IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LARRY KLAYMAN, *et al*,

Plaintiffs,

v.

BARACK OBAMA, *et al*,

Defendants.

Civil Action Nos. 13-cv-0851 (RJL)
13-cv-0881 (RJL)

ORAL ARGUMENT REQUESTED

PLAINTIFFS' OPPOSITION TO GOVERNMENT DEFENDANTS' MOTION TO DISMISS *KLAYMAN I* AND *KLAYMAN II* FOR LACK OF SUBJECT MATTER JURISIDICTION[1] AND REQUEST FOR ORAL ARGUMENT

Respectfully submitted,

/s/ Larry Klayman

Larry Klayman, Esq.
KLAYMAN LAW GROUP
D.C. Bar No. 334581
2020 Pennsylvania Ave. NW, Suite 800
Washington, DC 20006
Tel: (561) 558-5536
Email: leklayman@gmail.com

Attorney for Plaintiffs

[1] As the Government Defendants submitted identical briefs for both 13-cv-0851 ("*Klayman I*") and 13-cv-0881 ("*Klayman II*"), Plaintiffs submit the same brief in opposition to both. For clarity purposes, the Government Defendants' Motion to Dismiss will be referred to as "Def's Mtn."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

MEMORANDUM OF LAW

I. INTRODUCTION

As this Court has undeniably already recognized, this is the case at the pinnacle of national importance. Despite the passage of the USA FREEDOM Act, which this Court's decisions played a key role in, the issues set forth initially in 2013 are still as pressing, if not even more so, today. Even now, given the rise of ISIS, there is a strong sentiment to repeal the USA FREEDOM Act, which would put the intelligence agencies and the public back at square one. While the media is focused on the so-called Russian election hacking "scandal," it ignores the fact that our own Government has committed the biggest violation of constitutional rights in American history, leaving the intelligence agencies free to continue their pattern and practice of violating the law in its intelligence gathering operations. As Plaintiff Klayman argued in front of this Court on November 18, 2013, "[w]e have never seen in the history of this country this kind of violation of the privacy rights of the American citizens. We live in an Orwellian state." *Klayman I*, Docket No. 41 at 17. This Court concurred, finding, "…the almost-Orwellian technology that enables the Government to store and analyze the phone metadata of every telephone user in the United States is unlike anything that could have been conceived in 1979." Docket No. 48 at 49. *See also id*. at 41 ("…empower the government to conduct wide-ranging 'DNA dragnets' that raise justifiable citations to George Orwell"). This Court's rulings on the Forth Amendment to the Constitution are "set in stone," and constitute the law of the case.

The intelligence agencies' conscious disregard for the law has been ongoing for decades, and there is no reason to believe that, all of a sudden, they will begin to respect the constitutional rights of Plaintiffs, and all Americans. Indeed, even today, President-elect Donald Trump credibly accused outgoing CIA Chief, John Brennan, who worked with James Clapper, the

Director of National Intelligence, of leaking false news reports and classified information to the media in an attempt to undermine him.[2] Trump wrote, "'Outgoing CIA Chief, John Brennan, blasts Pres-Elect Trump on Russia threat. Does not fully understand.' Oh really, couldn't do…much worse – just look at Syria (red line), Crimea, Ukraine and the build-up of Russian nukes. Not good! Was this the leaker of Fake News?"[3] The National Security Agency ("NSA") even published on its own website, in 2014, a report detailing instances of its own unauthorized and illegal surveillance practices.[4] These forced admissions of illegality are clearly only the "tip of the iceberg" when it comes to the intelligence agencies' pattern and practice of conducting illegal and unconstitutional surveillance on Americans. Crucially, there is absolutely nothing to indicate that this illegal behavior has stopped, or even slowed down.

In 2014, the Honorable Reggie Walton, who is now a member of this Court wrote a scathing opinion and order, accusing intelligence agencies of callous and lawless disregard for the truth and the law, while he was part of the Foreign Intelligence Services Court. ("Walton Order"). A true and correct copy of the Walton Order is attached hereto as **Exhibit A**. At the heart of the Walton Order was the Department of Justice's (in representing the intelligence agencies) blatant misrepresentations on behalf of the NSA and other intelligence agencies, to the FISC court regarding whether certain parties had made requests to have their collected metadata preserved for litigation. Despite the fact that the parties, Jewel and First Unitarian, had contacted

---

[2] Ryan Saavedra, *Trump Slams Failed CIA Chief*, Gateway Pundit, Jan. 15, 2017, available at: http://www.thegatewaypundit.com/2017/01/trump-blasts-outgoing-cia-chief-john-brennan-leaker-fake-news/.

[3] Eli Watkins, *Donald Trump Slams CIA Director Brennan Over Plea for 'Appreciation' of Intel Community*, CNN, Jan. 16, 2017, available at: http://www.cnn.com/2017/01/15/politics/john-brennan-cia-donald-trump/

[4] Kukil Bora, *NSA Reports Show Agency May Have Violated Laws For a Decade by Spying on Americans*, IBT, Dec. 25, 2014, available at: http://www.ibtimes.com/nsa-reports-show-agency-may-have-violated-laws-decade-spying-americans-1767104

the government and made a "specific request" that the government inform the FISC of their existence, the government lies in a later pleading, stating that the parties "did not make a 'specific request' that the government inform this Court about the preservation orders…." Walton Order at 7. Judge Walton writes scathingly about the Department of Justice's deception, stating that, "[a]s the government is aware, it has a heightened duty of candor to the Court in *ex parte* proceedings. Regardless of the government's perception of the materiality of the preservation orders in Jewel and Shubert to its February 25 Motion, the government was on notice, as of February 26, 2014, that the plaintiffs in Jewel and First Unitarian believed that orders issued by the U.S. District Court for the Northern District of California required the preservation of the FISA telephony metadata at issue in the government's February 25 Motion." Walton Order at 8.

> The government, upon learning this information, should have made the FISC aware of the preservation orders and of the plaintiffs' understanding of their scope, regardless of whether the plaintiffs had made a "specific request" that the FISC be so advised. Not only did the government fail to do so, but the E-mail Correspondence suggests that on February 28, 2014, the government sought to dissuade plaintiffs' counsel from immediately raising this issue with the FISC or the Northern District of California.

Walton Order at 8-9 (emphasis added). Thus, as Judge Walton found, not only did the Department of Justice, in representing the intelligence agencies, blatantly attempt to deceive the court regarding its preservation obligations, it actively tried to cover up its deception by trying to "dissuade plaintiffs' counsel from immediately raising this issue." Walton Order at 9. This clearly demonstrates the lengths to which the intelligence agencies are willing to go to, in this case, destroy data that might be used as evidence of their illegal activities against them.[5]

[5] This Court has already made reference to the intelligence agencies' extensive pattern and practice of disregard for the law and Constitution. For instance, this Court found that "Judge Reggie Walton of the FISC concluded that the NSA had engaged in 'systematic noncompliance'

Incredibly, the Director of National Intelligence, James Clapper, has gone so far as to brazenly lie in front of Congress regarding the NSA's pattern and practice of running rampant through the constitutional rights of Americans and illegally conducting massive spying operations.[6] Such a blatant and brazen lie under oath is indicative of the intelligence agencies' pattern and practice of dishonest behavior, which has led for critics, such as Sen. Rand Paul to call for Clapper's resignation over the incident, which "amounts to perjury."[7]

---

with FISC-ordered minimization procedures…." *Klayman I*, Docket No. 48 at 21. "As a consequence, Judge Walton concluded that he had no confidence that the Government was doing its utmost to comply with the court's orders…." *Id*. at 22. "In October 2011, the Presiding Judge of the FISC, Judge John Bates, found that the Government had misrepresented the scope of its targeting of certain internet communications" and "Judge Bates wrote: 'the Court is troubled that the government's revelations regarding NSA's acquisitions of Internet transactions mark the third instance in less than three years in which the government has disclosed a substantial misrepresentation regarding the scope of a major collection program." *Id*. at 22-23 (emphasis added). In addition, Plaintiffs' pleadings have contained many more examples of the intelligence agencies' pattern and practice of running rampant through the constitutional rights of Americans. For instance, Plaintiffs set forth, "More than deeply troubling are the number of misleading statements senior officials have made about domestic surveillance and the extent of Defendants' false misrepresentations and blatant lies. These officials have engaged in obstruction of justice, with impunity." *Klayman I*, Docket No. 13-1 at 6. "As Judge Bates emphasized, '[c]ontrary to the government's repeated assurances, N.S.A. has been routinely running queries of the metadata using querying terms that did not meet the standard for querying,' and that this requirement had been 'so frequently and systematically violated that it can fairly be said that this critical element of the overall…regime has never functioned effectively.'" *Id*. at 7. Furthermore, "[i]n her Amended Memorandum Opinion, dated August 29, 2013, the Honorable Claire V. Eagan recognized and acknowledged Defendants' repeated lack of adherence to minimization procedures implicit in the authorization to compel production of the documents, stating, '[t]he Court is aware that in prior years there have been incidents of non-compliance with respect to NSA's handling of produced information.' *Id*. at 8. "NSA Inspector General George Ellard admitted that since 2003, there have been '12 substantiated instances of intentional misuse' of 'surveillance authorities.' *Id*. at 8-9. These are only a few examples, that do not come anywhere near to an exhaustive list of the intelligence agencies' pattern and practice of running rampant through the constitutional rights of Americans by using illegal and unconstitutional surveillance practices.

[6] Julian Hattem, *Attorney: Spy Chief Had 'Forgotten' About NSA Program When he Mislead Congress*, The Hill, May 8, 2015, available at: http://thehill.com/policy/technology/241508-spy-head-had-absolutely-forgotten-about-nsa-program

[7] *Id*.

This pattern and practice of blatant dishonest and lawless behavior has also been manifest over the course of this litigation, as this Court explicitly found, regarding Defendants, "[c]andor of this type defies common sense and does not exactly inspire confidence!" *Klayman I*, Docket No. 48 at 38. *See also id.* at 62, n. 64 ("Such candor is as refreshing as it is rare."). For that reason, it is of paramount importance that this matter be allowed to proceed, discovery take place, an evidentiary hearing held, and a permanent injunction granted against the Government Defendants, preventing them from conducting illegal and unconstitutional surveillance practices. This Court is the last line of defense against these illegal and unconstitutional surveillance practices, and has the golden opportunity to create a real, meaningful deterrent to illegal and unconstitutional surveillance practices by granting Plaintiffs' request for a permanent injunction and subjecting Defendants to oversight by the Court and to criminal contempt if further violations occur.

Indeed, there is no evidence that the intelligence agencies' pattern and practice of illegal and unconstitutional spying has even had any deterrent effect on threats to national security and achieved the purposes that it was set out to achieve. This Court already found as much, holding that, **"[f]or reasons already explained, I am not convinced at this point in the litigation that the NSA's database has ever truly served the purpose of rapidly identifying terrorists in time sensitive investigations…."** *Klayman I*, Docket No. 48 at 66.

Essentially, Defendants falsely hide behind the premise of "national security issues" and misleadingly and disingenuously raise the "classified" defense against any evidence that is harmful to their assertions. First and foremost, it is crucial to note that the Government Defendants have not certified that this matter would compromise national security. Furthermore, this matter can certainly be litigated effectively while still being mindful of even "classified"

information. Indeed, the Honorable Richard Leon has a security clearance, which would allow for him to review any evidence that the Government Defendants may deem "classified." This Court has recognized this fact, and stated that, "[t]he Government could have requested permission to present additional, potentially classified evidence *in camera*, but it chose not to do so." This is especially significant, as this Court has already found that "[t]he Government…describes the advantages of bulk collection in such a way as to convince me that plaintiffs' metadata—indeed *everyone's* metadata—is analyzed, manually or automatically…." *Klayman I*, Docket No. 48. at 39. As stated on the record during the September 2, 2015 Status Hearing, counsel for Plaintiffs argued:

> Let me just mention briefly, if I may…that to get to the issue of their having my metadata and the other plaintiffs is simple. Either you can grant discovery that I can take that dep [sic]…I can take that discovery directly from them. You have the power. You have a national security clearance, Your Honor. You can call the NSA in. You can call Verizon in, and you can confirm that with them, ask them, in camera, you have Klayman's data, don't you?

This Court was in agreement, stating, "[y]eah, I would think it would be pretty simple. I would be shocked, and frankly disappointed if the counsel at that table right now didn't know the answer to that question, who is the person at NSA who can give me the answer: Was there metadata harvested?" *Klayman II*, Docket No. 106-2 at 24-25. This bad-faith refusal alone should serve as grounds for denying the Government Defendants' Motion to Dismiss, as Plaintiffs must, at a minimum, be allowed to take appropriate discovery as to whether their metadata was collected. It would be entirely inequitable, and in fact, non-sensical, for the Government Defendants to hide behind the so-called "classified" defense, even after being given the opportunity for *in camera* review—which they vehemently denied—and merely take their word that Plaintiffs' metadata was never collected, especially given the intelligence agencies'

longstanding pattern and practice of illegal and unconstitutional behavior. Discovery is therefore necessary.[8]

For these reasons, it is also clearly evident that the claims asserted by Plaintiffs are not moot. In fact, these issues are as pressing, if not more so today, than when this matter was initiated in 2013, given the political climate both domestically and abroad. The intelligence agencies' long-standing pattern and practice of consciously disregarding the law and Constitution in its surveillance practices, set forth briefly above, is widely-known. Thus, it is clear that despite the fact that Defendants themselves state that these illegal and unconstitutional practices have ceased, it is impossible to take that assertion at face value. This would defy all logic and contravene all reason. Indeed, if the intelligence agencies have truly ceased their illegal and unconstitutional surveillance practices, they should have no issue with a permanent injunction being granted to that effect to simply preserve the status quo under the Fourth Amendment to the Constitution, which is sacrosanct. Taking the Government Defendants' assertions at face value, any such injunction would—hypothetically—never be violated. Instead, however, the Government Defendants strongly oppose any such injunction, as evidenced by their Motions to Dismiss. Thus, it is incumbent upon this Court to stand as the last line of defense against the illegal and unconstitutional surveillance practices of the intelligence agencies,

[8] Furthermore, counsel for Plaintiffs had previously filed a motion for Dennis Montgomery ("Montgomery") to be interviewed in chambers, *ex parte*. *Klayman I*, Docket No. 129. Plaintiff renews this motion at this time. Montgomery "has attempted to alert appropriate government authorities that surveillance goes beyond what whistleblower Edward Snowden disclosed. In fact, the surveillance has even harvested the records of judicial, congressional, and executive government officials." *Id*. at 1. Montgomery is aware that this Court's as well as Plaintiff Klayman's metadata has been harvested, and his testimony will not only serve as additional evidence of Plaintiffs' standing, but will show exactly how far the wide-ranging illegal and unconstitutional surveillance practices of the intelligence agencies really go. *See This MLK Day The Corrupt Obama Intelligence Heads Must Be Held Legally Accountable*, Jan. 16, 2017, available at: https://www.youtube.com/watch?amp;v=FYPu-kkxiVE

something that other courts and the media are either afraid or unwilling to do. As such, the Government Defendants' Motion to Dismiss must be denied, and this matter must be allowed to proceed.[9]

II. LEGAL STANDARD

The Government Defendants move to dismiss under Fed. R. Civ. P 12(b)(1)—that this Court lacks subject-matter jurisdiction to hear Plaintiffs' claims. Specifically, the Government Defendants move to dismiss *Klayman I* and *Klayman II* on jurisdictional grounds, contending that Plaintiffs lack standing to assert their various claims and that certain claims that Plaintiffs have asserted are moot.

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.' As we have explained, '[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (U.S. 2013). "To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Id*. at 1147. As the Supreme Court has held, the "imminence" requirement for future injury is an "elastic concept." *Id*. The Supreme Court has found Article III standing where a party merely shows a "reasonable probability" that future harm will occur." *Monsanto Co. v. Geertson Seed Farms*, 177 L. Ed. 2d 461, 466 (U.S. 2010). *See also Davis v. FEC*, 554 U.S. 724,

[9] As this Court previously dismissed the Individual Defendants without prejudice on the basis that they were improperly served, this Brief only substantively responds to the issues set forth in Government Defendants' Motion to Dismiss. As set forth *infra* section III(a), Plaintiffs maintain that the Individual Defendants were properly served, but also request that this Court allow adequate time for the Individual Defendants to be served according to this Court's instruction, now that they will soon be private citizens, and therefore no longer protected by the "shield" of the Federal Government. This will allow this matter, which is at the "pinnacle of national importance," to proceed substantively against the Individual Defendants.

734 (U.S. 2008) ("A plaintiff may challenge the prospective operation of a statute that presents a realistic and impending threat of direct injury.") "Moreover, courts have often found probabilistic injuries sufficient to support standing." *Amnesty Int'l USA*, 133 S. Ct. at 1162. Even more, the U.S. Court of Appeals for the District of Columbia Circuit has found standing merely upon just an increased risk of future injury. *See Mountain States Legal Found. v. Glickman*, 92 F.3d 1228 (D.C. Cir. 1996). Accordingly, the bar set by this Court and the Supreme Court to find standing for a threatened future injury is undeniably, low. Certainly, a finding that the threatened injury is "certainly impending" is not required. *Klayman I*, Docket No. 48 at 62, n. 65.

III. LEGAL ARGUMENT

a. The Individual Defendants Should Not Have Been Dismissed and Plaintiff Should Be Allowed to Perfect Service

On September 20, 2016, this Court dismissed Barack Obama, Eric Holder, Keith Alexander, and Roger Vinson (collectively the "Individual Defendants" unless individually named) without prejudice on the grounds that they had not been properly served as individuals pursuant to Fed. R. Civ. P. 4(e). (the "Dismissal Order") Plaintiffs maintain that the Individual Defendants were, in fact properly served, as it is undeniable that the Individual Defendants received actual notice of the pending litigation, as evidenced by their active participation in all of the matters at bar. The Individual Defendants, through counsel, have filed numerous pleadings, motions, oppositions, and responses. As this Court found in the Dismissal Order, Plaintiffs effectuated service through certified mail to each of the Defendants' workplaces. "Their return receipts for President Obama and Director Alexander have what appear to be stamps from the White House and NSA mailrooms. For Attorney General Holder and Judge Vinson, the return receipts both contain what seems to be the same signature of someone in the Justice Department…." Dismissal Order at 3. However, the Individual Defendants' disingenuous claim

that the recipients of service were not authorized to accept service of process is clearly nothing more than a delay tactic—the Individual Defendants are playing games by pretending they have not been served.

However, even if this Court maintains that the Individual Defendants were not properly served, Plaintiffs must be allowed to perfect service instead of being made to suffer the extreme prejudice of dismissal. Indeed, any delay in service can be attributed to the long stays that were granted in these matters and the fact that Plaintiffs have made good faith efforts to serve the Individual Defendants, and maintain the position that they were, indeed, properly served. Crucially, any "deficiency" in service can be attributed largely to the Individual Defendants' status as government officials, which has allowed them to hide behind the shield of the government and avoid service. Now that the Obama administration is coming to a close, the Individual Defendants become private citizens, and Plaintiffs will have no problem personally delivering copies of the operative complaints to the individual Defendants once they no longer enjoy the buffer that their jobs provide. Thus, Plaintiffs will be moving the Court to allow Plaintiffs adequate time to personally serve the Individual Defendants, in their individual capacity, now that they will soon become private citizens, and allow this crucial matter to proceed substantively.

b. <u>Plaintiffs Have Undeniably Been the Target of Illegal Surveillance Activity by the Government</u>

i. Larry Klayman

As set forth in *Klayman II*, Klayman "frequents and routinely telephones and e-mails individuals and high ranking government officials in Israel, a high-conflict area where the threat of terrorism is always present." Docket No. 106-1 ¶ 12. Specifically, Klayman has alleged that he communicates via telephone and e-mail with (1) Mark Regev, the press secretary for Prime

Minister Benjamin Netanyahu, (2) Ron Nachman, the former mayor of Ariel, Israel, (3) Danny Danon, a member of Israel's legislative body who is currently serving as the Deputy Minister of Defense, and (4) Aaron Klein, a reporter who hosts a radio show on WABC in New York, which originates in Israel. Docket No. 106-1 ¶¶ 13-16. Furthermore, Klayman has alleged:

> Plaintiff Klayman also telephoned and e-mailed individuals within Spain in preparation for his visit to Spain in July of 2012 where he met with prominent human rights lawyers to discuss bringing an action against the Islamic Republic of Iran and its officials for violations of human rights. Plaintiff continued communication with those he met in Spain following his visit. Prior to this, Plaintiff Klayman telephoned and e-mailed individuals in India in preparation for his trip to India in 2007, where he served process on the Prime Minister of India. Similarly, in May of 2012, Plaintiff Klayman traveled to the headquarters of the Organization of the Petroleum Exporting Countries ("OPEC") located in Vienna, Austria in order to personally serve it with process and has made calls to Austria in this regard. Among OPEC's members is the Islamic Republic of Iran, and other Islamic states, which further, harbor and/or have close ties to terrorism. In fact, the oil revenues of OPEC help fund terrorism and terrorists bent on destroying the United States, its ally Israel, and other western and European interests. Plaintiff Klayman also routinely sends and receives e-mails and telephone communications to and from Italy, France, Great Britain, Morocco, Germany, Belgium and other European Union nations which have very large Muslim populations and where terrorist cells are located and thus where terrorist attacks have been perpetrated resulting in numerous deaths and maimed persons.

Docket No. 106-1 ¶ 17.

ii. Charles Strange and Mary Ann Strange

Charles Strange and Mary Ann Strange ("Strange Plaintiffs") are the parents of Michael Strange, a Navy cryptologist assigned to SEAL Team VI who was killed when his helicopter was shot down by Taliban jihadists in Afghanistan on August 6, 2011. *Klayman II*, Docket No. 106-1 ¶ 19. The Strange Plaintiffs have pled, "[o]n information and belief, Defendants have accessed [their] records particularly since these Plaintiffs have been vocal about their criticism of President Obama as commander-in-chief, his administration, and the U.S. military regarding the circumstances surrounding the shoot down of their son's helicopter in Afghanistan, which

resulted in the death of [their] son…." *Id*. To that extent, the Strange Plaintiffs also specifically allege that they "make telephone calls and send and receive e-mails to and from foreign countries and have received threatening e-mails and texts from overseas, in particular Afghanistan." *Id*.

iii. Michael Ferrari, Matt Garrison, and J.J. Little

As set forth in *Klayman II*, Plaintiffs Michael Ferrari, Matt Garrison, and J.J. Little all make and receive telephone calls and send and receive emails to and from foreign countries. Docket No. 160-1 ¶¶ 20-22. Plaintiffs Ferrari and Garrison are both renowned private investigators and Plaintiff Little is a criminal defense lawyer who has litigated against the Government on behalf of his clients. "Each and every Plaintiff uses and subscribes to the enumerated telephonic, Internet, and social media communications providers and uses these services both domestically and internationally." *Klayman II*, Docket No 106-1 ¶ 23.

c. Plaintiffs' Claims Under the Section 215 Program Are Not Moot and Plaintiffs Have Standing to Bring those Claims

i. Plaintiffs' Claims Are Not Moot Under the Doctrine of Voluntary Cessation

The Government Defendants erroneously contend that Plaintiffs' claims for declaratory and injunctive relief against the Section 215 program present no live case or controversy because they are moot. The Government Defendants reason that Plaintiffs' requests are moot solely because Congress has enacted legislation prohibiting the bulk collection of records about their phone calls and the querying of the records collected under the Section 215 program when the USA FREEDOM Act of 2015 was passed ("Freedom Act"). However, what the Government Defendants conveniently fail to set forth is that the Freedom Act is replete with loopholes that create plenty of "wiggle room" for the intelligence agencies to continue to operate unchecked, and in many ways actually expands the scope of wide-scale unconstitutional surveillance on

Americans. First, the Freedom Act creates extremely broad "emergency" powers that allow the intelligence agencies to collect all kinds of personal data without prior court approval. *See* Section 102 ("Emergency Authority"). Critics of the Freedom Act have recognized these expansive loopholes, stating that, "[t]he latest draft opens up an unacceptable loophole that could enable the bulk collection of Internet users' data..."[10] A letter sent to Congress by a bipartisan coalition of 60 advocacy groups summarizes the Freedom Act perfectly:

> The USA Freedom Act has significant potential to degrade, rather than improve, the surveillance status quo… At best, even if faithfully implemented, the current bill will erect limited barriers to Section 215, only one of the various legal justifications for surveillance, create additional loopholes, and provide a statutory framework for some of the most problematic surveillance policies, all while reauthorizing the Patriot Act.[11]

In addition to the expansive "wiggle room" and loopholes explicitly written into the Freedom Act, which maintain the status quo, if not expand the scope of wide-scale surveillance, the Government Defendants have engaged in a longstanding pattern and practice of ignoring existing law and acting in an unchecked capacity in its intelligence collection efforts, as set forth in the Introduction. As such, any argument that Plaintiffs have been rendered moot by passage of the Freedom Act under *ABA v. FTC*, 636 F.3d 641 (D.C. Cir. 2011) is erroneous under the doctrine of voluntary cessation. **Clearly, with the incontrovertible loopholes built into the Freedom Act, any cessation of the Government Defendants' illegal and unconstitutional conduct would be voluntary, at best**.

---

[10] Christian Brazil Bautista, *Congress Passes Bill That May Allow the NSA to Continue Gathering Phone Records*, Digital Trends, May 22, 2014, available at: http://www.digitaltrends.com/mobile/congress-passes-nsa-reform-bill/

[11] James Richard Edwards, *The USA Freedom Act Eroding America's Rights*, Communities Digital News, Jun. 5, 2015, available at: http://www.commdiginews.com/politics-2/the-usa-freedom-act-eroding-americas-rights-42779/

The court in *ABA* recognized that voluntary cessation is an exception to the doctrine of mootness. *Id*. at 647-48.

> As a general rule, a defendant's 'voluntary cessation of allegedly illegal conduct does not deprive [a court] of power to hear and determine the case.' Voluntary cessation will only moot a case if 'there is no reasonable expectation . . . that the alleged violation will recur' and 'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.' The defendant carries the burden of demonstrating 'that there is no reasonable expectation that the wrong will be repeated,' and '[t]he burden is a heavy one.'

Id. at 648 (internal citations omitted). As set forth in *ABA*, the Defendant has the heavy burden of showing that there is no reasonable expectation that the wrong will be repeated, *id*, which the Government Defendants cannot come close to meeting. Indeed, the Government Defendants have engaged in a longstanding pattern and practice of acting outside of the law and ignoring the Constitution when conducting intelligence gathering, and there is therefore no reason to believe that the passage of the Freedom Act will do anything to curtail this. Indeed, the Freedom Act does little to limit the scope of illegal and unconstitutional surveillance, leaving significant loopholes that the intelligence agencies, have and will undoubtedly continue to, exploit. Importantly, this is the Government Defendants' burden to show, and they have not done so. The second element of voluntary cessation—complete eradication of the effects of the alleged violation—are also met by the passage of the Freedom Act, as it clearly now—on paper—prohibits the activity that Plaintiffs seek to enjoin. In actuality, however, only permanent injunctive relief will do anything to curtail the ongoing and future instances of illegal and unconstitutional surveillance.

In *ABA*, the court held that the voluntary cessation doctrine did not apply when the "Clarification Act" expressly amended the definition of a creditor under the "FACT Act." *Id*. at 646. The American Bar Association was challenging the inclusion of law firms and legal

professionals as creditors under the FACT Act, but this challenge was mooted out when the definition of creditor was amended to not include legal professionals. Unlike the instant matter, in *ABA* there was no evidence that the FTC had engaged in a pattern and practice of disregarding the law, or that there was any risk that the FTC would continue to exercise its Extended Enforcement Policy to include legal professionals as creditors. As such, the Court held that the voluntary cessation exception did not apply. Here, however, the Government Defendants have, indeed, engaged in a longstanding pattern and practice of operating outside of the law and Constitution in its intelligence gathering efforts, and as such, the risk of the continued employment of the methods that Plaintiffs seek to enjoin is very real. The Government Defendants simply cannot show that there is no "reasonably expectation" that the conduct will not be repeated, as set forth by *ABA*. The Government Defendants' contention that they are not "free" to recommence broad collection of metadata and to query the collected data are disingenuous at best, given the enormous loopholes contained in the Freedom Act. Furthermore, even if the Freedom Act did, in a literal sense, prohibit wide-scale illegal and unconstitutional surveillance of Americans, prohibiting law has has never stopped the intelligence agencies in the past, and there is no reason to believe that it will do so in the future. As such, the Government Defendants cannot rely on the mootness doctrine, and permanent injunctive relief from this Court is therefore necessary.

ii. Government Defendants Misstate Plaintiffs' Position Regarding Expungement of Bulk Telephony Metadata Collected Under Section 215

Plaintiffs do not contend that the Government Defendants are not bound by the preservation obligations in this litigation and Plaintiffs do not seek expungement of their collected bulk telephony metadata while this litigation and any possible appeal is ongoing.

Plaintiffs also do not seek expungement of the collected bulk telephony metadata of any non-parties to this litigation. Plaintiffs only seek expungement of their own collected bulk telephony metadata, and only after full and final resolution of all claims set forth against all Defendants, including the individual Defendants, in *Klayman I* and *Klayman II*.

In fact, potential expungement serves as a compelling equitable reason why it is improper to dismiss the Government Defendants at this stage. The Individual Defendants have been dismissed, without prejudice, for what this Court has deemed to be failure to effectuate service. Plaintiffs arguments on this matter have been set forth previously, *supra* section III(a), but should this Court grant dismissal as to the Government Defendants in disposition of the instant motion, the Government would be free to delete Plaintiffs' collected metadata—the hard evidence—and therefore preclude a suit against the Individual Defendants even after they are re-served in accordance with this Court's order. Thus, it is not only essential that the Government Defendants be made to maintain Plaintiffs' collected bulk telephony metadata until final disposition of all of Plaintiffs' claims, it is also imperative that this Court deny the Government Defendants' Motion to Dismiss, which would allow them to purge the evidence against them and preclude any claims against the Individual Defendants from moving forward.

iii. Plaintiffs Have Standing to Challenge the Section 215 Program

Lastly, Plaintiffs clearly have standing to seek permanent injunction relief regarding the Section 215 Program. This Court has already ruled as much in its order of December 16, 2013 granting Plaintiff's Request for Preliminary Injunction. *See Klayman I*, Docket No. 48 at 35-42. Moreover, Plaintiffs still have standing now to challenge the ongoing and future threat of harm resulting from the Section 215 Program. As set forth in *supra* section II, a party seeking relief for future harm need only show a "reasonable probability" that the harm is likely to occur.

Monsanto, 177 L. Ed. at 466. Standing can also be conferred merely on an increased risk of future harm. *See generally Glickman*, 92 F.3d 1228. As this Court has found, the Government Defendants has engaged in a clear pattern and practice of disregarding and ignoring the law as it conducts its surveillance practices and procedures. Thus, it is not enough that merely the law has been written in a way that, on paper, prevents the ongoing and future implementation of the Section 215 program. Because of the high probability that the Government is currently engaged in, and will continue to engage in this illegal behavior, based on the Government's pattern and practice of deception and disregard for the law, permanent injunctive relief is necessary—as Plaintiffs have clearly established at minimum "reasonable probability" that future harm will arise—so that this Court may engage in oversight of the Government's surveillance practices and hold the Government Defendants in contempt if and when a violation is discovered.

At a minimum, Plaintiffs, who were at all relevant times subscribers to Verizon Wireless (and the Little Plaintiffs, who were at all relevant times subscribers to Verizon Business Services), must be allowed to take discovery to determine whether their metadata was, in fact, collected under the Section 215 program. The government has evaded meaningful discovery at every step, even refusing the present evidence *in camera* to alleviate and concerns over classified information. Further evidence of the Government Defendants' bad faith is set forth in the November 18, 2013 Preliminary Injunction hearing before this Court. Counsel for the Government Defendants refused to confirm nor deny whether Verizon Wireless was the subject of the Section 215 Program, starting that, "…the Government has not acknowledged the identities of any carriers who have before or since been participants in the program." Docket No. 41 at 34. This Court strongly opposed this disingenuous and misleading position, finding:

> I mean if the Government holds all the cards, so to speak, there is no way they could -- if your theory of how they -- what they must do, I should say, to

> demonstrate standing is what I believe it is and the Government holds all the cards, they could never essentially unless the Government were to reveal the program as it has acknowledged with the Judge Vincent's order for Verizon Business Services Network, Inc., they could never have standing, could they?

Id. at 34-35. While the Little Plaintiffs' metadata was certainly collected, as Verizon Business subscribers—pursuant to Edward Snowden's report—the remaining Plaintiffs must also be afforded an opportunity to conduct discovery to that effect, as proposed herein. Any assertion that the government makes that Plaintiffs' information was not collected simply cannot be taken at face value, given their longstanding pattern and practice of illegal and unconstitutional surveillance.

d. Plaintiffs Have Standing to Challenge the Bulk Internet Metadata Program

Per the Government Defendants' admission, the NSA engaged in bulk collection of Internet metadata— "certain routing, addressing, and signaling information about Internet-based electronic communications such as e-mail" under FISA Section 402. Def's Mtn. at 10. This program "operated on a very large scale," as per the Government Defendants' own admission. Def's Mtn. at 10. The Government Defendants assert that, in December of 2011, this program was discontinued because it did not meet operational expectations. Def's Mtn. at 11. However, only in June of 2015 did Congress amend FISA Section 402 to prevent its use to collect information in bulk. Def's Mtn. at 11.

The Government Defendants erroneously contend that Plaintiffs lack standing to challenge the Bulk Internet Metadata Program under FISA Section 402 on two grounds: that (1) the NSA ceased this program and destroyed the accumulated metadata in December of 2011, and (2) Plaintiffs cannot show that metadata pertaining to their communications was ever collected under this program. Both contentions are without merit, as discussed below.

First, the Government Defendants' assert that there is no ongoing case or controversy because the program at issue was allegedly discontinued in 2011 because it failed to meet operational expectations. Importantly, however, Congress did not amend FISA Section 402 to prevent its use to collect information in bulk until June of 2015, after this litigation was commenced. The Government Defendants would have Plaintiffs, and this Court, believe that this program was discontinued on their own accord—and submit the declaration of Wayne Murphy in support. Def's Mtn. Ex.1. The fatal flaw in this logic is readily apparent, as a declaration from the Director of Operations of the NSA—a named Defendant—is hardly credible evidence, particularly since the NSA has a history of deceit, lying to this and other courts, and lawless conduct. If Director of National Intelligence James Clapper is willing to lie and commit perjury, under oath, before Congress, it would be foolish to take Mr. Murphy's declaration at face value. This is further reason for discovery. Furthermore, Wayne Murphy, as Director of Operations for the NSA, at least appears to be testifying to information beyond the scope of his personal knowledge, an issue that this Court has already raised with the Government Defendants. During the October 8, 2015 hearing, this Court essentially dismisses a declaration submitted by the Deputy Assistant Director of the FBI, reasoning that the position is "about a level 4 or 5 down from the director…." Docket No. 155 at 34. The Court goes on to say, "[d]oes 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 [terrorist] plot?" *Id*. Thus, for the same reasons set forth above regarding the Section 215 Program, this issue is hardly moot under the doctrine of voluntary cessation.

Next, the Government Defendants contend that Plaintiffs cannot show injury because Plaintiffs cannot show that their information was ever the subject of metadata collection under

this program. However, as established by the U.S. Court of Appeals for the District of Columbia in the seminal case of *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009), "[i]t has long been established that the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'" Indeed, the Government Defendants' bogus contention is based on the fact that the Government itself has never "disclosed any details about its scope of operation or from which providers metadata were collected." Def's Mtn. at 40. Despite this, the Government Defendants readily admit that the program was administered on a "very large scale," which clearly supports the contention that Plaintiffs' data was, in fact, collected. As set forth in detail in *supra* section III(b), Plaintiffs have pled specific details that strongly support their contention that their metadata was, in fact, collected under the Section 402 Program, especially given the Government's own admission that it was conducted on a "very large scale." For instance, Plaintiff Klayman set forth that alleged that he communicates via telephone and e-mail with, among others, (1) Mark Regev, the press secretary for Prime Minister Benjamin Netanyahu, (2) Ron Nachman, the former mayor of Ariel, Israel, (3) Danny Danon, a member of Israel's legislative body who is currently serving as the Deputy Minister of Defense, and (4) Aaron Klein, a reporter who hosts a radio show on WABC in New York, which originates in Israel. Docket No. 106-1 ¶¶ 13-1. All of the persons listed above are highly influential members in or around the government of Israel, "a high-conflict area where the threat of terrorism is always present." Docket No. 106-1 ¶ 12. Furthermore, the Strange Plaintiffs specifically allege that they "make telephone calls and send and receive e-mails to and from foreign countries and have received threatening e-mails and texts from overseas, in particular Afghanistan." Docket No. 106-1 ¶ 19. Afghanistan is indisputably a "hot-bed" for terrorist activity.

Furthermore, it would be entirely inequitable to allow Government Defendants to escape liability on this issue based simply on the fact that the Government Defendants have concealed the details of the program. Thus, at a minimum, Plaintiffs must be allowed to take appropriate discovery to determine the details of the Section 402 program and to determine whether Plaintiffs' information was collected as metadata as part of this program, which was administered on a "very large scale."

Lastly, Plaintiffs clearly have standing to seek permanent injunction relief regarding the Section 402 Program. As set forth in *supra* section II, a party seeking relief for future harm need only show a "reasonable probability" that the harm is likely to occur. *Monsanto*, 177 L. Ed. at 466. Standing can also be conferred merely on an increased risk of future harm. *See generally Glickman*, 92 F.3d 1228. Here, as this Court has found, the Government has shown a callous disregard for obeying the law as written in its surveillance practices and procedures. Thus, it is not enough that merely the law has been written in a way that, on paper, prevents the ongoing and future implementation of the Section 402 program. Because of the high probability that the Government is currently engaged in, and will continue to engage in this illegal behavior, based on the Government's pattern and practice of deception and disregard for the law, permanent injunctive relief is necessary—as Plaintiffs have clearly established a "reasonable probability" that future harm will arise—so that this Court may engage in oversight of the Government's surveillance practices and hold the Government Defendants in contempt if and when a violation is discovered.

e. Plaintiffs Have Standing to Challenge the PRISM Program's Past, On-Going, and Future Harm

Under FISA Section 702, the Government engaged in a surveillance program "targeting…persons reasonably believed to be located outside of the United States to acquire

foreign intelligence information." 50 U.S.C. § 1881(a) ("PRISM Program"). By statute, the PRISM Program is subject to limitations, insofar as an acquisition authorized thereunder

> (1) may not intentionally target any person known at the time of acquisition to be located in the United States; (2) may not intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States; (3) may not intentionally target a United States person reasonably believed to be located outside the United States; (4) may not intentionally acquire any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States; and (5) shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States.

50 U.S.C. § 1881(b).

The Government Defendants falsely assert that Plaintiffs lack standing to challenge the PRISM Program. The Government Defendants contend that none of Plaintiffs' "pleadings or supporting affidavits contained any assertions that the NDS actually had targeted communications of theirs in contravention of the plain terms of Section 702." Def's Mtn. at 41. The Government Defendants falsely contend that "Plaintiffs simply speculated that their communications had been intercepted based on their level of political activism." *Id*. This assertion is misleading, at best. Indeed, Plaintiffs have pled specific facts that strongly support Plaintiffs' contention that their metadata was collected under the PRISM Program, and that it remains substantially at risk of such collection. *See generally* supra section III(b). For instance, Plaintiff Klayman has specifically pled that he has engaged in communications with persons in foreign regions that are almost certainly to have been the target of the PRISM Program. For example, in *Klayman II* Klayman has alleged that he communicates via telephone and e-mail with, among others, (1) Mark Regev, the press secretary for Prime Minister Benjamin Netanyahu, (2) Ron Nachman, the former mayor of Ariel, Israel, (3) Danny Danon, a member of Israel's legislative body who is currently serving as the Deputy Minister of Defense, and (4)

Aaron Klein, a reporter who hosts a radio show on WABC in New York, which originates in Israel. Docket No. 106-1 ¶¶ 13-1. All of the persons listed above are highly influential members in or around the government of Israel, "a high-conflict area where the threat of terrorism is always present." Docket No. 106-1 ¶ 12. Furthermore, the Strange Plaintiffs specifically allege that they "make telephone calls and send and receive e-mails to and from foreign countries and have received threatening e-mails and texts from overseas, in particular Afghanistan." Docket No. 106-1 ¶ 19. Afghanistan is indisputably a "hot-bed" for terrorist activity. This is far more than mere "speculation" as the Government Defendants' assert. Plaintiffs have set forth specific details that can only lead to the conclusion that their metadata was collected under the PRISM Program.

In fact, the Government Defendants' primary assertion appear simply to be that Plaintiffs cannot possibly show that they communicated with targets of the PRISM Program because the targets of the PRISM Program are classified. Def's Mtn. at 44. Thus, regardless of the amount compelling evidence set forth by Plaintiffs that their communications were collected under the PRISM Program, the Government Defendants would lead this Court to believe that Plaintiffs would never be able to demonstrate that their information was actually collected because the information is deemed classified, by the Government Defendants. The inherent flaw in this line of reasoning is readily apparent. Deciding in favor of the Government Defendants in this regard essentially sets the precedent that the Government may escape liability for their illegal activities by deciding, on their own, that evidence of their illegal activities are classified. However, as this Court has recognized, the Government Defendants have essentially hid behind the "classified" defense insofar as it even refuses to allow *in camera* review of any purported evidence. *See*

supra section I. Indeed, the Government Defendants refusal to share this information, even with this Court, is highly compelling evidence of their bad-faith.

Furthermore, the Government Defendants improperly set forth *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (U.S. 2013) in support of their contention that Plaintiffs lack standing to challenge the PRISM Program. First, the *Amnesty* case specifically held that the plaintiffs lacked standing to challenge the PRISM Program related to its claims of future injury. "But respondents' theory of *future* injury is too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.'" *Id*. at 1143 (emphasis in original). Thus, to the extent that the Government Defendants' rely on *Amnesty* to assert that Plaintiffs lack standing for the past and on-going injury, that reliance is entirely misplaced. Furthermore, to the extent that the Government Defendants rely on *Amnesty* to contend that Plaintiffs lack standing to challenge threat of future harm, such reliance is improper, as discussed below.

i. Plaintiffs Have Standing to Challenge the PRISM Program's Threat of Future Harm

In *Amnesty*, the Supreme Court held that the plaintiffs lacked Article III standing to challenge the PRISM Program because they could that show that the "threatened injury …[was] certainly impending to constitute injury in fact." *Id*. at 1147. However, the majority in *Amnesty* based its ruling on the plaintiffs' broad statements that they "believe that some of the people with whom they exchange foreign intelligence information are likely targets of surveillance under [the PRISM Program]" because "they communicate by telephone and e-mail with people the Government 'believes or believed to be associated with terrorist organizations,' 'people located in geographic areas that are a special focus' of the Government's counterterrorism or diplomatic efforts, and activists who oppose governments that are supported by the United States Government." *Id*. at 1145. On the other hand, here, Plaintiffs have set forth specific persons that

they contacted in high-risk terrorism regions in the world. As the dissent correctly, and ably points out, plaintiffs in *Amnesty*, and by extension, Plaintiffs here have standing to challenge the PRISM Program.

The threatened injury in *Amnesty*, and here, clearly go far beyond "speculative," as the Government Defendants would have this Court believe. "Several considerations, based upon the record along with commonsense inferences, convince me that there is a very high likelihood that Government, acting under the authority of [the PRISM Program], will intercept at least some of the communications just described." *Id*. at 1157 (Dissent).

> First, the plaintiffs have engaged, and continue to engage, in electronic communications of a kind that the 2008 amendment, but not the prior Act, authorizes the Government to intercept…. Second, the plaintiffs have a strong *motive* to engage in, and the Government has a strong *motive* to listen to, conversations of the kind described…. Third, the Government's *past behavior* shows that it has sought, and hence will in all likelihood continue to seek, information about alleged terrorists and detainees through means that include surveillance of electronic communications…. Fourth, the Government has the *capacity* to conduct electronic surveillance of the kind at issue. To some degree this capacity rests upon technology available to the Government.

Id. at 1158-59 (Dissent). These factors are all clearly applicable to the facts at bar, and as such, the threatened injury—that the Government will continue to harvest Plaintiff's data under the PRISM Program—clearly rises about the "speculative" level.

Lastly, as set forth in *supra* section II, the proper inquiry for plausibility that future harm will occur is not "certainly impending," but merely that there is a "reasonable probability" that the harm will occur. Plaintiffs have certainly done so here, as as such, the Government Defendants' Motion to Dismiss must be denied.

///

///

f. Sovereign Immunity Does Not Preclude Plaintiff's Constitutional Tort Claims Against the Individual Defendants

As discussed in *supra* section III(a), Plaintiffs will file a motion, upon the termination of this current administration, to serve the Individual Defendants, in their individual capacities, now that they will soon become private citizens, and allow this crucial matter to proceed substantively. This matter is at the pinnacle of national importance, and Plaintiffs' constitutional tort claims against the Individual Defendants must be allowed to proceed. The Individual Defendants should not be allowed to escape liability for their illegal actions simply because of their status as Government officials and their ability to evade service using the buffer that the Government provides.

IV. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this Court deny the Government Defendant's Motion to Dismiss, and allow Plaintiffs adequate time to serve the Individual Defendants, now that they are no longer under the shield of the Federal Government, so that this matter of crucial national importance may proceed substantively. It is of paramount importance that this Court retains the ability to conduct oversight into the intelligence agencies surveillance techniques, especially given the fact that the Freedom Act is riddled with loopholes that allows the intelligence agencies to continue to run rampant over the constitutional rights of Americans in conducting surveillance. **Lastly, Plaintiffs also request oral argument and hearing so that these issues may be thoroughly addressed and the parties may be instructed on how to proceed, both with regard to service of the Individual Defendants, and with discovery.**

///

///

Dated: January 17, 2017

Respectfully submitted,

/s/ Larry Klayman
Larry Klayman, Esq.
KLAYMAN LAW GROUP
D.C. Bar No. 334581
2020 Pennsylvania Ave. NW, Suite 800
Washington, DC 20006
Tel: (561) 558-5536
Email: leklayman@gmail.com

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically and served through the court's ECF system to all counsel of record or parties on January 17, 2017.

/s/ Larry Klayman
Attorney

EXHIBIT A

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE APPLICATION OF THE
FEDERAL BUREAU OF INVESTIGATION FOR
AN ORDER REQUIRING THE PRODUCTION
OF TANGIBLE THINGS

Docket Number: BR 14-01

OPINION AND ORDER

This matter is before the United States Foreign Intelligence Surveillance Court ("FISC" or "Court") on the Motion of Plaintiffs in *Jewell v. NSA* and in *First Unitarian Church v. NSA*, Both Pending in the United States District Court for the Northern District of California, for Leave to Correct the Record, filed in the above-captioned docket on March 10, 2014 ("March 10 Motion").

As a threshold matter, the Court notes that the section of the statute under which this case was brought, Section 501 of the Foreign Intelligence Surveillance Act of 1978 ("FISA" or "the Act"), codified at 50 U.S.C. § 1861, as amended (also known as Section 215 of the USA PATRIOT Act),[1] only provides for the government and recipients of production orders to make filings with the Court. Specifically, Section 501 permits the Federal Bureau of Investigation ("FBI") to apply to this Court "for an order requiring the production of any tangible things

---

[1] "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001," Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001) ("USA PATRIOT Act"), amended by the "USA PATRIOT Improvement Reauthorization Act of 2005," Pub. L. No. 109-177, 120 Stat. 192 (Mar. 9, 2006); "USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006," Pub. L. No. 109-178, 120 Stat. 278 (Mar. 9, 2006); and Section 215 expiration extended by the "Department of Defense Appropriations Act, 2010," Pub. L. No. 111-118 (Dec. 19, 2009); "USA PATRIOT - Extension of Sunsets," Pub. L. No. 111-141 (Feb. 27, 2010); "FISA Sunsets Extension Act of 2011," Pub. L. No. 112-3 (Feb. 25, 2011); and the "PATRIOT Sunsets Extension Act of 2011," Pub. L. No. 112-14, 125 Stat. 216 (May 26, 2011).

(including books, records, papers, documents, and other items) for an investigation . . . to protect against international terrorism." FISA § 501(a)(1), 50 U.S.C. § 1861(a)(1). If the application meets the statutory requirements, FISA requires that the Court "shall enter an *ex parte* order as requested, or as modified, approving the release of the tangible things." FISA § 501(c)(1), 50 U.S.C. § 1861(c)(1) (emphasis added). Section 501 further provides that "[a] person receiving a production order may challenge the legality of that order," and it provides specific instructions for how to do so. FISA § 501(f)(2)(A)(i), 50 U.S.C. § 1861(f)(2)(A)(i). Notwithstanding these limitations, the Court, when recently petitioned by a non-governmental entity which was not the recipient of a production order, determined that it has inherent discretion to allow such a non-party to file an *amicus curiae* brief in a Section 501 proceeding. See Memorandum Opinion issued in Docket No. BR 13-158 on December 18, 2013 ("December 18 Opinion"), available at http://www.uscourts.gov/uscourts/courts/fisc/br13-158-Memorandum-131218.pdf. In the instant matter, the Court views the movants as fulfilling one of the primary roles of *amicus curiae*, in that they are seeking to provide the Court with information that might otherwise escape its attention. December 18 Opinion at 3. Accordingly, in the exercise of its discretion, the Court treats the movants as *amici curiae* and grants the relief requested.

On January 3, 2014, in the above-captioned docket, the Court approved the government's application pursuant to Section 501 of FISA for orders requiring production, on an ongoing basis, of all call detail records or "telephony metadata" to the National Security Agency ("NSA"), from certain telecommunications carriers ("BR metadata"). The Primary Order in this docket ("January 3 Primary Order") approved and adopted a detailed set of minimization procedures restricting the NSA's retention and use of the BR metadata, including a requirement that telephony metadata produced in response to the Court's orders be destroyed within five years. January 3

Primary Order at 4-14. On February 25, 2014, the government filed a Motion for Second Amendment to Primary Order ("February 25 Motion"), through which it sought to modify this destruction requirement to permit the government to retain telephony metadata beyond five years, subject to further restrictions on the NSA's accessing and use of the metadata.[2] The February 25 Motion asserted that such relief was needed because destruction of the metadata "could be inconsistent with the government's preservation obligations in connection with civil litigation pending against it." February 25 Motion at 2. In seeking this relief, the government highlighted six civil matters pending before either a United States District Court or a United States Court of Appeals in which the lawfulness of Section 215 had been challenged, including *First Unitarian Church of Los Angeles, et al., v. National Security Agency*, et al., No. 3:13-cv-3287 (JSW) (N.D. Cal.) ("*First Unitarian*"). February 25 Motion at 3-5.

On March 7, 2014, based on what the government represented in its February 25 Motion, the Court issued an Opinion and Order that denied the government's February 25 Motion without prejudice ("March 7 Opinion and Order"). The Court rejected the government's premise that the common law obligation to preserve evidence that is potentially relevant to civil litigation superseded requirements to destroy information under provisions of FISC orders that were adopted pursuant to 50 U.S.C. §§ 1861(c)(1), (g). March 7 Opinion and Order at 3-4. In issuing the March 7 Opinion and Order, the Court analyzed the government's proposed amendments

[2] On February 5, 2014, the government filed an initial Motion for Amendment to Primary Order to amend the aforementioned minimization procedures. The Court approved the motion on the same date, modifying the minimization procedures to require the government (except in emergencies) to obtain the Court's approval by motion before querying the BR metadata for selection terms, and to restrict queries of the BR metadata to identify only that metadata within two "hops" of an approved selection term. The first "hop" would include the set of numbers directly in contact with the approved selection term, and the second "hop" would include the set of numbers directly in contact with the first "hop" numbers.

under the statutory minimization requirements and found that on the record then before it, the government's proposal did not satisfy those requirements. Id. at 4-12. The Court concluded that any interests the civil plaintiffs might assert in preserving all of the BR metadata was "unsubstantiated" on that record. Id. at 8. The Court further observed that

> no District Court or Circuit Court of Appeals has entered a preservation order applicable to the BR metadata in question in any of the civil matters cited in the motion. Further, there is no indication that any of the plaintiffs have sought discovery of this information or made any effort to have it preserved, despite it being a matter of public record that BR metadata is routinely destroyed after five years.

Id. at 8-9 (citations omitted). Further, while acknowledging that "questions of relevance are ultimately matters for the courts entertaining the civil litigation to resolve," id. at 10, the Court was unpersuaded by the government's assertion that the entire, voluminous set of BR metadata needed to be preserved for the civil litigation, particularly in view of the fact that the plaintiffs in the civil matters, as described by the government, generally sought destruction of the BR metadata. Id. at 9-10. As noted above, the Court denied the February 25 Motion without prejudice, stating that the government may bring "another motion providing additional facts or legal analysis, or seeking a modified amendment to the existing minimization procedures." Id. at 12.

On March 10, 2014, counsel for plaintiffs in *Carolyn Jewel, et al., v. National Security Agency, et al.,* No. 08-cv-4373-JSW (N.D. Cal.) ("*Jewel*") and *First Unitarian* filed the above-referenced motion (i.e., the March 10 Motion) seeking to correct the record. The March 10 Motion noted that the March 7 Order and Opinion was based on the belief that no preservation requests or orders applicable to the data in question existed, and it represented that at least two such orders had been issued. March 10 Motion at 1. Specifically, the March 10 Motion noted that there has been litigation challenging the lawfulness of the government's collection of

telephony metadata (among other collections) pending in the United States District Court for the Northern District of California ("District Court" or "Northern District of California") since 2006. Id. The first case filed was *Hepting v. AT&T*, No. 06-cv-0672 (N.D. Cal.) ("*Hepting*"), which became the lead case in a Multidistrict Litigation ("MDL") proceeding in the Northern District of California, in which the District Court entered a preservation order on November 6, 2007. Id. at 2. The March 10 Motion further indicated that one of the MDL cases, *Virginia Shubert, et al., v. Barack Obama, et al.*, No. 07-cv-0603 (N.D. Cal.) remains in litigation, and the MDL preservation order remains in effect for that case. Id. Additionally, the March 10 Motion stated that the *Jewel* case, which was filed in 2008, was designated by the District Court as a related action to the *Hepting* matter, and that Court entered an evidence preservation order in *Jewel*, based on the MDL evidence preservation order, which remains in effect.[3] Id. The March 10 Motion noted that the plaintiffs in *Jewel* and *First Unitarian* contacted the government on February 26, 2014, regarding the relevance of these preservation orders to the February 25 Motion, and made a "specific request" that the government inform the FISC of their existence. Id. at 1-2.

The March 10 Motion further noted that on the evening of March 7, 2014, the government filed a notice in the *First Unitarian* case in the Northern District of California, stating that "as of the morning of Tuesday, March 11, 2014, absent a contrary court order, the United States will commence complying with applicable FISC orders requiring the destruction of call-detail records at this time." March 10 Motion at 3. On March 10, 2014, the plaintiffs in *Jewel* and *First Unitarian* sought a Temporary Restraining Order ("TRO") from the Northern District of California against the destruction of any BR metadata. The District Court granted a TRO in both

[3] The plaintiffs in *Jewel* and *First Unitarian* submitted copies of both preservation orders as exhibits with their March 10 Motion.

matters on the same date ("March 10 TRO"), prohibiting the government defendants "from destroying any potential evidence relevant to the claims at issue ..., including but not limited to ... any telephone metadata or 'call detail' records," pending further order of that court. March 10 TRO at 2. The March 10 TRO also established a schedule for further consideration of the preservation issues, with briefing by the government and the plaintiffs to be completed by March 18, 2014, and a hearing set for March 19, 2014. Id.

On March 11, 2014, the government filed in the FISC a Notice of Entry of Temporary Restraining Order Against the United States and Motion for Temporary Relief from Subparagraph 3(E) of Primary Order ("March 11 Notice and Motion"). Through the March 11 Notice and Motion, the government informed the FISC of the TRO which had been entered the day before, and again sought relief from the provision of the January 3 Primary Order which prevents the government from retaining BR metadata for longer than five years. Based on the information about the preservation orders that had been issued and remained in effect in the Northern District of California litigation, which had not previously been part of the record in this matter, this Court granted the government's Motion for Temporary Relief on March 12 ("March 12 Order and Opinion"). Specifically, this Court ordered that BR metadata otherwise required to be destroyed under the five-year limitation on retention specified in subparagraph (3)(E) of the January 3 Primary Order be preserved and/or stored "[p]ending resolution of the preservation issues raised by the plaintiffs in *Jewel* and *First Unitarian Church* before the United States District Court for the Northern District of California[."] March 12 Order and Opinion at 6. The March 12 Order and Opinion further prohibited NSA intelligence analysts from accessing or using such data for any purpose; permitted NSA technical personnel to access the data only for the purpose of ensuring continued compliance with the government's preservation obligations; and prohibited any further

accesses of the BR metadata for civil litigation purposes without prior written notice to the FISC. Id. at 6-7. Finally, the March 12 Order and Opinion required the government to promptly notify the FISC of any additional material developments in civil litigation pertaining to the BR metadata, including the resolution of the TRO proceedings in the Northern District of California. Id. at 7.

On March 13, 2014, the government filed with the FISC its Response of the United States of America to the Motion of Plaintiffs in *Jewell v. NSA* and in *First Unitarian Church v. NSA*, Both Pending in the United States District Court for the Northern District of California, for Leave to Correct the Record ("March 13 Response"). In its response, the government did not object to the movants' introduction of the preservation orders and other documents into the record of this proceeding, but noted, citing to the March 12 Opinion, that "issues regarding the government's compliance with prior preservation orders issued by the Northern District of California" are "a matter for the District Court to resolve." March 13 Response at 1-2. A footnote in the March 13 Response indicated that, "[c]ontrary to their representation . . . [the m]ovants did not make a 'specific request' that the government inform this Court about the preservation orders in *Jewel* and *Shubert*." Id. at 2, n.1. In making this statement, the government cited to an exhibit (i.e., Exhibit E) of the plaintiffs' application for the TRO filed in the Northern District of California on March 10 (both of which were part of Exhibit A to the government's March 11 Notice and Motion), which is a chain of e-mail correspondence between attorneys of the Civil Division of the United States Department of Justice ("DOJ") and counsel for plaintiffs in the *Jewel* and *First Unitarian* litigation ("E-mail Correspondence"). Id.

A review of the E-mail Correspondence indicates that as early as February 26, 2014, the day after the government filed its February 25 Motion, the plaintiffs in *Jewel* and *First Unitarian* indeed sought to clarify why the preservation orders in *Jewel* and *Shubert* were not referenced in

that motion. E-mail Correspondence at 6-7. The Court's review of the E-mail Correspondence suggests that the DOJ attorneys may have perceived the preservation orders in *Jewel* and *Shubert* to be immaterial to the February 25 Motion because the metadata at issue in those cases was collected under what DOJ referred to as the "President's Surveillance Program" (i.e., collection pursuant to executive authority), as opposed to having been collected under Section 215 pursuant to FISC orders – a proposition with which plaintiffs' counsel disagreed. Id. at 4. As this Court noted in the March 12 Order and Opinion, it is ultimately up to the Northern District of California, rather than the FISC, to determine what BR metadata is relevant to the litigation pending before that court.

As the government is well aware, it has a heightened duty of candor to the Court in *ex parte* proceedings. See MODEL RULES OF PROF'L CONDUCT R. 3.3(d) (2013). Regardless of the government's perception of the materiality of the preservation orders in *Jewel* and *Shubert* to its February 25 Motion, the government was on notice, as of February 26, 2014, that the plaintiffs in *Jewel* and *First Unitarian* believed that orders issued by the District Court for the Northern District of California required the preservation of the FISA telephony metadata at issue in the government's February 25 Motion. E-mail Correspondence at 6-7. The fact that the plaintiffs had this understanding of those preservation orders – even if the government had a contrary understanding – was material to the FISC's consideration of the February 25 Motion. The materiality of that fact is evidenced by the Court's statement, based on the information provided by the government in the February 25 Motion, that "there is no indication that any of the plaintiffs have sought discovery of this information or made any effort to have it preserved." March 7 Opinion and Order at 8-9.

The government, upon learning this information, should have made the FISC aware of the

preservation orders and of the plaintiffs' understanding of their scope, regardless of whether the plaintiffs had made a "specific request" that the FISC be so advised. Not only did the government fail to do so, but the E-mail Correspondence suggests that on February 28, 2014, the government sought to dissuade plaintiffs' counsel from immediately raising this issue with the FISC or the Northern District of California. E-mail Correspondence at 5.

The government's failure to inform the FISC of the plaintiffs' understanding that the prior preservation orders require retention of Section 501 telephony metadata may have resulted from imperfect communication or coordination within the Department of Justice rather than from deliberate decision-making.[4] Nonetheless, the Court expects the government to be far more attentive to its obligations in its practice before this Court.

Based on the foregoing, it is HEREBY ORDERED that the Motion of Plaintiffs in *Jewell v. NSA* and in *First Unitarian Church v. NSA*, Both Pending in the United States District Court for the Northern District of California, for Leave to Correct the Record is GRANTED.

It is FURTHER ORDERED that the government shall make a filing with this Court pursuant to Rule 13(a) of the United States Foreign Intelligence Surveillance Court Rules of Procedure ("FISC Rules of Procedure") no later than April 2, 2014.[5] As part of this filing, the

---

4 Attorneys from the Civil Division of the Department of Justice participated in the E-Mail Correspondence with plaintiffs' counsel. As a general matter, attorneys from the National Security Division of the Department of Justice represent the government before the FISC. The February 25 Motion, as well as the March 13 Response, were submitted by the Assistant Attorney General for the Civil Division and the Acting Assistant Attorney General for the National Security Division.

5 Rule 13(a) of the FISC Rules of Procedure" requires the following, in relevant part:

(a) **Correction of Material Facts.** If the government discovers that a submission to the Court contained a misstatement or omission of material fact, the government, in writing,
(continued . . .)

government shall explain why it failed to notify this Court of the preservation orders in *Jewel* and *Shubert* and of the plaintiffs' understanding of the scope of those orders, upon learning that plaintiffs' counsel viewed those orders as applying to the Section 501 telephony metadata at issue in the February 25 Motion.

SO ORDERED, this 21st day of March, 2014, in Docket Number BR 14-01.

REGGIE B. WALTON
Presiding Judge, United States Foreign
Intelligence Surveillance Court

(. . . continued)
must immediately inform the Judge to whom the submission was made of:

(1) the misstatement or omission;
(2) any necessary correction; [and]
(3) the facts and circumstances relevant to the misstatement or omission[.]