WHP)
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6 JAMES R. CLAPPER, et al.,
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7 Defendants.
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9
9 November 22, 2013
10 10:30 a.m.
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11 Before:
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12 HON. WILLIAM H. PAULEY III
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13 District Judge
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14 APPEARANCES
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15 AMERICAN CIVIL LIBERTIES UNION FOUNDATION
15 BY: JAMEEL JAFFER
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16 PATRICK C. TOOMEY
17 BRETT M. KAUFMAN
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19 BY: STUART F. DELERY
19 Assistant Attorney General
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20 U.S. DEPARTMENT OF JUSTICE
21 BY: MARCIA BERMAN
21 JAMES J. GILLIGAN
22 BRYAN DEARINGER
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25

1 APPEARANCES (CONT'D)
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1 (Case called)
2 THE DEPUTY CLERK: Appearances for the plaintiff.
3 MR. JAFFER: Jameel Jaffer, Alex Abdo, Patrick Toomey,
4 and Brett Kaufman for the plaintiffs.
5 THE COURT: Good morning.
6 THE DEPUTY CLERK: Appearance for the defendants.
7 MR. JONES: David Jones from the U.S. Attorney's
8 Office for the Southern District of New York. This is John
9 Clopper, my colleague here in the Southern District, three
10 attorneys from the Justice Department in Washington, who will
11 not be arguing, Bryan Dearinger, Marcia Berman and Jim
12 Gilligan, and arguing for the government is Stuart Delery, who
13 is also from the Justice Department in Washington.
14 THE COURT: Good morning.
15 This is oral argument, both on the ACLU's motion for a
16 preliminary injunction and the government's motion to dismiss.
17 I propose to conduct the argument in the following manner. I
18 will hear first from the ACLU and then from the Department of
19 Justice on your principal arguments for approximately 30
20 minutes each, and then I will give each of you an opportunity
21 to respond to what you have heard from your adversary. And, of
22 course, I will allow some flexibility in that, but that's my
23 general intention.
24 So with that in mind, do you want to be heard, Mr.
25 Jaffer?

1 MR. JAFFER: Yes, please, your Honor.
2 Your Honor, I am going to address our statutory claims
3 and my colleague Alex Abdo is going to address our
4 constitutional claims. There are some issues that relate to
5 both sets of claims, and we are both prepared to address those.
6 As you know, this case involves a challenge to the
7 NSA's collection of data about virtually every telephone call
8 made or received on U.S. networks. This vast dragnet is said
9 to be authorized by Section 215 of the USA Patriot Act, but
10 nothing in the text or legislative history of that provision
11 remotely suggests that Congress intended to empower the
12 government to collect information on a daily basis,
13 indefinitely, about every American's phone calls.
14 The language of Section 215 is broad, but it's similar
15 or identical to the language used in other authorities, and
16 none of those authorities has been interpreted as the
17 government interprets Section 215 here.
18 Moreover, Section 215 is part of a larger statutory
19 scheme that reflects a sensitivity to the intrusive power of
20 technology and a respect for individual privacy. If there were
21 any doubt about the reach of the provisions of the doctrine of
22 constitutional avoidance counsels against interpreting it as
23 the government interpreted here, that is in a way that would
24 raise substantial constitutional questions.
25 So I would like to address three questions. The first

1 is the Court's jurisdiction to hear the case, the second is
2 whether the program exceeds statutory authority, and the third
3 is whether plaintiffs' claim is precluded either by 18 U.S.C.,
4 Section 2712 or by Section 215 itself. But, of course, if you
5 have questions on any other issue, I am happy to address those
6 too.
7 On the jurisdictional question, your Honor, we think
8 that this issue is pretty straightforward. The Court has
9 subject matter jurisdiction under the federal question statute
10 and the Administrative Procedure Act. To the extent the
11 question that the Court asked at the original status conference
12 in this case was a question about prudential considerations,
13 our view is that all prudential considerations weigh in favor
14 here of the exercise of the Court's jurisdiction. I am
15 thinking of three things in particular.
16 The first is that plaintiffs can't bring these claims
17 in any other court. The FISA court, as you know, is a court of
18 limited jurisdiction, a specialized court that deals only with
19 the government's applications for surveillance. There is a
20 statutory provision, 50 U.S.C. 1803, that sets out that
21 jurisdiction. This is not the kind of case that we can bring
22 in the FISA court and the government agrees with that.
23 The second is that the government has conceded that
24 this Court is the proper venue for these claims. In fact, in
25 In re EPIC, the government asked the Supreme Court to dismiss a

1 mandamus petition that had been filed directly in that court on
2 the grounds that petitioner in that case should have done
3 precisely what the ACLU has done here, file an action in an
4 ordinary district court. And I will just read you one sentence
5 from the government's brief in that case. The government
6 wrote, "The proper way for petitioner to challenge the
7 telephony records program is to file an action in federal
8 district court, as other parties have done."
9 Then, finally, your Honor, there is nothing unusual or
10 inappropriate about a district court evaluating the lawfulness
11 of a FISA court order. It happens routinely in criminal cases.
12 When defendants move to suppress evidence obtained under FISA,
13 the question that courts ask is, was the surveillance lawful?
14 And in effect the court is assessing the original FISA court
15 order.
16 So for all those reasons, we think that there is no
17 question that the Court has jurisdiction here, and to the
18 extent the prudential consideration should be factored in, all
19 of them weigh in favor of the exercise of the Court's
20 jurisdiction.
21 I will go on to the scope of the statute.
22 On the question of whether the program is authorized
23 by Section 215, I think I think would like to focus on three
24 things, unless your Honor feels that the focusing on one of
25 them is unnecessary.

1 The first is whether Section 215 can lawfully be used
2 to collect call records at all. The second is whether, even if
3 Section 215 can be used to collect call records, it can be used
4 to engage in collection on this scale. Then, finally, the
5 question whether Congress ratified the call tracking program
6 when it reauthorized Section 215 in 2010 and 2011.
7 As we explained in our briefs, your Honor, and I will
8 try not to repeat what we have said in our briefs, but just
9 highlight a few points, Section 215 can't lawfully be used to
10 obtain call records at all. That's because at the same time
11 that Congress enacted Section 215 in 2001, in fact, in the very
12 same bill, it added a separate provision to the Stored
13 Communications Act that specifically prohibits the disclosure
14 of call records. Now, there are exceptions to that rule, but
15 those exceptions don't include Section 215.
16 The government's argument, as I understand it, is that
17 Section 215 constitutes an implicit exception to that privacy
18 rule set out in 18-2702. That argument is unpersuasive for
19 several reasons.
20 First, it's a well accepted canon of statutory
21 interpretation that the inclusion of some things implies the
22 exclusion of others. In its list of exceptions to 2702,
23 Congress included some authorities, but it excluded others, and
24 the Court should give significance to that decision.
25 THE COURT: What about the language in Section 215

1 stating that, "Any production or nondisclosure order not
2 explicitly modified or set aside consistent with this
3 subsection shall remain in full effect"?
4 MR. JAFFER: Two things about that. First, we are not
5 asking this court to set aside the Section 215 order. This is
6 a challenge to executive conduct, not a request that the Court
7 review the 215 order. And that's a distinction I think that
8 the government makes quite well in its response in the In re
9 EPIC decision.
10 The second thing is the legislative history makes
11 clear that the purpose of that particular provision was to
12 ensure that if a provider brought a challenge to a Section 215
13 order, while the issues were going up through the FISA court of
14 review and then eventually possibly to the Supreme Court, the
15 Section 215 order would remain valid. That was the point of
16 that provision. It was not meant to be this grand preclusive
17 provision in the way that the government suggests it is. There
18 is no suggestion of that in the legislative history.
19 THE COURT: If this Court were to enjoin the metadata
20 collection, wouldn't that be an order not modified or set aside
21 consistent with Section 215?
22 MR. JAFFER: I don't think so. I think the order we
23 are asking you to issue is an order that goes only to executive
24 officials. It restricts what they can do. It would create a
25 an obvious tension with the Section 215 order, but the Section

1 215 order would not be set aside. It would remain valid and
2 that provision would not be implicated at all in our view, your
3 Honor. And again, I think that's consistent with the
4 legislative history.
5 But I think your question goes to preclusion, and I
6 would like to, if your Honor doesn't mind, just first set out
7 our view of the scope of the statute and why, assuming our
8 statutory claims aren't precluded, why we think that this
9 program violates Section 215.
10 As I already said, the privacy rule sets out
11 exceptions. 215 is on one of them. In our view, the Court
12 should give significance to the distinction that Congress drew.
13 But the other thing is that the government has itself
14 recognized that reading in implied exceptions to the privacy
15 rule set out in 2702 is inappropriate. And we go through some
16 examples on page 5 of our reply brief, which I won't recite
17 here, three different examples in which the government itself
18 concluded that reading in the kind of implied exception that
19 it's asking the Court to read in here would be inappropriate.
20 Then, finally, your Honor, a third prong of the
21 government's argument that Section 215 constitutes an implicit
22 exception to 2702 is that Section 215 lacks the
23 "notwithstanding any other provision" language that appears in
24 every other provision of FISA.
25 Now, the only authority that the government relies on

1 here for the proposition that Section 215 constitutes an
2 implicit exception is Judge Walton's opinion from December of
3 2008. I am not sure that this is entirely clear from the
4 briefs, but the program was launched several years before this,
5 and my understanding is at some point it came to the
6 government's attention that they had overlooked a statute when
7 they first briefed this to the court, and to their credit they
8 went to the court and said, it turns out that there is this
9 statute that on its face forecloses us from collecting call
10 records under Section 215. We believe there is a way to read
11 Section 215 to allow us to do what we are doing. And three
12 years after the program was first launched, Judge Walton was
13 asked to address this question.
14 Obviously, it was not an adversarial process. The
15 arguments we are making to this Court were not made to that
16 court, and certainly they weren't made by anyone who had an
17 incentive to make them forcefully and persuasively. And we
18 think Judge Walton's opinion is wrongly decided. We think that
19 he got this particular issue wrong. The sort of pivotal point
20 in Judge Walton's opinion is the theory that Congress would not
21 have wanted to foreclose the government from obtaining call
22 records through a Section 215 order, which requires court
23 review at the outset, when it authorized the government to
24 obtain call records under Section 2709, the national security
25 letter provision, which doesn't require court review at the

1 outset.
2 But there are actually many good reasons why Congress
3 might have wanted the government to use 2709 rather than
4 Section 215 to collect call records. I will just identify two
5 of them. We identify others in the brief. One of them is that
6 Section 2709 places limits on the kind of call records that the
7 government can obtain. And if you allow the government to use
8 Section 215 to obtain call records, then the government
9 essentially has an end run around the limits in 2709.
10 This is something that we don't say in our brief, but
11 2709 also restricts the kinds of investigations in which the
12 government can obtain call records. It says that the
13 government can obtain call records in counterterrorism
14 investigations and in clandestine intelligence investigations,
15 but not in foreign intelligence investigations. Foreign
16 intelligence investigations are a sufficient basis for Section
17 215 orders, but not for national security letters. So there
18 are all sorts of reasons why Congress would have wanted the
19 government to proceed under the NSL statute rather than under
20 215, and Judge Walton, respectfully, overlooked those reasons.
21 Now, ultimately, your Honor, I don't think it's
22 necessary to get into this inquiry about what Congress
23 intended. The statute is clear on its face, and I think that
24 that should end the analysis.
25 So that's our first argument on the scope of the

1 statute. The one other argument which I thought I should
2 highlight is just that even if the government can obtain call
3 records under this statute, nothing permits it to obtain call
4 records on the scale that it's obtaining them.
5 Your Honor, the statute, as you know, imposes two
6 limits on the scope of the government's authority here. One is
7 set out in 1861(b)(2)(A), which includes the language relating
8 to relevance, reasonable grounds to believe that the tangible
9 things are relevant. And the other is set out in (c)(2)(D),
10 which states that the government can't obtain anything that
11 can't be obtained by a grand jury subpoena or administrative
12 subpoena or another court order.
13 So those are two distinct limits. But before I sort
14 of dive into the weeds of those limits, I just want to note
15 that the big problem with the government's theory is that it is
16 absolutely without limit. And when I say that, I am thinking
17 of three things. First, if the government can engage in
18 collection on this scale under Section 215, there is no reason
19 why it couldn't do so under many other authorities. As I said
20 earlier, the same language that's used in Section 215, or
21 language very similar to it, is used in many other authorities.
22 So if the government can collect all call records under Section
23 215, why couldn't it collect all call records with a grand jury
24 subpoena or an administrative subpoena or a national security
25 letter?

1 THE COURT: What is the proper unit to be considered
2 in determining relevance? Is it a single customer's records?
3 MR. JAFFER: I am not sure it would make a difference
4 to the outcome in this case given how much information they are
5 obtaining about every single person. But ultimately here, the
6 court order that the government is relying on, or the argument
7 that the government made to the FISA court, is that all
8 American's call records are relevant. So I think that's the
9 relevant unit. That is what the government is seeking. The
10 question is, are all of those records relevant?
11 Now, I don't know if this is what you're getting at,
12 your Honor, but the language in (b)(2)(A) uses the phrase "are
13 relevant." I am not saying that every single record that the
14 government obtains under Section 215 either has to relate to a
15 suspected terrorist or it's not relevant. I am not making that
16 argument. But I do think that it's worth noting that the
17 language in (b)(2)(A) is, if anything, narrower than the
18 language that the courts have used in a grand jury or
19 administrative subpoena.
20 THE COURT: When the Congress added the word relevant
21 in 2006, did it intend to raise the necessary showing?
22 MR. JAFFER: I think it did, your Honor. The language
23 before 2006 obviously didn't include a relevance requirement.
24 To be frank, the legislative history is mixed on this point.
25 THE COURT: That's nothing new, right?

1 MR. JAFFER: No, it's nothing new.
2 So I am not sure how much we can take from the
3 legislative history on that particular point. But on the face
4 of it, I think that the language of the 2006 statute is more
5 restrictive than the language that existed before, and nobody
6 made the argument that the 2006 amendments were meant to widen
7 the aperture of the government's investigative authority under
8 this provision. I think it's worth asking, if the government
9 can get everything now under the 2006 language, what more could
10 it have got before that additional restriction was put in the
11 statute?
12 THE COURT: How does it affect the relevant standard
13 that the government only has to show "reasonable grounds" to
14 believe the items sought are relevant?
15 MR. JAFFER: That phrase is used in a lot of the grand
16 jury cases and the administrative subpoena cases. In fact,
17 it's used with respect to the whole category of information.
18 So what courts will say is: Are there reasonable grounds to
19 believe that this category of information will lead to relevant
20 information? So it's actually a much more sort of attenuated
21 standard. Certainly, a less stringent standard in the grand
22 jury context. So it may be that the phrase "reasonable
23 grounds" makes the standard less stringent than it would
24 otherwise be. But it's still at least as stringent as the
25 standard applied by courts in the grand jury and administrative

1 subpoena context, and arguably less permissive than that
2 standard.
3 Your Honor, there are two other points I would like to
4 just make very briefly about accepting the government's theory
5 here. One I already made, which is that if they can collect
6 these kinds of records under this authority, they can collect
7 them under other authorities as well. The second is if they
8 can collect call records under this authority, there is no
9 reason why they can't collect all kinds of other records as
10 well.
11 The government argues the call records are distinctive
12 because they are interrelated, but many other kinds of records
13 are interrelated. That's true of location information. It's
14 true of financial records. It's true of some kind of medical
15 records. We have submitted a declaration from Edward Felten, a
16 professor of computer science, who explains how and why those
17 kinds of records are also interrelated. So if you accept that
18 the government can get these kinds of records, you are
19 accepting that the government can get many others as well.
20 Then, finally, your Honor, if the government can
21 obtain these kinds of records in terrorism investigations,
22 there is no reason why it couldn't obtain these kinds of
23 records in other kinds of investigations as well. The
24 government says that terrorism and national security
25 investigations are different, they are far-reaching, they are

1 broad, but that's true of many other kinds of investigations as
2 well. It's true of some insider trading investigations. It's
3 true of some securities fraud investigations. It's certainly
4 true of some drug trafficking investigations. I think that if
5 you accept the government's theory here, you are creating a
6 dramatic expansion in the government's investigative power.
7 THE COURT: In your view, is it factually incorrect
8 that the government needs to collect all metadata in order to
9 sufficiently identify connections between terrorists, or is it
10 your position that even if that is true, that it's not enough
11 to make the bulk collection relevant?
12 MR. JAFFER: I am glad you have asked this question
13 because this is a point that to our argument I think is
14 crucial.
15 We are making both of those arguments. Even if all of
16 this was necessary, it wouldn't be relevant in the sense that
17 the statute requires it to be relevant. But I think maybe more
18 important, it's not necessary. And we have submitted, again,
19 the Felten declaration which explains why it's not necessary.
20 You don't need all call records in order to do what the
21 government says it wants to do. The government says it wants
22 to track the associations of suspected terrorists, and we can
23 certainly understand why the government would want to do that.
24 But you don't need to collect everything in order to do that,
25 and Professor Felten explains why that is true.

1 The other thing that is worth noting here, your Honor,
2 is that even the government doesn't seem to argue anymore that
3 it is necessary to have all call records in order to do what it
4 wants to do here. If you look at Judge Walton's opinion from
5 2009, which we cite on page 13 of our reply brief, that opinion
6 begins by saying, We authorize this program because the
7 government asserted in sworn affidavits that collecting all
8 call records was the only effective means to do what we want to
9 do here, which is, again, track the associations of suspected
10 terrorists. And if you look at Judge Egan's opinion that was
11 issued in August over the summer and released over the summer,
12 it says the same thing on page 19 of that opinion. It says
13 that we authorize this program because the government asserted
14 that this was the only way to track the associations of
15 suspected terrorists.
16 But if you look at the government's declarations in
17 this case, those phrases appear nowhere in the declarations.
18 It's actually quite a very conspicuous absence. Where you
19 would expect to find those phrases, instead you find phrases
20 like, this is one tool that we could use, or, it may not be
21 feasible. I am not saying that means that the government has
22 no interest anymore in collecting any of this stuff, but I am
23 saying that the interest that the FISA court relied on and said
24 was crucial to its ultimate decision to authorize the program,
25 the statements that the government made to the FISA court to

1 result in the authorization of the program it no longer makes.
2 There may be good reasons for that. Perhaps the
3 government has just changed its mind or it has recognized that
4 there are technological tools available to it that it didn't
5 recognize were available five or six years ago. But for
6 whatever the reason, the point is that the government is no
7 longer saying what the FISA court thought was necessary for the
8 government to say in order to justify the program.
9 Your Honor, unless you have further questions about
10 the scope of the statute, I will just return to preclusion
11 briefly. I want to make sure that I leave sufficient time for
12 my colleague to address the constitutional claims.
13 So the government has two different preclusion
14 arguments. The first is that 18 U.S.C. 2712, which provides a
15 damages remedy for certain claims, implicitly precludes
16 plaintiffs' claim here.
17 I think it's useful and important, your Honor, to
18 start by remembering what the background rule is here because
19 the government forgets it in its briefs. The background rule
20 here is the Administrative Procedure Act. The Administrative
21 Procedure Act creates a strong presumption that Congress
22 intends judicial review of administrative action. And that
23 presumption can be overcome only with clear and convincing
24 evidence.
25 The presumption is different for damages claims. If

1 we were making a damages claim, if we were asserting a damages
2 claim, it would be our burden to show that Congress intended to
3 create the right of action, but that's not true with injunctive
4 relief. It's the government's burden to show clear and
5 convincing evidence.
6 I point that out in part because one of the cases that
7 the government relies on in Jewel, a California case involving
8 the warrantless wiretapping program, the whole premise of the
9 court's reasoning in the section on injunctive relief is that
10 it's the plaintiff's burden to show that Congress intended
11 there to be a right of judicial review, which is wrong. It's
12 not the plaintiff's burden, it's the government's.
13 THE COURT: For this Court to find that 2712 does not
14 preclude the statutory claim, do I have to find that Jewel was
15 wrongly decided?
16 MR. JAFFER: You don't, your Honor, because Jewel
17 actually involved one of the subchapters listed in 2712. So
18 three of FISA's four subchapters are listed and Jewel involved
19 one of those subchapters. This case doesn't involve that.
20 That said, I do think Jewel was wrongly decided, and I
21 think if you look at the section of the injunctive relief part
22 of that opinion, you will see what I just said, that the court
23 cites the wrong burden. So certainly the premise of the
24 court's analysis was incorrect.
25 On Section 215 itself, your Honor, the government

1 argues that Congress precluded judicial review to people like
2 us by providing judicial review to the telecoms, to the
3 providers. A few things here, your Honor.
4 First, the legislative history shows that Congress
5 added the judicial review provisions for providers not in order
6 to preempt or preclude any other claim, but, rather, because
7 the question of what process should be afforded to providers
8 had been a subject of litigation under the National Security
9 Letter statute. So there is a separate set of cases in this
10 district before Judge Marrero involving a National Security
11 Letter provision. Those cases involved a challenge by a
12 provider, and the question that was presented in those cases
13 was, what rights did the provider have to challenge the
14 national security letter that's been served on it? And in
15 response to those decisions, Congress made these additions to
16 not just the national security statute, but to 215 as well,
17 explaining precisely what process the providers should have.
18 So that was congressional intent here. And if you
19 read the government's briefs, the most that the government can
20 say on the other side is just that Congress never contemplated
21 that the targets of these orders would ever come into court,
22 because Congress never contemplated that they would learn of
23 this kind of surveillance. I don't know whether that's true or
24 not, but even taking it as true, that doesn't meet the
25 government's burden. It's not enough for the government to say

1 Congress never considered. The government has to establish
2 that Congress not just considered, but considered the claim of
3 particularity. That's the language from the Pottawatomi case,
4 Justice Kagan's opinion. It's the language from Block in the
5 D.C. Circuit.
6 The last thing I want to say relates to Block itself,
7 to the D.C. Circuit case that the government relies on heavily
8 in this part of its argument. In that case, the D.C. Circuit
9 rejected a milk consumer's argument that the Agricultural
10 Marketing Agreement Act gave them an implied right of action to
11 challenge orders setting milk prices.
12 There are three things that were crucial to the
13 court's decision in that case. The first was that extending a
14 cause of action to consumers would have undermined the
15 statutory scheme by allowing an end run around administrative
16 review requirements; the second is that the statutory scheme
17 was enacted to protect the producers, not the consumers who are
18 asking the court to recognize an action; and the third is that
19 Congress had extended a cause of action to another group,
20 handlers, milk handlers, whose interests were aligned with
21 those of the consumers. No analogous thing can be said about
22 this particular context.
23 First, extending a cause of action to the plaintiffs
24 wouldn't allow us to do an end run around administrative
25 requirements, administrative remedies. There is nothing to do

1 an end run around.
2 Second, the statutory scheme here, FISA, was intended,
3 at least in part, to protect the privacy of people like our
4 clients, people like the ACLU, organizations like the NYCLU,
5 and all other Americans. That was the point of FISA, to put
6 limits on the government's surveillance authority.
7 Finally, the interest of plaintiffs in the telecom
8 companies, the other group that Congress has allowed to sue
9 here, are not aligned. That's true because most telecoms have
10 little interest in protecting the privacy of their subscribers.
11 Challenging Section 215 is time-consuming and costly. Section
12 215 orders come from the same government that regulates them.
13 They are shielded from liability under 1861(e). And even if a
14 provider had an incentive to challenge orders, there are
15 practical reasons why they wouldn't do so. Marc Zwillinger,
16 the Yahoo attorney, sets out those reasons in testimony that we
17 cite on page 25 to our opposition to the government's motion to
18 dismiss.
19 Finally, as your Honor knows, no provider has yet
20 challenged a Section 215 order. So the idea that providers are
21 standing in the shoes of the ACLU and NYCLU is far-fetched.
22 Unless you have further questions about the statute, I
23 will turn it over to my colleague.
24 THE COURT: I don't at this point in time. You can
25 turn it over, and I want to let the government know that they

1 will get equal time. You have already used 30 minutes, but
2 it's fine.
3 MR. JAFFER: I apologize.
4 MR. ABDO: Good morning, your Honor. Thank you for
5 the Court's indulgence.
6 The argument so far has focused on the extraordinary
7 breadth of the government's interpretation of the term
8 relevant. But beyond the statutory problems with the
9 government's theory are extraordinary constitutional ones.
10 Never before has the government attempted a program of dragnet
11 surveillance on Americans on this scale and the constitutional
12 questions that the program raises are therefore novel and
13 profound. They go to the very nature of the relationship
14 between the citizens of this country and their government, and
15 they provide an independent basis to invalidate the
16 government's collection of plaintiffs' call records.
17 Moreover, to the extent there is any doubt about
18 whether Section 215 authorizes the form of dragnet surveillance
19 in which the government is now engaging, the substantial and
20 serious constitutional questions that that dragnet surveillance
21 raises counsel in favor of plaintiffs' narrower interpretation.
22 I will begin with the Fourth Amendment, your Honor.
23 There are two questions I think that are relevant to our Fourth
24 Amendment claim. The first is whether the government's
25 collection or long-term collection of call records constitutes

1 a search for Fourth Amendment purposes and the second is
2 whether that search is reasonable.
3 Long-term collection of call records constitutes a
4 search because it places in the government's hands an
5 extraordinary amount of information about Americans, including
6 the vast majority of whom are innocent Americans. It reveals
7 who you call and when, whether you call your doctor, the
8 domestic violence hotline, an abortion provider, an
9 ex-girlfriend, a suicide hotline, or a pastor. And it reveals
10 not just one of those details about every American, but every
11 one of those details. As Professor Felten summarizes in his
12 declaration, telephony metadata, particularly when collected in
13 the aggregate, can be a proxy for content.
14 THE COURT: Accepting the assertions of Professor
15 Felten that aggregated call data can reveal much more intimate
16 details of a person's life in just a person's call records
17 alone, would the search for Fourth Amendment purposes happen
18 when the government merely obtains the call records or when it
19 queries them?
20 MR. ABDO: I think it would happen at the moment of
21 the collection, your Honor. I think it's worth noting that the
22 premise of essentially all Fourth Amendment case law has been
23 that an individual's expectation of privacy is upset by
24 government action when the government obtains information in
25 which that individual has an expectation of privacy. This is

1 in part because the Fourth Amendment creates a private sphere
2 that the government cannot penetrate without sufficient cause.
3 And it's in part because the Fourth Amendment reflects an
4 historic uneasiness with entrusting to the government vast
5 quantities of information about Americans without
6 individualized determinations of cause.
7 The implications of the government's argument to the
8 contrary I think are really without limits. It would allow the
9 government to wiretap and record every phone call in the
10 country, store those calls in a database for future searching
11 if and when a need arose. It would allow the government to
12 photocopy every piece of mail sent in this country and store
13 those photocopies in a database subject to future searching.
14 It would allow the government to demand the membership lists of
15 every organization, including the ACLU, including the New York
16 Civil Liberties Union, and including every American to store
17 for future searching.
18 So I think it's important to understand the
19 implications of the government's argument that collection
20 itself doesn't implicate the Fourth Amendment. I don't think
21 there are any cases that stand for that proposition. Moreover,
22 if there were, in fact, such a gaping exception to the Fourth
23 Amendment, you would have expected the government to have run
24 through that exception many years ago and not just in recent
25 time.

1 One way, I suppose, of thinking about the question as
2 well is to ask whether ordinary Americans expect that strangers
3 would acquire this information and be assured by the promises
4 of those strangers that they wouldn't look at them. That's a
5 motive analysis the Supreme Court has often used. And I think
6 most Americans would be shocked if they learned that strangers
7 were acquiring this information, and they would not be at all
8 consoled by the assurances of those strangers that they weren't
9 looking at them. That's the expectation I think of most
10 Americans. And that's an expectation that the Congress
11 recognized when it enacted, for example, the Wiretap Act which
12 criminalizes unlawful surveillance. That act doesn't just
13 criminalize the government's unlawful use of information that
14 it has acquired through a wiretap, it criminalizes the
15 government's unlawful acquisition in the first instance.
16 Now, of course, future use of information can
17 aggregate an initial search, but the search for constitutional
18 purposes happens at the outset.
19 I would like to address one of the government's other
20 arguments when it comes to the question of whether collection
21 is a search. Because the government doesn't dispute Professor
22 Felten's claims regarding how revelatory aggregated call
23 records can be in the government' possession. They really
24 quibble with the legal underpinnings of our claim. And, of
25 course, their other primary claim is that the Supreme Court's

1 decision in Smith v. Maryland decides this case or controls
2 this case, and that simply is not true.
3 Smith was a dramatically different case. It involved
4 a targeted use of a pen register against an individual
5 suspected criminal over the course of a matter of days, and it
6 did not involve a dragnet collection or bulk collection of call
7 records. It would have been, I think, a vastly different case
8 and people would have understood its significance differently
9 had the government, in targeting Michael Smith in that case,
10 assembled a database of all American's call records and merely
11 queried that database in pursuing Mr. Smith. I think everyone
12 would have understood the constitutional questions presented in
13 that case to have been different, and we certainly would have
14 hoped that the outcome would come out differently had the
15 Supreme Court understood the case to stand for that
16 proposition.
17 THE COURT: If Smith doesn't control, what rule is
18 this Court to apply?
19 MR. ABDO: I think the question the Court should
20 attempt to answer is the one that the Supreme Court set out in
21 Katz, which is whether plaintiffs have an expectation or a
22 reasonable expectation of privacy in the sum of their call
23 records in all of their associations? That's a question that
24 the Supreme Court itself recognized in United States v. Jones,
25 all nine justices recognized, presents a different question

1 when it comes to bulk collection. Four of the justices writing
2 for the court would not have resolved that question because
3 they thought they could resolve the case on a narrower ground
4 of trespass theory. But five of the justices in Jones would
5 have resolved that question against the government, recognizing
6 that bulk collection implicates an expectation of privacy in a
7 significantly different way.
8 THE COURT: Can this Court rely on concurring opinions
9 in Jones to conclude that Smith doesn't control here?
10 MR. ABDO: I don't think the Court needs to or has to.
11 We are not contending that Jones controls this case. We are
12 simply contending that its analysis is relevant to the
13 expectation of a privacy analysis. I think the antecedent
14 question is whether Smith controls this case? And we don't
15 think that's true for the reasons I have said.
16 THE COURT: How do the factual differences from Smith
17 add up to a constitutional difference here?
18 MR. ABDO: I think that's right. The Supreme Court
19 recognized that basic proposition in United States v. Knotts,
20 which was a case in which the government used a beeper to track
21 the public movements of a car that was suspected of being
22 involved in drug trafficking. And the petitioner in that case
23 didn't so much quibble with the general proposition that
24 individuals generally have little expectation of privacy as
25 they travel in public, but the focus of his argument in the

1 case was that accepting that rule in an individual case might
2 allow pervasive surveillance of Americans all the time. And
3 the Supreme Court was very careful to carve out that question
4 and it said, bulk collection for pervasive surveillance raises
5 a different question, and we will have time enough to address
6 that question if and when it arises.
7 It first arose, I think, in a way that could serve as
8 a model for this Court in the D.C. Circuit's decision in United
9 States v. Maynard, which is the appellate decision that came
10 before U.S. v. Jones. And the government argued very
11 forcifully in that case that Knotts controlled the outcome,
12 that using a GPS device to track an individual over the
13 long-term is no different than the beeper in Knotts, and that
14 therefore Knotts controlled the case. And the D.C. Circuit
15 rejected that argument. It said Knotts does not control this
16 case, in the same way we argue Smith does not control this
17 case, and they explained at length why they thought the
18 question was a different one and why the expectation of privacy
19 question comes out differently.
20 So I don't think the Court needs to rely on Jones as
21 binding, but of course I think it's persuasive precedent when
22 it comes to the question of what Americans' expectation of
23 privacy is in bulk collection of information.
24 THE COURT: You want to turn to your First Amendment?
25 MR. ABDO: I will be brief on the First Amendment. I

1 just want to emphasize three points.
2 THE COURT: Actually before we leave Smith, at what
3 point is phone data collection no longer controlled by Smith?
4 MR. ABDO: I think that's a very difficult question
5 and one that this Court doesn't have to address. I will try to
6 address it in a moment, but I don't think the Court has to
7 address it, in part for the same reason that the D.C. Circuit
8 didn't feel the need to address it in Maynard and for the same
9 reason that the five concurring justices in Jones didn't think
10 it necessary to address. That no matter where the line is,
11 surely it is unreasonable the government's indefinite and
12 pervasive collection of Americans' call records.
13 In terms of taking your question on the merits and not
14 trying to dodge it, it's a difficult question. It would
15 require the Court to answer at what point Americans'
16 expectation of privacy is upset. I think for guidance, the
17 Court can look, for example, to some of the pen register
18 authorities that the government has relied upon, some of which
19 allow collection for 60 or 90 days, but those authorities are
20 also only available to the government when it makes an
21 individualized application to a court and obtains court
22 approval. So it might mean that there would be a gradient of
23 rules that would apply. For one or two days you wouldn't need
24 to go to a court, for 60 or 90 you would need to go to a court,
25 and for pervasive surveillance you would need to satisfy the

1 strict requirements of the Fourth Amendment, warrants and
2 probable cause requirements. But again, I don't think this
3 Court needs to answer those questions. Surely, unreasonable is
4 pervasive surveillance.
5 To turn back to the First Amendment question, just to
6 highlight a few points. The protection of the First Amendment
7 is distinct from the protection of the Fourth Amendment, even
8 when it comes to government's investigatory tools. And I think
9 that's perhaps nowhere clearer than in the Second Circuit's
10 decision in Tabaa, where it separately analyzed the Fourth
11 Amendment question and the First Amendment question and made
12 clear that the First Amendment imposed a different burden.
13 We are not suggesting that every Fourth Amendment
14 search predicated on a warrant based upon probable cause needs
15 to survive the strictest of court review, because as a general
16 matter, most tailored Fourth Amendment searches will survive
17 First Amendment scrutiny as well. But it is particularly
18 important to apply the First Amendment when the government's
19 surveillance reaches as broad as it does in this case, and
20 indeed, when the government says that the Fourth Amendment
21 provides no independent protection whatsoever.
22 Because the First Amendment applies and is independent
23 of the Fourth Amendment, the Court really has two questions to
24 answer. First is whether the government's collection of call
25 records imposes a substantial burden on First Amendment rights.

1 And it clearly does. The government has collected essentially
2 all of Americans' associational records. The case outstrips
3 even the Supreme Court's decisions in NAACP v. Alabama or
4 Shelton v. Tucker in which states have sought to acquire
5 invasive --
6 THE COURT: Isn't this case different from the Alabama
7 case, in that you can't know if the government will ever
8 actually look at and analyze the ACLU's call records?
9 MR. ABDO: I don't think that distinction is a
10 meaningful one. Those cases stand for the proposition that
11 when the government collects associational information of that
12 scale and of that intrusiveness, the First Amendment is
13 violative because associational information has been handed
14 over to the government. But they also recognize that there is
15 a common sense way, in which allowing the government to acquire
16 that sort of associational information infringes individuals'
17 ability to associate with others; it chills context.
18 If you look, for example, at the Second Circuit's
19 decision in Local 1814, in which an interstate commission
20 sought to acquire payroll records for longshoremen in New York
21 and New Jersey, the court was aware that there were differences
22 between that case and NAACP v. Alabama. The commission wasn't
23 going after the longshoremen. It was in fact going after the
24 union itself. But the court recognized that the longshoremen
25 would have been chilled in a very obvious and common sense way.

1 It didn't demand the kind of history that Alabama had to it.
2 THE COURT: Is there a substantial burden with no
3 evidence of actual chill?
4 MR. ABDO: Yes. I think Local 1814 stands for that
5 proposition. Chill is an inherently difficult fact to prove.
6 It generally requires proving a negative that someone didn't
7 contact us who may have contacted us. Of course, at the moment
8 they choose not to contact us, the evidentiary trail runs dry.
9 So for that reason, the Second Circuit has taken this common
10 sense approach.
11 It described Shelton v. Tucker, which is another
12 associational case, as standing for the general proposition
13 that when there is a common sense chill that would be worked
14 upon the organization complaining, courts shouldn't turn a
15 blind eye to that common sense.
16 I guess another way of thinking about it is this. If
17 the NSA had knocked on the doors of every American in this
18 country and demanded that they turn over a list of every call
19 they had made that day and for the previous five years, there
20 would be no question but that the First Amendment would be
21 implicated, no matter what the government's intended use for
22 that information, and no matter what limitations the government
23 had put in place for itself on the use of that information.
24 That case is, for all practical purposes, no different than
25 this one.

1 If there are no other questions, I will sit down.
2 Thank you.
3 THE COURT: Thank you, Mr. Abdo.
4 Mr. Delery.
5 MR. DELERY: May it please the Court. Over the past
6 several months there has been significant public discussion
7 about a number of alleged surveillance activities. This case
8 concerns one specific program that the government has
9 officially acknowledged, the NSA's collection of bulk telephony
10 metadata pursuant to orders of the Foreign Intelligence
11 Surveillance Court, and under a provision of FISA that Congress
12 has twice extended, without change, after having been briefed
13 on this program.
14 The details of the program are important and haven't
15 much been discussed this morning, and I would like to start by
16 just highlighting a couple of those elements.
17 The records collected are business records of
18 telecommunications carriers that are prepared for other
19 business purposes, and may include information such as the
20 numbers placing and receiving calls, routing information, and
21 the time and duration of calls. But under this program, the
22 government does not collect the content of any conversation,
23 listen to any calls, or even collect the identifying
24 information about customers or parties to the calls.
25 In addition, the data may only be searched for

1 counterterrorism purposes, and only then, and then only, if
2 there is reasonable articulable suspicion to believe that the
3 selection term or the number to be queried is associated with
4 specified foreign terrorist organizations. And as the briefs
5 lay out, the FISC has established other controls on the program
6 as well.
7 The public debate has focused on the wisdom of this
8 program, given its scope, and Congress is currently considering
9 various proposals to alter it. That's a discussion the
10 Executive Branch has said it is important to have. But the
11 merits question in this case is whether the program is lawful,
12 and the answer is yes. It's authorized by statute and it's
13 constitutional.
14 The Court, however, need not reach those questions
15 because the complaint doesn't properly establish plaintiffs'
16 standing and the Court lacks jurisdiction over the statutory
17 claim. And so for all of those reasons, the threshold
18 questions and the merits, the government urges the Court to
19 grant the motion to dismiss, and obviously to deny the
20 preliminary injunction which seeks to limit a national security
21 program that has been repeatedly approved by all three branches
22 of government.
23 So I would like to start, if I might, with the
24 question of standing. Plaintiffs' claims of harm in the
25 complaint are speculative, not the kinds of concrete,

1 particularized, or certainly impending injury that the Supreme
2 Court has required. There are really two types of injury that
3 the complaint alleges, and obviously on preliminary injunction
4 these have to be proved and not just alleged.
5 The first is that the government has reviewed or might
6 review plaintiffs' telephony metadata, call detail records, to
7 identify people who associate with the plaintiffs. But under
8 the FISC's orders, the NSA may only review records responsive
9 to queries using identifiers that are believed, numbers
10 believed, based on reasonable articulable suspicion, to be
11 associated with a foreign terrorist organization. There is no
12 allegation, much less proof, that the government has reviewed
13 plaintiffs' metadata under this so-called RAS standard or
14 otherwise, much less created the kind of comprehensive profile
15 that plaintiffs reference.
16 The government has argued this expressly in their
17 briefs and there has been no response on either motion. And
18 the Supreme Court's decision in Amnesty International v.
19 Clapper teaches that the kind of speculative harm then that the
20 plaintiffs are claiming here would not be sufficient to allow
21 the Court to pass on that claim.
22 THE COURT: Isn't there a difference between this case
23 and the Amnesty case, in that there is no dispute here that the
24 ACLU's call records have been collected by the government?
25 MR. DELERY: That is true, your Honor, at least as to

1 the 90 day period covered by the secondary order that has been
2 publicly acknowledged and reclassified. That order, coupled
3 with the plaintiffs' declarations, leads the government not to
4 challenge the question of collection as to that time period.
5 But while we are not saying that collection alone
6 could never lead to a concrete, actionable injury that might
7 provide standing, the plaintiffs' complaint and supporting
8 papers have not established such an injury here. The injuries
9 that they identify, the creation of a comprehensive profile, or
10 the second one, that persons who might be interested in talking
11 to the plaintiffs might be chilled from doing so, are
12 speculative. There is nothing to support that either of those
13 things has happened. Indeed, the declarations don't identify
14 anyone who has refrained from contacting the plaintiffs because
15 of the kinds of concerns that are identified here.
16 So cases like Clapper and the Laird case from the
17 Supreme Court suggest that therefore, at least on this record,
18 the plaintiffs have failed to establish standing.
19 THE COURT: In the context of the Fourth Amendment, if
20 the plaintiff can plausibly allege that its own Fourth
21 Amendment rights have been violated, isn't that an injury in
22 fact?
23 MR. DELERY: Your Honor, if you read the complaint to
24 have alleged that much, I think we would agree that the
25 plaintiffs have standing at least to argue that they have a

1 Fourth Amendment interest that has been put in issue here.
2 However, there the inquiry quickly collapses into the merits,
3 and we will come back to that later. The government's
4 position, obviously, is that there is no Fourth Amendment
5 privacy interest that is implicated by collection of the
6 third-party business records that are at issue here as you were
7 just discussing. But, in any event, the Fourth Amendment is
8 not infringed unless and until the government or some person
9 actually looks at the data, and that's the teaching of the
10 Horton case and the VanLeeuwen case and others that we have
11 cited in the brief.
12 I would submit, your Honor, this also quickly then
13 collapses into the question of irreparable harm for the
14 purposes of the preliminary injunction. So even if you are
15 satisfied that there is a modicum of injury to clear the
16 Article III standing hurdle, we think that the level of injury
17 is clearly insufficient to support a preliminary injunction.
18 THE COURT: Is it possible that the ACLU has standing
19 to bring some of its claims but not others?
20 MR. DELERY: Yes, your Honor. I think that goes to
21 the second of the jurisdictional arguments that we have raised.
22 The statutory claim here is impliedly precluded by FISA's
23 detailed scheme for judicial review, which sets out who may
24 challenge 215 orders and where those challenges have to be
25 brought. And the answer is the organizations that are the

1 recipients of the production orders and in the FISC, the FISA
2 court established by Congress to hear these and other foreign
3 intelligence matters.
4 The APA's waiver of sovereign immunity does not apply
5 when Congress specifies a particular forum for limited parties
6 for judicial review. And that's what the Supreme Court said in
7 the Block v. Community Nutrition Institute case. The APA
8 itself in Section 702 recognizes this issue of implied
9 preclusion. And here there are several elements of the statute
10 that establish that the FISA court process is the exclusive
11 mechanism for hearing challenges to applications under the
12 statute.
13 The first is 215 itself, which together with Section
14 1803, which establishes the FISA court, the statute provides
15 that recipients may challenge the production order with the
16 FISC's so-called review pool. That's in subsection (f). Then
17 either the recipient or the government can appeal to a court of
18 review and then ultimately seek certiorari in the Supreme Court
19 if necessary. But 215 does not allow challenges by third
20 parties who, as plaintiffs have acknowledged, should not know
21 about the existence of the orders. And this was a deliberate
22 choice by Congress reflected in the legislative history to
23 create a secret given the national security interests at stake
24 and expeditious process. And the legislative history
25 references are cited at page 6 of our motion to dismiss brief.

1 There are several other relevant parts of the statute
2 as well. The first is that unlike some other provisions of
3 FISA, the statute does not provide for a suppression remedy or
4 an opportunity to challenge adequacy under the statute. And
5 the other FISA examples are in footnote 7 of our motion to
6 dismiss brief. 215 is not one of them. As your Honor pointed
7 out earlier, 1861(f)(2)(D) provides that an order issued
8 pursuant to this provision shall remain in full effect unless
9 it has been explicitly modified or set aside under the
10 procedure that's specified in the statute, which is quite a
11 strong statement by Congress, that a validly issued
12 procedurally regular order of the FISA court shall remain
13 valid, unless the appeal process, which could go up to the
14 Supreme Court, that is specified is followed.
15 The other statute was also discussed earlier, your
16 Honor, and that's 18 U.S.C. 2712, which provides for damages
17 actions for violations of three specific provisions of FISA,
18 again, not including Section 215, and does not provide for
19 injunctive relief.
20 THE COURT: 2712 has another phrase in it that the
21 government didn't focus on. It says "for any claims within the
22 purview of this section" before it lists the three FISA
23 provisions. Wouldn't violations of other sections of FISA be
24 outside the purview of Section 2712 given that qualifying
25 language.

1 MR. DELERY: I think what 2712 establishes, your
2 Honor, again, together with the other provisions of FISA that
3 create suppression remedies for particular types of orders, is
4 that where Congress intended to allow third parties outside of
5 the recipients of a particular order to challenge the order in
6 one way or the another, it knew how to do it, and it did do it
7 in certain specific instances, but not with respect to Section
8 215.
9 THE COURT: What about the government's argument in
10 EPIC that a district court challenge is not a challenge to a
11 FISA order, but rather it's a challenge to executive action?
12 MR. DELERY: I think, your Honor, if you look at the
13 EPIC brief in totality, in addition to pointing out that as
14 opposed to bringing a case as an initial matter in the Supreme
15 Court it should be brought in district court in the first
16 instance, the brief made clear that we would be making the
17 preclusion argument that we are making here in district court
18 as well. It laid out that that was a reason to follow the
19 regular order because the same preclusion argument would apply
20 to an original action in the Supreme Court, and the brief
21 detailed why original or appellate jurisdiction in that context
22 didn't lie in the Supreme Court.
23 The last thing thing I would highlight on this
24 question, your Honor, is Congress actually considered and
25 rejected a proposal for district court challenges to 215 orders

1 in 2006. That's the references on page 18 of our motion to
2 dismiss brief. Which is further confirmation that this was not
3 a question that Congress didn't think about at the time.
4 Section 215 and the related provisions of FISA reflect a
5 deliberate choice about where and by whom challenges to orders
6 under this provision could be brought. And under the Supreme
7 Court's decision in Block and others, that means that claims
8 like the ones that the plaintiffs have brought here is
9 precluded.
10 THE COURT: Did it mean to preclude suits altogether
11 or just presume that there wouldn't be any because everything
12 was confidential?
13 MR. DELERY: I think that if you look at the
14 legislative history, there was consideration to providing for
15 other types of challenges. Certainly, one of the reasons why
16 third parties should not be invited into this process was the
17 fact that given the national security interests at stake, it
18 was contemplated that the procedures would be in secret, and,
19 in fact, the statute requires that the filings and proceedings
20 be conducted pursuant to appropriate security arrangements.
21 But I think that the statutory language and the absence of a
22 215 remedy, as was provided with respect to other types of FISA
23 orders, suggests a stronger intent than just an assumption that
24 they would remain secret.
25 In fact, under the plaintiffs' theory, there wouldn't

1 be any reason why other requirements other than relevance
2 couldn't be challenged in district court, including the
3 adequacy of particular minimization procedures or compliance
4 with Executive Order 12333, also elements of the overall
5 scheme. The government would submit that that kind of
6 intrusion into the workings of this type of national security
7 program is inconsistent with the framework and the statute that
8 Congress established.
9 I think if I could then turn to the statute itself,
10 your Honor, and the scope of Section 215.
11 The collection of bulk telephony metadata is relevant
12 within the meaning of Section 1861(b)(2)(A) because the key
13 investigative purpose of terrorism investigations is to find
14 connections between known and unknown terrorists, and unless
15 the NSA aggregates records created by different companies and
16 over time, the analytical tools that are available to NSA to
17 identify chains of communications and those connections would
18 not operate as effectively. And I would like to highlight
19 three main reasons why that conclusion is correct. The text
20 and structure of the statute, the nature of counterterrorism
21 investigations, and third, the ratification by Congress.
22 So, first, on the text and structure instructor of the
23 statute. Congress clearly intended a broad scope for 215. It
24 used the term "relevant," that under its ordinary definitions,
25 even plaintiffs recognize, has a broad meaning, appropriate to

1 or bearing on the matter at hand. And not only has Congress
2 presumed to adopt ordinary background assumptions about
3 statutory terms that the legislative history suggests that it
4 did so here, and was intending to invoke broad investigatory
5 authority, the addition of the relevant requirement in 2006,
6 and I think it's clear from the legislative history, was not
7 meant to narrow or create a narrowing of the authority under
8 Section 215, contrary to plaintiffs' suggestions.
9 If you look at the legislative history that we cited
10 in the reply brief at page 12, footnote 15, I think that
11 statement is clear. In fact, the House report made clear that
12 the 2006 addition of relevance was intended to basically codify
13 the then existing understanding and practice, again, not to
14 narrow it further.
15 THE COURT: Does the insertion of the word "relevant"
16 then have any meaning?
17 MR. DELERY: It certainly does have meaning, your
18 Honor, and obviously it's the obligation of the courts, as the
19 FISC has done, to give it effect. But the legislative history
20 explains how it came to be, which was to clarify an existing
21 practice.
22 THE COURT: Are grand jury subpoenas an appropriate
23 place to look for the definition of relevance?
24 MR. DELERY: Certainly, the grand jury analogy has a
25 bearing on this question and legislative history refers to that

1 to some extent. I don't think it's the end of the inquiry,
2 however, because of some of the other elements of the structure
3 of the statute and Congress's attempt that I will come to in a
4 moment. But even looking at grand jury practice itself, it's
5 long established that grand juries have broad and wide-ranging
6 investigative powers. They don't need to be focused at the
7 outset on an individual potential target.
8 THE COURT: But 17(c) is not really a relevance
9 requirement, is it? It's really a question of whether it's, in
10 the words of 17(c), unreasonable or oppressive?
11 MR. DELERY: And the Supreme Court has made that clear
12 in resisting attempts to impose on the government or the grand
13 jury at the outset a tight focus on a particular target of an
14 investigation. As the Supreme Court said in R. Enterprises, a
15 grand jury can be investigating to find out whether a crime has
16 even been committed at the earlier stage, even than focusing on
17 who might have done it, or even to satisfy itself that a crime
18 has not been committed. So it has quite a wide-ranging
19 authority.
20 I think if you take the term "relevant" and then focus
21 on where it comes in the sentence though, it's clear that
22 Congress has established a deferential standard, reasonable
23 grounds to believe that they are relevant to an authorized
24 investigation, which seems to contemplate an element of
25 judgment on the part of the government and national security

1 professionals.
2 Again, Congress considered and rejected a proposal in
3 2006 to limit the scope of this provision to individuals who
4 are actually suspected of terrorist activity, and that was done
5 at the same time that the relevant standard was added to the
6 statute, which again suggests that the type of analysis that at
7 least in the briefs at times the plaintiffs seem to urge a much
8 narrower focus was something that Congress considered and
9 rejected.
10 The last thing I will say on the structure of the
11 statute is that it also built in protections recognizing the
12 broad scope of the material that could be collected under 215,
13 designed to ensure that the government gets all the information
14 it needs for national security investigations, but protects
15 U.S. person information. So in Section 1861(g)(2), which
16 requires minimization procedures, it reflects an understanding
17 that the government will get records from unconsenting U.S.
18 persons, and that the court would need to ensure that there
19 were protections built in for the handling of that information.
20 And that's, of course, what the FISC has done repeatedly here.
21 These terms in the statute and these phrases, we would
22 submit, need to be understood in light of the nature, purpose
23 and scope of counterterrorism investigations. The Supreme
24 Court in Oklahoma Press made clear that that's the question for
25 any kind of relevance inquiry, and it's certainly true here.

1 These investigations are different from ordinary or what we
2 might think of as ordinary criminal investigations, which are
3 focused on a particular event in the past that you may be
4 trying to explore. These investigations are designed to
5 detect, disrupt, and prevent ongoing or even future terrorist
6 attacks, terrorist plots, so that they can prevent attacks
7 before they occur. The investigations are necessarily
8 predictive. They are prospective. They are looking for
9 patterns. They are far-reaching in terms of across time and
10 geographic scope. And the declaration submitted from an FBI
11 official, the Holley declaration, at paragraph 17 and 18,
12 describes these attributes.
13 A key focus here is that information or connections
14 that are important to the investigation may not be known at the
15 outset. That's why a historical retrospective analysis of a
16 data set that is compiled across time and across
17 telecommunications carriers is critical. The same type of
18 analysis could not practically be done with the kind of
19 targeted intelligence gathering focused on just the call
20 records of somebody who you already know or suspect to be
21 associated with terrorism. And the Supreme Court in the Keith
22 case highlighted this distinction between ordinary criminal
23 investigations and the broader requirements of intelligence
24 investigations.
25 Significantly, your Honor, the plaintiffs have not

1 offered any theory of Section 215 or any relevant standard that
2 would make sense for the statutory purpose and the nature of
3 investigations that it was clearly designed to address. As I
4 indicated earlier, in fact, at least the position in their
5 briefs, which I think they may have walked away from some this
6 morning, that it should be enough to get the records of
7 somebody that you actually suspect of having a connection to
8 terrorism, was considered and rejected by Congress. So that is
9 not a reading that would comport with congressional intent.
10 And they haven't offered any other definition of relevance that
11 would be an appropriate fit for the scope of this statute.
12 THE COURT: The government appears to focus on
13 relevance to the authorized investigation by limiting it only
14 with respect to the application of investigative techniques.
15 Couldn't it just as easily mean relevant to the
16 subject matter of the investigation as opposed to investigative
17 techniques?
18 MR. DELERY: I do think it says relevant to an
19 authorized investigation, so that might have several
20 components. I think it's true that we have focused on the
21 relevance to this particular analytical tool that NSA uses.
22 THE COURT: The technique here is limitless, right?
23 MR. DELERY: I do think you're correct, your Honor,
24 that relevance often has a subject matter component and
25 analogies to other types of investigations, grand jury or even

1 civil discovery, and in many ways it's closely related to the
2 idea of the technique. The point of the NSA's analysis is to,
3 as the declarations made clear, identify connections between
4 known and unknown terrorists, particularly those who might be
5 in the United States, ongoing plots. So I think whichever way
6 you look at it, the information is relevant and tied to the
7 purpose for which it is being collected.
8 I think, your Honor, it's significant then that the
9 restrictions that the FISC has imposed and the minimization
10 procedures are carefully calibrated to this purpose so that the
11 information can be used only for counterterrorism purposes. It
12 can only be queried where there is articulable suspicion that
13 the number you want to inquire about has a connection to
14 terrorism. And the government is expressly precluded from
15 using the data for other purposes, including many of the things
16 that the plaintiffs are concerned about.
17 THE COURT: If all of the call records are relevant,
18 why aren't they all turned over to the FBI?
19 MR. DELERY: There are a couple of answers to that,
20 and these are reflected in the declarations.
21 One is the sharing of information with the FBI has a
22 practical element and the NSA has the analytical capability to
23 identify the connections that would be useful investigative
24 needs for the FBI. As I think the Shea declaration makes
25 clear, NSA exercises its own analytical judgment, intelligence

1 judgment, to identify which of the hits that might be returned
2 from a query are worth following up on which don't seem to be.
3 So there is a practical element to providing the FBI with
4 investigative leads that would be useful for the purpose for
5 which they would be provided.
6 Second, I think -- again, this is a reflection of the
7 minimization procedures. I think the government in its
8 application, you can see it in the recently released
9 application from 2006, the FISC in its orders has recognized
10 that the scope of this program raises certain concerns. And so
11 the FISC has been very careful to provide, as required by
12 statute, for restrictions on the use and dissemination of
13 information, particularly related to U.S. persons.
14 So that's why I say the program is carefully
15 calibrated to the purpose for which it is being used and isn't
16 the kind of indiscriminate use of the data that plaintiffs
17 suggest.
18 THE COURT: There seems to be a tension here. If it's
19 simply a practical consideration, namely, that it's the NSA
20 that has the analytical capacity to go through the metadata,
21 why the legal prohibition on providing all of it to the FBI?
22 MR. DELERY: I think it is, again, your Honor, a
23 combination of the practical aspect and --
24 THE COURT: Why should the practical impinge on the
25 legal? Shouldn't be the FBI have access to all relevant

1 material?
2 MR. DELERY: The FBI certainly is getting the benefit
3 of all of the relevant material. The analysis is being
4 conducted by the NSA. And this structure, which again reflects
5 the application that the government made in 2006 and the order
6 of the FISC, reflects a balance which should be relevant for,
7 to use a word, the statutory analysis and also for any
8 reasonableness inquiry under the Fourth Amendment.
9 I think significantly, your Honor, that brings me to
10 the third main point about the text of this statute, which is
11 that Congress has ratified this construction of Section 215 to
12 allow the collection of bulk telephony metadata by extending
13 the authority of Section 215 twice, in 2010 and 2011, without
14 change, after having been notified and provided information
15 about the bulk telephony metadata program. There were, as we
16 have detailed, many briefings of the intelligence committees
17 and the judiciary committees. In December of 2009, a
18 classified paper setting out the scope of the program under the
19 215 authority was provided to the intelligence committees of
20 both the House and Senate, and was made available to all
21 members, and that was before the 2010 extension of the sunset
22 date. And in 2011, similarly, an updated paper was provided to
23 the intelligence committee and made available at least on the
24 Senate side.
25 THE COURT: How can you argue that Congress ratified

1 this understanding of Section 215 when, for example, in the
2 papers submitted I learned that the classified document
3 describing the program was not even made available to the House
4 of Representatives in 2011?
5 MR. DELERY: It was made available to the House of
6 Representatives to all members in 2010. In 2011, it was made
7 available only to certain committees, the intelligence
8 committee, not to all members. The intelligence committees of
9 both the House and Senate, I think it is long established,
10 serve a critical function in overseeing national security
11 affairs, and in particular the activities of the intelligence
12 community, and the purpose for structuring them the way they
13 are is so that they can stand in the shoes of the broader
14 membership and the public when dealing with individual programs
15 that deal with classified information. I think the test that
16 the Supreme Court has identified is that Congress ordinarily is
17 presumed aware of administrative and judicial interpretations
18 of a statute.
19 THE COURT: A veteran congressman, Congressman
20 Sensenbrenner, submitted an amicus brief in this case, didn't
21 he, in which he said he had no idea of what was happening?
22 MR. DELERY: It is certainly true that some members of
23 Congress have expressed sentiments like that, and he is one of
24 them. I think the record establishes that the intelligence and
25 judiciary committees of both houses were briefed, and again,

1 there were materials made available on both sides, and
2 certainly at the time of the first reauthorization in 2010 made
3 available to all members of Congress that again made clear the
4 scope of the program.
5 THE COURT: Were the FISC opinions made available to
6 Congress?
7 MR. DELERY: I believe certainly some of the FISC
8 opinions, at least over time, has now been revealed in some of
9 the materials released.
10 THE COURT: That's since June 15, right?
11 MR. DELERY: They have been released publicly since
12 June 15. Some of the materials that have now been released
13 reflect the -- I want to say in 2009, although I am not
14 positive, we can get back to that -- provision of some of the
15 opinions, for example, on the compliance incidence, that those
16 were provided to the oversight committees at the time, not just
17 this year after the disclosures.
18 THE COURT: Even when you say in your brief, and as
19 you have said here, they were "made available," that's in one
20 location for a very limited period of time in 2010 and to only
21 one house of Congress in 2011, right?
22 MR. DELERY: Not quite, your Honor. I think in 2011,
23 it was made available to all senators. As I indicated before,
24 in 2010, the actual classified paper was kept in the secure
25 space on Capitol Hill, as classified documents would be kept in

1 a particular location.
2 THE COURT: In a SCIF for a limited period of time.
3 MR. DELERY: But as I understand it, a letter went out
4 to all members on both sides, both the House and the Senate,
5 telling them that significant information about a program
6 relevant to the reauthorization was available here, and not
7 only making that available, but making members of the
8 intelligence committee staffs available to answer questions
9 that members might have about the program.
10 So I think in ratification cases, often there is no
11 real expectation that any member of Congress has focused on a
12 particular provision.
13 THE COURT: It's a presumption, right? And a
14 presumption can be overcome, right?
15 MR. DELERY: Certainly, ordinarily here.
16 THE COURT: If a presumption that Congress is aware of
17 the Court's interpretation of a statute can ever be overcome,
18 isn't this the case?
19 MR. DELERY: I would submit not, your Honor, because
20 here, regardless of the limits, given the need to handle the
21 document in a classified way, there was much more of a direct
22 effort to get information to the members.
23 THE COURT: The Executive Branch worked to do it, but
24 they didn't succeed, did they?
25 MR. DELERY: Your Honor, I am not saying that every

1 member read these materials. I think what we can say is that
2 the members of the relevant committees on both sides were
3 briefed, and that the chairs of those committees drew the
4 attention of all members to this issue and the need to focus on
5 it.
6 The plaintiffs have identified a statement in one of
7 the briefs from Senator Wyden where he expresses many of the
8 concerns that are expressed here. And he did that in
9 connection with the debate on the reauthorization of 2011,
10 again, trying to emphasize what was at stake in the vote to
11 extend the authority. So, again, unlike often in ratification
12 cases with invariably obscure provisions, I think the record
13 establishes that this was focused on more than you would have
14 in the ordinary case.
15 If I could turn now to the Stored Communications Act
16 issue--
17 THE COURT: Fine.
18 MR. DELERY: -- that the plaintiffs have raised.
19 I think the significant point is that 1861 (c)(2)(D),
20 part of Section 215, added in 2006, is a later enacted
21 provision than 18 U.S.C., Section 2703. And it authorizes
22 production under Section 215 of tangible things that could be
23 obtained by a grand jury subpoena or "with any other order
24 issued by a court of the United States directing the production
25 of records of tangible things." Section 2703(d), a subsection

1 of the statute that plaintiffs have identified, allows the
2 production of call detail records by order in a criminal case.
3 So by structure of the statute, which was intended to provide
4 Section 215 authority for categories of documents that could be
5 obtained through other forms of legal process, Congress has
6 expressly authorized the collection of call detail records
7 under this provision.
8 So that is an express authorization that you don't
9 even need to reach the question of implied exceptions to the
10 list. As your Honor pointed out earlier, Section 215 also
11 allows the government to obtain any tangible things without
12 restriction. There is certainly nothing that I am aware of in
13 the legislative history that suggests that 2703 was a limit on
14 that broad authority. And as was discussed, the FISC
15 considered and rejected this argument in 2008, that having 2703
16 carve out a category of records that would otherwise be
17 available under 215 would be inconsistent with the statutory
18 structure. The point that I have just made about Section
19 (c)(2)(D) is referenced in Judge Walton's opinion in footnote 1
20 where he notes the connection between these two.
21 The plaintiffs have identified in their reply brief a
22 couple of other sources unrelated to 215 that they suggest are
23 inconsistent with this argument. I submit that neither of them
24 are. The first two examples again relate to implied exemptions
25 which is, given (c)(2)(D), not what the Court has to do here.

1 And the third, which was an inspector general report, reflects
2 a debate within the Department of Justice about Stored
3 Communications Act before 2006 so before Section (c)(2)(D) was
4 added.
5 THE COURT: Do you agree that the plain language of
6 Section 2702(a)(3) would prohibit the government from
7 collecting the telephone data?
8 MR. DELERY: I think again, your Honor, you need to
9 read Section 2702 and 2703 -- 2702 is for voluntary production,
10 2703 has a provision for various forms of compelled
11 production -- in light of Section 215, and I think they are
12 different authorities. They are providing different
13 authorities to the government. 215 is the one that's relied on
14 here.
15 Just two other points about the scope of the statutory
16 argument that I would like to address. One goes to the
17 discussion about the usefulness of the program as a tool that
18 was raised here and also in the briefs. I think, first of all,
19 Section 215 doesn't require the program to be crucial or the
20 least restrictive means of obtaining information. The test is
21 relevant to an authorized investigation, which is clearly met
22 here. Second, I think that some of the discussion has confused
23 or melded two different types of usefulness that I think it's
24 useful to separate. One is the role of bulk collection for the
25 analytical tools that the NSA applies.

1 So, therefore, both we and the FISC have said that the
2 NSA analysis would not be effective, at least on the scale that
3 it is, without the bulk history and the collection of cross
4 carriers. So the 2006 application, for example, that has been
5 released in the FOIA production says that NSA can effectively
6 conduct metadata analysis only if it has the data in bulk.
7 Judge Egan's opinion from August of this year includes a
8 similar term.
9 So the point is that the same level of historical
10 analysis, discovery of contacts, links between known and
11 unknown terrorists, can't practically be accomplished through
12 sequenced NSL's or some of the other ideas that have been
13 identified, although certainly, as I indicated at the
14 beginning, some other options are being debated in Congress
15 that seems like the place for those.
16 The second sense of usefulness is the contribution
17 that this telephony metadata program has made to
18 counterterrorism investigations. There, I think the discussion
19 of this subject is inconsistent. The program, as the
20 declarations identify here, has made important contributions
21 that assists the FBI, including as a complement to other
22 investigative tools. I don't think that there has been an
23 assertion that this should be examined in isolation. Again,
24 the key to thwarting future attacks is to identify before they
25 occur what plans are occurring and to identify connections

1 between people that are identified in counterterrorism
2 investigations, and others with whom they might be working,
3 including here in the United States.
4 So it's in that respect that this tool has been
5 important, one of significant value as the Holley declaration
6 reads and Judge Egan's opinion expresses in similar terms.
7 So with that, unless there are more questions about
8 the statute, I will turn to -- one other point if I might,
9 which is that the suggestion has been made that this authority
10 is limitless. Respectfully, I think that is not the
11 government's position. This program is tailored and focused on
12 the distinctive features of telephony metadata, in that they
13 are highly standardized, they are structured, and that analysis
14 of large data sets allows for the drawing of the connections
15 that I have been talking about. Upholding the program here
16 doesn't sanction all bulk data collection. There wouldn't be,
17 obviously, any other type of collection unless the FISA court
18 is willing to grant it. But again, you need to look in any
19 other context to these same types of considerations -- the
20 nature of the records, the connection to an investigation, the
21 scope of the production sought -- and as we have said, other
22 types of bulk data, including medical records or library
23 records, would not have the same connections.
24 THE COURT: Should the Court credit statements of
25 Senators Udall, Wyden and Heinrich, who are members of the

1 Senate Intelligence Committee in the Northern District of
2 California case, where they assert that they have seen no
3 evidence that this monitoring program has provided any uniquely
4 valuable intelligence?
5 MR. DELERY: I think, your Honor, respectfully, I
6 would start with the declarations that have been submitted in
7 this case, which do detail the role that the program plays and
8 some examples that could be discussed publicly about its
9 connection to particular investigations.
10 As to the uniqueness question, again, I think there is
11 a blending there of the two. Certainly, as the declarations
12 establish, we are not aware of another currently available
13 mechanism that would accomplish the contact chaining inquiry
14 and the analysis of connections in as timely or effective
15 manner as the one that's at issue in this program. Obviously,
16 to the extent that those senators have different views on that,
17 again, they are currently debating proposals that include
18 potential changes to the program, it seems like that's the
19 venue. But ordinarily, I think, in national security matters,
20 the Supreme Court has said courts should defer to the
21 professional judgment of the national security professionals,
22 here that would be reflected in the declarations that have been
23 submitted in this record.
24 With that then, your Honor, I will turn to the Fourth
25 Amendment. The government's position is that the Fourth

1 Amendment challenge is foreclosed by Smith v. Maryland, which
2 held that there is no reasonable expectation of privacy in the
3 non-content information that's held by third parties. So the
4 metadata at issue here or the same type of information was at
5 issue in Smith, telephone numbers.
6 THE COURT: Doesn't the information collected here
7 reveal far more about a person than the information collected
8 on one suspect for a few days in Smith?
9 MR. DELERY: Potentially, the aggregation of the data
10 can be a powerful tool. That's the reason for the collection.
11 In fact, going back to the usefulness point that we were just
12 making, the Felten declaration confirms the value of the tool.
13 The reasons why Professor Felten identifies, you can use the
14 data to draw connections, learn information, for a different
15 purpose, but the same type of analysis that the NSA applies.
16 The key question is, who are you using it for? And here the
17 program is tailored to people who are suspected of having a
18 connection to terrorism and not for other purposes.
19 I think the other key distinction between Smith, and
20 Jones for that matter, is that there you're gathering
21 information about a known person, about an individual person,
22 and the metadata is associated with that person. In the
23 telephony metadata program, the business records that are
24 collected from the telecommunications carriers are not tied to
25 identifying information. Therefore, it's only later, after an

1 appropriate query triggered by a suspicion of an association
2 with terrorism, that you could identify the information with an
3 individual. It's a key distinction. So in some ways the
4 relevant analogy is not the collection, but the querying here
5 to the framework that was at issue in Smith.
6 Smith's holding, though, it's true it was about an
7 individual and a couple of days, as opposed to the program that
8 has a broader scope as we have here, but its holding was about
9 the expectation of privacy that everyone has in a particular
10 type of data. And the court's clear conclusion was that there
11 is no reasonable expectation of privacy in this type of
12 metadata that is conveyed to third parties, the phone
13 companies. People assume that when they use the phone, the
14 phone company is recording the number dialed and how long the
15 call lasts and the like, and we know that because all of us get
16 the bills that detail the calls. That was the key insight of
17 the Supreme Court's decision in Smith. In fact, the dissent in
18 that case made many of the same arguments that are being made
19 here. Noted that from a pattern of calls, if the calls are
20 associated with an individual, you could learn information
21 about that person, and, nevertheless, the court held that there
22 is no reasonable expectation of privacy in that information.
23 Couple that holding with the Supreme Court's clear
24 statement in Rakas and other cases that the Fourth Amendment
25 right is personal, can't be asserted vicariously, then those

1 holdings control the outcome of the Fourth Amendment question
2 in this case. Certainly, in United States v. Jones, as has
3 been identified, Justice Sotomayor in her conferring opinion,
4 and in Justice Alito's, but particularly Justice Sotomayor's,
5 suggested that this question, this so-called third party
6 doctrine, may at some point warrant reconsideration.
7 THE COURT: Is the expectation of privacy affected by
8 the Stored Communications Act's prohibitions on turning that
9 information over?
10 MR. DELERY: I don't think so. I think given Smith
11 and given the ways in which the information is used, and people
12 understand that this information is in the hands of a third
13 party, in the hands of a business, uses it for its own
14 purposes, billing and fraud detection, and, also, under the
15 Stored Communications Act, may be required to provide it to the
16 government for various purposes. And certainly Section 215,
17 like the Stored Communications Act, would be one of the
18 background authorities under which, when a provider says we are
19 going to handle the records consistent with applicable law and
20 authority, that would be one of them.
21 THE COURT: Haven't Justice Sotomayor and Justice
22 Alito and several others in Jones indicated that the third
23 party doctrine relied on in Smith may no longer be appropriate
24 in light of modern technology?
25 MR. DELERY: Certainly, your Honor, Justice Sotomayor

1 and Justice Alito, but again, particularly Justice Sotomayor,
2 suggested that it may warrant reexamination, but she did not
3 identify what the answer would be to that question. So hasn't
4 provided any standard that could be applied in a case like this
5 in place of the very clear Smith standard.
6 In fact, that's a conclusion that the FISC has already
7 reached. Judge McLaughlin's most recent opinion addressed that
8 question. Last week, the Southern District of California in
9 the Roland case came to that conclusion, and the District of
10 Maryland last year in a case called Graham noted that the
11 Supreme Court had not yet resolved this question about the
12 effective aggregation and new technology on the third party
13 doctrine, and until then the established law needed to apply.
14 Given the Supreme Court's repeated admonitions that predictions
15 of an overruling of clear prior rulings should be avoided and
16 that all of us, the government and the court, should wait for
17 the Supreme Court's own resolution of those questions, leads to
18 the conclusion that Smith still controlled here on the question
19 of whether there is a search.
20 I should indicate that even before Jones, lower
21 courts, a number of cases cited in our briefs, had made clear
22 that call detail records, like the ones at issue here, don't
23 come with a reasonable expectation of privacy so collecting
24 them is not a search.
25 Obviously, as we have argued, to the extent that the

1 Court turned to a reasonableness inquiry, we think that we
2 would still prevail. Any search, if one existed, would be
3 reasonable in light of the government's compelling interest in
4 the purpose of the statute, counterterrorism investigations.
5 The tailored intrusion, if there is any one, on the data of the
6 plaintiffs, again, given the restrictions on the querying and
7 the lack of any evidence that the plaintiffs' data has actually
8 been reviewed by any person is likely in any way, that's not in
9 the record.
10 Indeed, I will point out as to that, the plaintiffs
11 don't seem to challenge the RAS standard. In fact, again in
12 their briefs, to the extent that they suggest anything as an
13 alternative, it would be to seek the phone records only of
14 people who have an articulable suspicion of being associated
15 with terrorism. So to the extent that there is a querying of
16 data that would happen to turn up records of any individual
17 person, I don't read the plaintiffs to be challenging that as a
18 Fourth Amendment problem, even under the existing framework.
19 And as I indicated earlier, the framework was imposed
20 for a reason. It is designed to be carefully tailored. And
21 the safeguards, by limiting both the use and the retention and
22 the dissemination of the information outside of the NSA, and
23 then an oversight structure on top of that, are protective of
24 Fourth Amendment interests. Under a standard reasonableness
25 inquiry, this program would pass muster.

1 THE COURT: Do you want to turn to the First
2 Amendment?
3 MR. DELERY: The First Amendment claim fails as a
4 matter of law because the plaintiffs haven't alleged or proved,
5 for purposes of the preliminary injunction, that the telephony
6 metadata program is directed at their expressive or
7 associational activities in any way. Good faith government
8 investigations, conducted consistent with the Fourth Amendment,
9 do not violate the First Amendment, as long as they are not
10 pursued with the purpose to deter or penalize protected
11 expression. And that distinguishes this situation directly
12 from the Tabaa case to which Mr. Jaffer referred.
13 In that case, the investigation was being pursued
14 because individuals had attended a particular conference in
15 Canada. It was based on expressive activities. Here, there is
16 no sense of that. The First Amendment claim is based on a
17 hypothesis that, as we have established, is wrong that
18 associational activities are actually being pursued, and there
19 is also no evidence of an actual chilling effect and any actual
20 person has declined to speak to the plaintiffs or otherwise has
21 changed their course of conduct.
22 THE COURT: How can it be though that the Fourth
23 Amendment is the only protection of interest started by the
24 First Amendment?
25 MR. DELERY: That is not the position of the

1 government, your Honor. Although that was attributed to us,
2 that is not the case. The point is that where an investigation
3 is being conducted in good faith, consistent with the Fourth
4 Amendment, in order for there to be a First Amendment
5 violation, there needs to be some actual targeting of
6 expressive activity or a desire to deter or punish First
7 Amendment activity, and that's the element that is missing
8 here. So it's not that the First Amendment doesn't add
9 anything to the analysis. It's not applicable to this program
10 and certainly hasn't been proved on the record in this case.
11 THE COURT: Could a good faith investigation
12 substantially impair the freedom of association?
13 MR. DELERY: As a theoretical matter?
14 THE COURT: Yes.
15 MR. DELERY: That, as I understand it, there has been
16 some debate in the cases about whether it is possible at any
17 level. Certainly here I don't think that that is the case, and
18 we are not at a situation where that would be put into play.
19 And for that reason, I think this is very different from the
20 cases like NAACP v. Alabama or the Shelton case that the
21 plaintiffs have cited, all of which involve, again, the
22 obtaining of membership information, or in the case of the
23 Shelton case, a listing of one's associations, but attributed
24 to a particular organization or individual. Again, the tying
25 of information to an individual or a particular organization.

1 Here, the metadata, as collected by the telephony
2 metadata program, is not tied to the identification of any
3 individual. And so there is no mechanism just from the
4 collection to identify which of all of the numbers in there, if
5 any, show connections between the plaintiffs and any of the
6 other people that they are concerned about. And so that's a
7 fundamental distinction from the types of cases that the
8 Supreme Court has recognized require exacting scrutiny.
9 We further submit that if that test did apply, given
10 the fact that this serves compelling governmental interests
11 that are unrelated to the expression of ideas and the careful
12 tailoring, the protections that are imposed on the identifying
13 ability to connect metadata to identifying information, this
14 program would satisfy that kind of First Amendment inquiry if
15 you got there. But given the threshold issues, we don't think
16 that would be appropriate.
17 Thank you.
18 THE COURT: Thank you very much, Mr. Delery.
19 A brief rebuttal, Mr. Jaffer.
20 MR. JAFFER: First, on the provision you raised
21 earlier, 1861(f)(2)(D), I just wanted to give you a fuller
22 response to your question, a few things that you should keep in
23 mind when you read that provision.
24 First, it appears in the section that it is entirely
25 about challenges by providers, and I think that it has to be

1 read in that limited context.
2 Second, the point I made earlier, which is that we are
3 not seeking modification of the 215 order. We are challenging
4 the conduct of executive officials.
5 Third, the legislative history, as I mentioned
6 earlier, makes clear that that provision was meant to protect
7 the 215 order on appeal. That was the narrow purpose that that
8 provision was meant to serve.
9 Fourth, to the extent there is ambiguity in the
10 meaning of that provision, there is of course the background
11 rule from the APA that requires a court interpret the provision
12 in a way to preserve the right of judicial review rather than
13 to preclude it.
14 Fifth, if you want to see what a real preclusion
15 provision looks like, you can look at the Stored Communications
16 Act. Section 2708 says, "The remedies and sanctions described
17 in this chapter are the only judicial remedies and sanctions
18 for nonconstitutional violations of this chapter." I think
19 that is clear language. The language in (f)(2)(D) does not
20 read anything like that.
21 Then, finally, your Honor, if you do find that that
22 particular provision precludes our statutory claims, I just
23 want to remind you of what is probably obvious. It doesn't
24 preclude our constitutional claims. And if it were read to
25 preclude the constitutional claims, that in itself would raise

1 difficult constitutional questions.
2 Finally, your Honor, the government says, I think
3 correctly, that we have not spelled out the precise contours of
4 Section 215. We can't do that. I think that's in part because
5 the application of the statute in any particular case will
6 depend on the context, it will depend on the factual context.
7 The point that I was trying to make earlier is just
8 that to accept the government's theory of the statute is to
9 accept that Congress used familiar language, the same language
10 that it has used in many other authorities, or similar language
11 to the language it has used in many other authorities, to
12 authorize collection on a truly massive scale, collection far
13 beyond what any court has previously sanctioned, and indeed,
14 far beyond what the government has ever previously proposed.
15 The Supreme Court has admonished many times that Congress
16 doesn't hide elephants in mouse holes. I think that is what
17 the government is proposing here. At the very least, your
18 Honor, this Court should require Congress to say that it wants
19 the government to collect all of this data, if it does indeed
20 want it.
21 Thank you.
22 THE COURT: Thank you, Mr. Jaffer.
23 Mr. Abdo.
24 MR. ABDO: Just quickly to address the government's
25 discussion of standing. I think it's quite clear that we have

1 at least three separate injuries, and we have standing for each
2 one, but I don't really want to spend much more time discussing
3 our principal claim, which is that collection of plaintiffs'
4 call records is sufficient for purposes of both our statutory
5 claim and our constitutional claims. That much is clear at
6 least from the Second Circuit's decision in Amidax, which
7 upheld that if the plaintiff in that case could demonstrate
8 that their financial records had been transferred to the
9 government, that would have been sufficient to raise their
10 claims on the merits.
11 We separately are injured by the government's later
12 querying of the database. Every time they query it, they test
13 to see whether a call is within three hops of those of
14 suspected terrorists. I think there is no question but that
15 that would separately give us standing. But again, our
16 principal claim is that the government's collection alone is
17 sufficient.
18 I also want to briefly discuss the government's
19 discussion of necessity, which I think cuts across all three of
20 our claims. Our position is, I think, best articulated in the
21 declaration of Professor Felten, the supplemental declaration,
22 which makes clear that the government could accomplish the very
23 same type of analysis it is trying to accomplish through the
24 construction of this database without in fact constructing a
25 database. It could use orders directed at the telecoms to

1 acquire the phone records of anyone within three hops of their
2 suspect. That's at paragraphs 6 to 8 of the supplemental
3 declaration.
4 With respect to your Honor's question about what
5 deference is owed either to the amicus brief filed in
6 California on behalf of the intelligence committee senators
7 versus the government's declarations in this case, it's of
8 course appropriate to consider the government's declarations,
9 but to also apply a sense of common sense. None of the
10 examples that the government has provided as supposed success
11 stories of this program even involve the sort of multi-hop
12 analysis that they claim the program is necessary for. Both of
13 the examples they relied upon employed only a simple one-hop
14 analysis, one that would be very easy for the government to
15 accomplish through targeted means. And even if they involved
16 more complicated investigations, Professor Felten lays out how
17 they could analyze multi-hop investigations using those same
18 target authorities.
19 A word on the government's First Amendment arguments
20 before just one final word on the Fourth Amendment.
21 I think it's misleading to say that our case doesn't
22 involve one directed at First Amendment activities. The very
23 purpose of the government's program is to collect plaintiffs'
24 associational information for the purpose of determining
25 whether we are in association with those that the government

1 suspects of wrongdoing. It could not be more directly
2 addressed to information protected by the First Amendment.
3 But even if it weren't, all of the cases that we cite,
4 particularly in our reply brief, make clear that even indirect
5 burdens on the First Amendment require exacting scrutiny
6 analysis by the court. I am thinking particularly about the
7 Supreme Court's decision in Arizona Free Enterprise, but also
8 decisions of the Second Circuit in Local 1814 and the decision
9 of the D.C. Circuit in Clark v. Library of Congress.
10 Finally, just a general comment on the government's
11 Fourth Amendment position. I think it's worth stepping back
12 and appreciating the consequences of the government's position.
13 Under the government's interpretation of the Fourth Amendment,
14 it would be free to construct databases housing all manner of
15 extraordinarily sensitive information about even innocent
16 Americans, information in which they have not only an
17 expectation of privacy, but that would reveal extraordinarily
18 sensitive details about their personal lives.
19 The government's position is not just that that
20 information is not protected by the Fourth Amendment, but that
21 the government's collection doesn't even raise a controversy
22 within the meaning of Article III of the Constitution. I think
23 it's worth pausing before accepting that principle because the
24 end result of it will be extraordinarily sensitive databases
25 that ordinary Americans will have no recourse for unless they

1 can prove in a rare case that the government has specifically
2 targeted them.
3 THE COURT: Mr. Delery, do you wish to be heard?
4 MR. DELERY: Yes, just briefly to respond to a couple
5 of points.
6 I think on the question of (f)(2)(D) and the provision
7 that says the order shall remain in full effect, I think there
8 is no question that the order that the plaintiffs are
9 requesting would affect the scope of the currently existing
10 orders of the FISC. Obviously, those orders allow for certain
11 collection pursuant to the terms of the primary order, the most
12 recent one of which was attached to Judge McLaughlin's opinion,
13 and the relief that the plaintiffs seek would carve out
14 exceptions to that, and so I do think necessarily would reflect
15 a modification of the authority, and certainly the insight of
16 this provision (f)(2)(D) was to avoid exactly that kind of
17 result.
18 Certainly, I think when we are talking about
19 preliminary injunctive relief, where obviously there is no
20 right to an injunction in this context, the fact that they are
21 asking for an injunction that would at the very least modify,
22 if not otherwise interfere with an ongoing order of an Article
23 III court that has been issued pursuant to the framework that
24 Congress allowed, all of those factors counsel strongly, and I
25 would argue dispositively, against the issuance of a

1 preliminary injunction here.
2 On the question of ratification, which obviously
3 relates to the repeated argument about the scope of Section 215
4 as interpreted by the FISC and the government, Judge Egan's
5 opinion in August from the FISC actually addressed this
6 question and noted that given that information was provided to
7 Congress on a number of occasions, that was sufficient to meet
8 the Supreme Court's test for ratification.
9 And similarly, in our opposition to the preliminary
10 injunction motion on page 22, we address some of the individual
11 statements by legislators that your Honor highlighted, and
12 noted the cases there that counsel I guess is relying on those
13 as opposed to the actual congressional votes, in terms of the
14 scope of congressional action, and that's certainly relevant
15 not only for the ratification point, but also for how you
16 interpret the statute as a whole when you put it together in
17 the context of the type of investigations that are here.
18 In terms of the scope of the Fourth Amendment
19 argument, I think it's important to note that the holding of
20 Smith was about non-content information. It was not about
21 collecting the types of information that the plaintiffs
22 sometimes reference, including information about content or
23 associations of individuals. Certainly, that's a different
24 type of information of a different order. It wasn't at issue
25 in Smith and it is not at issue here. And the type of records,

1 the phone numbers and related information, that are at issue in
2 this program are exactly the types of records that the Supreme
3 Court in Smith said individuals have no reasonable expectation
4 over.
5 As to standing, there was a reference to the Amidax
6 decision from the Second Circuit. The sentence that was
7 referenced comes in a discussion of whether the plaintiffs had
8 to prove the collection of an entire database or just
9 collection of their information in order to establish standing,
10 and it was not directed at the point that we are now debating
11 in this case. And I think for the reasons that I have said
12 earlier, the plaintiffs have not identified any concrete harm
13 that flows from your collection. Even if you think that the
14 mere collection provides enough injury to qualify for Article
15 III standing, when evaluated for purposes, for example, of the
16 preliminary injunction against the important interest in
17 national security and the harm that would come from disrupting
18 a valuable program for national security efforts, that type of
19 injury doesn't provide enough of a basis to justify the
20 injunctive relief that they ask.
21 So for purposes of the bottom line here, the motion to
22 dismiss I think can be disposed of. Statutory claims under
23 preclusion grounds, I think when you take together all of the
24 statutory references, it's clear that statutory claims are
25 appropriately presented in the FISC structure and not

1 elsewhere. And on both of the constitutional claims, binding
2 Supreme Court precedent at the topline legal level resolves the
3 threshold legal questions on the expectation of privacy and on
4 the need to show some actual effect on associational interest.
5 Those cases are enough to dispose of the claims in the case,
6 and we therefore submit that the motion to dismiss should be
7 granted.
8 On the preliminary injunction, obviously the same
9 legal issues apply. And, certainly, where we are talking about
10 an ongoing program that has been approved by the Article III
11 court established to hear that repeatedly, 35 occasions by 15
12 different judges, and where we submit has been briefed to
13 Congress, and where Congress has extended the authority with
14 information about how it is being used, the ordinary analysis
15 that the Court would ordinarily apply in evaluating a
16 preliminary injunction counsel is strongly against doing so
17 here. To the extent that the program should be modified, the
18 appropriate forum for that is the current debate ongoing in
19 Congress. This Court should, respectfully, leave this
20 important national security program on its firm footing as
21 approved by the FISC.
22 THE COURT: Thank you, Mr. Delery.
23 Counsel, I want to thank all of you for your
24 arguments. This has been a wide-ranging discussion. I have an
25 a lot to think about. Decision reserved.

1 Have a good weekend.
2 (Adjourned)
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