

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

LARRY KLAYMAN, *et al.*,

Plaintiffs-

Appellees,

v.

BARACK OBAMA, President of the
United States, et al.,

Defendants-

Appellants.

Case No: 15-5307

[Civil Action Nos. 13-cv-0851 (RJL), 13-
cv-881(RJL)]

ORAL ARGUMENT REQUESTED

**PLAINTIFFS-APPELLEES' OPPOSITION TO EMERGENCY
MOTION FOR STAY PENDING APPEAL AND FOR IMMEDIATE
ADMINISTRATIVE STAY**

I. PRELIMINARY STATEMENT

Appellees, by and through their respective counsel, oppose the Appellants pending motion before this Court. On November 10, 2015, Appellants filed an emergency motion for a stay pending appeal (“Appellants’ Emergency Motion”). Appellants rely principally on factual assertions that were explicitly rejected by the United States District Court for the District of Columbia (“District Court”) in the 68-page Memorandum Opinion of December 16, 2013 and then again in the 43-page Memorandum Opinion (“District Court’s Order”) issued just three days ago on November 9, 2015. As the Appellants are forced to concede, and as the District Court ruled, “the loss of freedoms, ‘for even minimal periods of time,

unquestionably constitutes irreparable injury.”” *Klayman v. Obama*, 957, F. Supp. 2d 32, 37 (D.D.C. 2013). This loss of constitutional freedoms is precisely what has occurred and is continuing to occur here. ***The only issue before this Court prior to a full appeal is whether removing two names or phone numbers from their supercomputer would irreparably harm Appellants. The answer is plainly no.***

First, the Appellants fail to meet the basic standard for a stay of the District Court’s Order and have little likelihood of success. Second, the Appellants will not be irreparably injured by the District Court’s Order which merely requires the Appellants to remove *one person and his law firm* from an enormous, highly sophisticated supercomputer database, abide by the Constitution, of which violations Appellants ***have been on notice of for two years***. As the District Court found:

I assumed the injunction pending the appeal would proceed expeditiously, especially considering that the USA PATRIOT Act, that statute pursuant to which the NSA was acting, was due to expire on June 1, 2015 – a mere eighteen months later. For reasons unknown to me, it did not. Instead, our Circuit Court heard argument on November 4, 2014 and did not issue its decision until August 28, 2015 – nearly three months after the USA PATRIOT Act had lapsed and had been replaced by the USA FREEDOM Act, which was enacted on June 2, 2015.¹

District Court’s Order at p. 2. Additionally:

¹ The appeal did not proceed expeditiously in part because of the delay tactics by the Appellants who filed frivolous motions to dismiss, asked for elongated briefing time, and then tactfully dismissed the motions to dismiss, among other delay tactics.

Fortunately for this Court [the District Court], my analysis of these ‘momentous constitutional issues’ began nearly two years ago, and so I do not suffer the same time constraints. Moreover, as I explain below, this Court cannot, and will not, sit idle in the face of likely constitutional violations for fear that it might be viewed as meddling with the decision of a legislative branch that lacked the political will, or votes, to *expressly* and unambiguously authorize the Program for another six months.

Id. at 15 (emphasis in original). Third, the Appellees have a continuing injury due to the constant and continual, egregious violations of the Fourth Amendment – which notably this Court did not reach the merits of in its August 28, 2015 Opinion – and as such, the District Court’s Order of December 16, 2013 with regard to the Fourth Amendment violations stands and is legally controlling at this time. Lastly, the assertion of public interest and public safety appears to be more of a political tactic rather than a reasoned legal position. The Appellants’ actions of circumventing the Constitution and violating hundreds of millions of people’s Fourth Amendment and other rights actively contravenes the public interest. “Congress, of course, is not permitted to prioritize any goal over the Constitution . . . This Court simply cannot, and will not, allow the Government to trump the Constitution merely because it suits the exigencies of the moment.” District Court’s Order at p. 40.

II. ARGUMENT

Under well-settled principles, a party seeking a stay must show that: (1) it will likely prevail on the merits; (2) it will suffer irreparable harm unless a stay is

granted; (3) other interested parties will not be harmed if a stay is granted; (4) a stay will serve the public interest. *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Taking these elements into consideration, each of which must be sufficiently established in order for a stay to issue, a “stay is an ‘intrusion into the ordinary processes of administration and judicial review,’ . . . and accordingly ‘is not a matter of right, even if irreparable injury might otherwise result to the appellant.’” *Nken v. Holder*, 556 U.S. 418, 427 (2009). An applicant “*must* establish that . . . he is likely to suffer irreparable harm in the absence of preliminary relief.” *Winters v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008) (emphasis added). The mere possibility of harm is insufficient. *Id.* at 22. Appellants’ Emergency Motion is brimming with mere hypothetical possibilities of harm, none of which have been actualized and none of which can possibly meet the high threshold that Appellants need to establish in order for this Court to issue a stay.

A. The Public Interest Weights in Favor of Denying Appellants’ Motion to Stay

“[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.” *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 898 F. Supp. 2d 73, 84 (D.D.C. 2012). The District Court has already ruled that the Appellants metadata gathering program violates the Fourth Amendment and this Court did not refute that. As it stands now and applied to the facts of this

case, if a plaintiff or appellee has standing, such as the Little Appellees do here, then there is a violation of his Fourth Amendment rights.

Also unavailing is the Appellants' argument that "immediate compliance with the district court's injunction would require the government to cease *all* bulk collection and queries of telephony-metadata under the Section 215 program." Appellants' Emergency Motion at 11. This is absurd. Unequivocally, the public's interest in combating terrorism is of paramount importance for the United States and its citizens. But the notion that *after being on notice of their constitutional violations and illegal activity for two years,*² Appellants, with arguably (and hopefully) the highest technological supercomputer in the world, have failed to decipher a way to remove a mere *two names or phone numbers* from their database, first underscores that the database has never truly served its own purpose, and second, confirms the fact that the Appellants have indeed been surveilling

² The District Court takes issue with these "last minute arguments." "The [Appellants] w[ere] given unequivocal notice that it may be required to undertake steps of this nature in my December 2013 Opinion granting plaintiffs' request for a preliminary injunction. Indeed, I expressly warned against any future request for delay stating, 'I fully expect that during the appellate process, which will consume at least the next six months, the [Appellants] will take whatever steps necessary to prepare itself to comply with this order when, and if, it is upheld.' *Klayman*, 957 F. Supp. 2d at 44. Given that I significantly under-estimated the duration of the appellate process, the [Appellants] ha[ve] now had over twenty-two months to develop the technology necessary to comply with this Court's order. To say the least, it is difficult to give meaningful weight to a risk of harm created, in significant part, by the [Appellants'] own recalcitrance." District Court's Order at p. 41-42.

everyone. Appellants cannot – and should not be able to – rely on the failed argument that it may be burdensome to avoid obeying the Constitution. “Of course, the public has no interest in saving the Government from the burdens of complying with the Constitution!” District Court’s Order of December 16, 2013 at pp. 66.

Moreover, the Declaration of Teresa H. Shea submitted to this Court by Appellants on November 10, 2015 seals the nail in the coffin of Appellants’ game-playing and disingenuous inaction. In it, she swears under oath:

Technical experts would have to develop a solution such as removing the numbers from the system upon receipt of each batch of metadata or developing a capability whereby plaintiffs’ numbers would be received by NSA but would not be visible in response to an authorized query. To identify, design, build, and test the best implementation solution would potentially require the creation of new full-time positions and could take **six months or more to implement**.

Shea Decl. ¶ 65 (emphasis added). Again, the Appellants have had almost two years (*well over three times* the amount of time Teresa Shea states would take to comply with the District Court’s Order of December 16, 2013) to “develop a solution such as removing the numbers from the system.” *Id.* In the District Court’s Order of almost two years ago, the Honorable Judge Leon warned, “the Government will take whatever steps necessary to prepare itself to comply with this order . . .” District Court’s Order of December 16, 2013 at p. 67. The Appellants failed to take the steps the Honorable Judge Leon warned them of and putting forth affidavits, declarations and other material that disingenuously

complain of time constraints “will not be well received and could result in collateral sanctions.”³ *Id.* at 68.

Appellants’ documented pattern and practice of lying to Congress, this Court, the District Court and the American people knows no bounds. They are the quintessential basketball team – one point ahead – trying to run out the clock with only a few minutes left in the game, instead of playing honestly and by the rules of the court (pun intended). Indeed, the Appellants’ behavior is far more outrageous than slick basketball tactics, as basketball is only a game and the strategy of running out the shot clock does not violate hundreds of millions of Americans’ constitutional rights, thereby irreparably injuring them.⁴ Moreover, the last minute protestations of Appellants to obey the District Court’s preliminary injunction cannot be believed and should be given no weight; particularly since their honesty is more than suspect.

³ Appellants’ argument that they cannot financially afford to obey the District Court’s Orders is simply absurd and unbecoming of a government that is supposed to represent the American people.

⁴ The undersigned counsel is a graduate of Duke University, today the premiere basketball team in the nation. However, when he was an undergraduate, the coach of University of North Carolina, Dean Smith – which at that time was the top basketball school – routinely used his four-corners offense to run out the clock at the end of a game, preventing the Blue Devils from scoring and winning. To the contrary, in this instance, the undersigned counsel Blue Devil has already scored and won. This Court should respectfully enforce the District Court’s Orders, which gave the Appellants two years to comply with the Orders, in which they improperly failed to do in direct defiance of the District Court’s admonitions and warnings.

The Director of National Intelligence, James Clapper, lied to Congress and the American people on March 12, 2013. “Does the NSA collect any type of data at all on millions or hundreds of millions of Americans?” “No, sir . . . not wittingly . . . There are cases where they could inadvertently perhaps collect, but not wittingly.”⁵ Even worse, he testified that the Central Intelligence Agency and NSA only engage in foreign intelligence collection and do not participate – at all – in any intelligence gathering within the domestic United States. None of that is true, as was later learned. There is every indication that the Appellants continue to believe that the wholesale domestic surveillance of American citizens is appropriate and it is clear that they will covertly continue to do so. As briefed below, these Appellants have consistently lied to the courts, such as the Foreign Intelligence Surveillance Court, and other tribunals and agencies about their illegal activities. Sadly, the Appellants here can be no more trusted to obey and adhere to the Constitution than the mullahs in Tehran to obey the Iranian nuclear treaty.

In addition, the other two affidavits submitted to this Court on November 10, 2015 fair no better than Teresa Shea’s so-called self-defeating affidavit. The affidavits of Major General Gregg C. Potter and Bryan C. Paarman are vague and

⁵ A.D. Phillip and Russell Goldman, “Senator Wants 'Straight Answers' On NSA From Country's Top Spy,” ABC News, June 11, 2013, accessible at: <http://abcnews.go.com/Politics/senator-straight-answers-nsa-countrys-top-spy/story?id=19375566>

conclusory and should not be given any weight. Affidavits and declarations become wholly improper, as well as unhelpful, when they assert “self-serving” or ultimate conclusions of either law or fact. *See e.g., BellSouth Telecomms., Inc. v. W.R. Grace & Co. – Conn.*, 77 F.3d 603, 615 (2d Cir. 1996).

Here, Mr. Paarman and Major General Potter cannot base their assertions of what the intent of Congress was in enacting the USA FREEDOM Act, failing actually being a member of Congress (or, more to the point, being all members of Congress). Their analysis of congressional intent should not displace the District Court’s own determination as to Congress’ intent which states, “Congress did not *explicitly* authorize a continuation of the Program.” (emphasis in original). District Court’s Order at p. 39.

In addition, and as discussed at the hearing of October 8, 2015, Mr. Potter is not in the position to be making such a conclusory declaration. Indeed, the Appellants’ declarations conveniently are of lower level officials, as the Honorable Richard J. Leon observed when considering their latest opposition to a preliminary injunction.

The Court: But you can’t show the Court a single instance where it has [been useful].

Ms. Berman: Unfortunately not, Your Honor.

The Court: Because they’re unwilling or unable to. Who wrote the declaration?

Ms. Berman: Your Honor, the FBI submitted the declaration.

The Court: But who, a person at what level, an assistant director?

...

Ms. Berman: Deputy Assistant Director, Your Honor.

The Court: Deputy Assistant Director. So that's about a level 4 or 5 down from the director, something like that?

Ms. Berman: I'm uncertain, Your Honor.

The Court: Yeah, well, it's probably about three to four levels below the director. Does he or she represent that they are aware of any instances where it occurred? Without saying what they are. Where it actually, actually was helpful in foiling some plot?

Ms. Berman: Your Honor, the declaration is not that specific. It does say that this program is being used by the FBI.

The Court: Well, we know it's being used. The FBI uses whatever it can use to do whatever it can do to protect our country.

Ms. Berman: And it also says, Your Honor, that it is more significant now than it was before because of the changes to the threat environment.

The Court: That sounds lovely, but that's not very helpful.

See Transcript of Hearing of October 8, 2015, Exhibit 1.

B. The Appellants Fail to Meet the High Threshold of Success on Full Appeal.

The Appellants have provided virtually no persuasive or controlling legal authority or factual basis for their claim of potential success on the merits. This case, as far as one of the constitutional issues is concerned, has been adjudicated not once, but twice in the District Court's Orders of December 16, 2013 and November 9, 2015 (and the U.S. Court of Appeals for the Second Circuit has also ruled this indiscriminate spy program illegal under Section 215). Importantly, in this Court's Opinion of August 28, 2015, it decided not to reach the constitutional issues, and left the District Court's ruling in place. Indeed, the Appellants' logic flies in the face of this Court, which ruled that in order for a plaintiff to have standing, the telephonic metadata collection program must have "target[ed]"

plaintiffs [Appellees].” *See Obama v. Klayman*, 800 F.3d 559, 567 (D.C. Cir. 2015) (Williams, J.). The Appellees J.J. Little and J.J. Little and Associates, P.C. (collectively, the “Little Appellees”) both are “at all material times” Verizon Business Network Solution Subscribers during the time in which the Appellants harvested, collected and maintained the Little Appellees telephony metadata. Therefore, according to this Court, they were “target[ed],” and therefore have standing.

Because the Appellants have acknowledged that Verizon Business Network Solutions subscribers, call records were collected during a window in which the Little Appellants were Verizon Business Network Solutions’ subscribers, “barring some unimaginable circumstances, it is overwhelmingly likely that their telephone metadata was indeed warehoused by the NSA.” District Court’s Order at p. 20.

C. The Balance of Harm Fails to Warrant the Extreme Remedy of a Stay and Appellants Will Not Suffer Irreparable Injury Absent a Stay.

“The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies. *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (quoting *Sampson v. Murray*, 415 U.S. 61, 88 (1974)). To obtain the extraordinary relief they seek, Appellants must therefore demonstrate that the alleged irreparable injury is “both certain and great,” “actual and not theoretical.” *Id.* Simply put, Appellants must provide “proof indicted that

the [alleged] harm is certain to occur in the near future,” *id.*, if the District Court’s Order which it complains remains in effect pending judicial review. Appellants cannot not do so here.

“To date, [Appellants] ha[ve] still not cited a single instance in which telephony metadata analysis actually stopped an imminent attack, or otherwise aided the [Appellants] in achieving any time-sensitive objective.” District Court’s Order at p. 35. Appellants have not demonstrated to the District Court or this Court that their alleged injury is “both certain and great” and “actual.” *Wisconsin Gas Co.*, 758 F.2d at 674. Indeed, the alleged injury Appellants set forth here is merely speculative and theoretical, which is precisely what this Court found when it **denied** relief Appellants sought in *Wisconsin Gas Co.*

1. Appellees’ Have Standing As the District Court Ruled.

Originally, after extensive briefing and hearings in front of the Honorable Judge Richard J. Leon, on December 16, 2013, the District Court ruled that Appellees’ Larry Klayman and Charles Strange had standing to proceed on the merits and had a substantial likelihood of success to prevail on their claims against Appellants. But, after almost two years later, this Court found that Larry Klayman and Charles Strange’s alleged injuries were too attenuated to constitute “concrete and particularized injury” as required by the standing requisite set forth in *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147 (2013) (quoting *Monsanto Co. v.*

Geerston Seed Farms, 561 U.S. 139, 149 (2010); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555 560-61 & n.1 (1992) (“By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.”). While undoubtedly, Verizon Wireless is a major part of the National Security Agency’s classified bulk telephony metadata collection program, which the District Court concludes is “logical,”⁶ Appellees now consist of two concrete, particularized customers of Verizon Business Network Solutions, the Little Appellees, whose telephony metadata *is being and has already been* collected pursuant to the Appellants’ own representations.

Appellants mistakenly represent to this Court that the Little Appellees have failed to satisfy the standing standard because a “threatened injury must be *certainly impending* to constitute injury in fact,” whereas “[a]llegations of *possible* future injury are not sufficient.” *Clapper*, 133 S. Ct. at 1147. But, as the District Court properly ruled, the “irreducible constitutional minimum of standing” requires that the Appellees “must have suffered an ‘injury in fact’ – an invasion of a legally protected interest which is . . . concrete and particularized.” *Lujan*, 504

⁶ The District Court “went to great lengths in [its] December 2013 Opinion to debunk the notion that the NSA had omitted from the Program the single largest wireless carrier in the United States and in so doing had collected a universe of metadata so woefully incomplete as to undermine the Program’s putative purpose. *See Klayman*, 957 F. Supp. 2d at 27. In my judgment, common sense still dictates that very conclusion regarding Verizon Wireless’ participation in the Program.” District Court’s Order at p. 19.

U.S. at 560. According to this Court, this means that the telephony metadata program must have “target[ed] plaintiffs [Appellees].” *See Obama v. Klayman*, 800 F.3d 559, 567 (D.C. Cir. 2015) (Williams, J.); *see also id.* at 563 (Brown, J.) (declining to find standing because “the facts marshaled by plaintiffs do not *fully* establish that their own metadata was ever collected”) (emphasis added).

“The Little plaintiffs [Appellees] emphatically meet this hurdle.” District Court’s Order at p. 20. The Appellants have acknowledged that Verizon Business Network Solutions subscribers’ call records were collected while the Little Appellees were themselves subscribers, and “barring some unimaginable circumstances, it is overwhelmingly likely that their telephone metadata was indeed warehoused by the NSA.”⁷ *Id.* Indeed, *Clapper*, the case Appellants mistakenly rely upon, reinforces the Little Appellees’ standing. Not only is the loss of the Little Appellees’ constitutional freedoms *certainly impending*, it is and has already occurred. “Given the strong presumption that the NSA collected, and warehoused, the Little plaintiffs’ data within the past five years, these plaintiffs unquestionably have standing to enjoin any future queries of that metadata.”

⁷ Indeed, the United States Court of Appeals for the Second Circuit recently held that Verizon Business Network Solutions’ subscribers have standing to bring nearly identical claims because evidence of the plaintiffs “call records are indeed among those collected” made it unnecessary to speculate that the government “may in the future collect[] their call records.” *ACLU v. Clapper*, 785 F.3d 787, 801 (2d Cir. 2015). Importantly, there is consensus among public interest privacy advocates across the ideological spectrum that Appellants have violated constitutional rights and statutory law. The Second Circuit’s ruling confirms this widely held belief.

District Court's Order at p. 21. Again, as the District Court ruled, "If the Program is unlawful – and for the reasons discussed herein I believe it is substantially likely that it is – plaintiffs have suffered a concrete harm traceable to the challenged Program and redressable by a favorable ruling. For that reason, I find that the Little plaintiffs have "standing to object to the collection and review of their data." District Court's Order at p. 22. So too should this Court, pursuant to its own guidelines and prior rulings.

2. The Bulk Collection of Metadata Constitutes a Search Within the Meaning of the Fourth Amendment and Is Unreasonable.

First, the Appellants continue to falsely represent that this "almost-Orwellian" spy program does not violate the Fourth Amendment based on their misinterpretation and analysis of *Smith v. Maryland*, 442 U.S. 735 (1979). The District Court, however, addressed this at length and ruled that "[t]he question before me is *not* the same question that the Supreme Court confronted in *Smith*." (emphasis in original). District Court's Order of December 16, 2015 at 44. Indeed, "whether the installation and use of a pen register constitutes a 'search' within the meaning of the Fourth Amendment," *Smith*, U.S. 735 at 736 – under the circumstances addressed and contemplated in that case – is a far cry from the issue in this case." District Court's Order of December 16, 2015 at 44.

Second, "[l]eft undecided – indeed wholly untouched – was the question of whether a program that indiscriminately collects citizens' telephone metadata

constitutes an unconstitutional search under the Fourth Amendment,” in this Court’s Order of August 28, 2015 vacating the District Court’s preliminary injunction on *standing* grounds only and remanding it back to the District Court for further *discovery* proceedings. See District Court’s Order of November 9, 2015 at 12. As such, the District Court’s prior companion Order of December 16, 2013, in which the court “[could not] imagine a more ‘indiscriminate’ and ‘arbitrary invasion’ than this systematic and high-tech collection and retention of personal data on virtually every single citizen for the purposes of querying and analyzing it without prior judicial approval,” *id.* at 64, is controlling law, should the Appellants decide to proceed with full appeal, not this poorly thought-out, desperate, defiant and abbreviated, last minute Emergency Motion to Stay. Indeed, “[t]he basic purpose of th[e Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against *arbitrary invasions by governmental officials.*” *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967) (emphasis added).

As the District Court ruled:

As to the merits of plaintiffs’ claims, I found it significantly likely that plaintiffs would be able to prove that the Program violated their reasonable expectation of privacy and therefore was a Fourth Amendment Search. *Id.* at 30-37. I held, moreover, that the Program likely failed to meet the Fourth Amendment’s reasonableness requirement because the substantial intrusion occasioned by the Program far outweighed any contribution to national security. *Id.* at 37-42. Because the loss of constitutional freedoms is an ‘irreparable

injury’ of the highest order, and relief to two of the named plaintiffs would not undermine national security interests, I found that a preliminary injunction was not merely warranted – it was *required*. *Id.* at 42-43. Cognizant, however, of the ‘significant national security interests at stake,’ and optimistic that our Circuit Court would expeditiously address plaintiffs’ claims, I voluntarily stayed my order pending appeal. *See id.* at 43-44.

District Court’s Order at p. 11.

D. Other Parties Will Be Harmed if a Stay is Granted

The harm to Appellees is significant, as they have suffered greatly from extensive delays and continuous constitutional violations. These systematic and continuous abuses impede on their daily lives by chilling their speech, chilling normal telephone activities, chilling conversations with potential clients, and other debilitating and violative corruptions. “It has been long established that the loss of constitutional freedoms, ‘for even minimal periods of time, unquestionably constitutes irreparable injury.’” *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). This Court in *Mills* was confronted with an alleged constitutional violation of a “Neighborhood Safety Zones” traffic checkpoint for vehicles entering into a high-rime area of Washington, D.C. *Id.* at 1306. This Court relied on the actual violation itself, stating that if a violation is found, injury is presumed. As such, Appellees will continue to be harmed if a stay is granted.

III. CONCLUSION

Appellants' *modus operandi* is clear: to further delay their obligation to abide by the Constitution and the District Court's Orders. This honorable Court must see through Appellants' Emergency Motion and deny it. After two long years since the Appellants were originally preliminarily enjoined, and given the District Court's admonitions and warnings to take steps to allow its preliminary injunction to be implemented should their appeal of the original preliminary injunction not prevail, the Appellants' belated claims that they are powerless to obey the law ring more than hollow. Given their history of making false statements to Congress, the courts, and the American people, Appellants must finally be held to account, at least to the Little Appellants. This is hardly too much to ask of our sophisticated yet lawless spy agencies.

Appellees respectfully request oral argument.

Dated: November 12, 2015

Respectfully submitted,

/s/ Larry Klayman

Larry Klayman, Esq.

General Counsel

Freedom Watch, Inc.

D.C. Bar No. 334581

2020 Pennsylvania Ave. NW, Suite 345

Washington, DC 20006

Tel: (310) 595-0800

Email: leklayman@gmail.com

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2015, I caused the foregoing document to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. I further certify that on the same day, I served the foregoing document on the following counsel by electronic service via the CM/ECF system.

DOUGLAS N. LETTER
H. THOMAS BYRON III
(202) 616-5367
CATHERINE H. DORSEY
(202) 514-3469
Attorneys, Appellate Staff
Civil Division, Room 7236
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Respectfully submitted,

/s/ Larry Klayman
Larry Klayman

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LARRY E. KLAYMAN, ET AL.,)	
)	
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)	
vs.)	Washington, D.C.
)	October 8, 2015
BARACK H. OBAMA, II, ET AL.,)	2:30 p.m.
)	
Defendants.)	
)	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE RICHARD J. LEON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	Larry E. Klayman John Moseley PRO SE LAW OFFICES OF LARRY KLAYMAN 2020 Pennsylvania Avenue, NW Suite 345 Washington, D.C. 20006 (310) 595-0800 Leklayman@gmail.com
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For the Defendant:	James J. Gilligan U.S. Department Of Justice Civil Division, Federal Programs Branch 20 Massachusetts Avenue, NW Room 5138 Washington, D.C. 20001 (202) 514-3358 james.gilligan@usdoj.gov
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1 Earls case, where drug testing was held to be reasonable,
2 the Supreme Court didn't ask for specific examples of drug
3 abuse being prevented by the program in question. The
4 analysis was more, is this program, is this something that
5 will meet the government's -- the special need?

6 It was a tailoring analysis that the Court did,
7 rather than an empirical search through actual evidence.

8 Unfortunately, Your Honor, we submitted what we
9 could in unclassified terms, and there isn't a mechanism.

10 THE COURT: Well, I can receive classified
11 information.

12 MS. BERMAN: Your Honor, unfortunately, in a case
13 like this, there's no mechanism for the government to
14 litigate the merits of a case on classified evidence.

15 But we would submit, Your Honor, in the
16 declaration provided by the FBI, the FBI attests that this
17 program is useful, especially in the current threat
18 environment, in its goal of detecting and disrupting these
19 small-scale attacks.

20 THE COURT: But you can't show the Court a single
21 instance where it has.

22 MS. BERMAN: Unfortunately not, Your Honor.

23 THE COURT: Because they're unwilling to or unable
24 to.

25 Who wrote the declaration?

1 MS. BERMAN: Your Honor, the FBI submitted the
2 declaration.

3 THE COURT: But who, a person at what level, an
4 assistant director?

5 MS. BERMAN: I believe that's correct, Your Honor.
6 I would have to take a look. May I have a moment?

7 THE COURT: Sure.

8 MS. BERMAN: Deputy Assistant Director,
9 Your Honor.

10 THE COURT: Deputy Assistant Director. So that's
11 about a level 4 or 5 down from the director, something like
12 that?

13 MS. BERMAN: I'm uncertain, Your Honor.

14 THE COURT: Yeah, well, it's probably about three
15 to four levels below the director.

16 Does he or she represent that they are aware of
17 any instances where it occurred? Without saying what they
18 are. Where it actually, actually was helpful in foiling
19 some plot?

20 MS. BERMAN: Your Honor, the declaration is not
21 that specific.

22 It does say that this program is being used by the
23 FBI.

24 THE COURT: Well, we know it's being used.
25 The FBI uses whatever it can use to do whatever it can do to

1 protect our country.

2 MS. BERMAN: And it also says, Your Honor, that it
3 is more significant now than it was before because of the
4 changes to the threat environment.

5 THE COURT: That sounds lovely, but that's not
6 very helpful.

7 MS. BERMAN: But, Your Honor, to the extent that
8 the Court is looking for a specific named example, the
9 Supreme Court's jurisprudence on this -- in particular,
10 *Chandler versus Miller*, that case where the Court said there
11 aren't specific facts here, the Court was talking about that
12 there aren't specific facts to support that there was a
13 problem there to be addressed, that there was a special
14 government need. And here, unfortunately, the problem is
15 very real.

16 Furthermore, Your Honor, Congress received
17 testimony about this from the intelligence community.

18 THE COURT: Does the declaration -- I haven't,
19 obviously, seen it yet. But does the declaration state what
20 the practical consequence would be for the four weeks?
21 The program is going to end in four weeks, five weeks.
22 End of November, right?

23 MS. BERMAN: November 29th, Your Honor.

24 THE COURT: Six weeks, roughly.

25 What's the practical effect would be of curtailing