[ORAL ARGUMENT NOT YET SCHEDULED]

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

LARRY KLAYMAN, *et al.*,	
Plaintiffs-Appellees,	
v.	No. 15-5307
BARACK H. OBAMA, *et al.*,	[Civil Action Nos. 13-CV-0851 (RJL) 13-CV-0881 (RJL)]
Defendants-Appellants.	

EMERGENCY MOTION FOR STAY PENDING APPEAL AND FOR IMMEDIATE ADMINISTRATIVE STAY

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INTRODUCTION AND SUMMARY

On November 9, 2015, the district court entered a preliminary injunction that requires the government to cease collection and analysis of the telephony metadata of certain plaintiffs (the Little plaintiffs) under the government's Section 215 program for collection of bulk telephony metadata. As the government explained to the district court, however, the technical steps necessary to comply with such a targeted injunction would require at least several weeks to complete. Absent a stay, therefore, immediate compliance with the district court's injunction would effectively require the abrupt termination of that important counter-intelligence program, as explained below. Such a result is contrary to Congress's judgment that the Section 215 program should instead end only after a transition period (ending less than three weeks from now) to avoid a gap in intelligence collection that could harm national security. As the Second Circuit recently held, that considered legislative decision should be respected and not overturned on the basis of uncertain constitutional claims that will be rendered moot in a matter of weeks. *ACLU* v. *Clapper*, 2015 WL 6516757, at *8-9 (2d Cir. Oct. 29, 2015).

The government immediately sought a stay of the injunction, which the district court denied today. Accordingly, the government asks this Court for a stay pending appeal, and for an immediate administrative stay pending this Court's resolution of this motion. (If neither type of order is granted by the Court, we move for a stay of at least ten days to allow the government to seek relief from the Supreme Court, if

authorized by the Solicitor General.) The government respectfully asks that this Court enter a stay as early as possible; otherwise, the government could be forced to abruptly terminate an important counter-intelligence program *in toto*, while it continues a burdensome and technically difficult process to prevent collection of and analytic access to any metadata associated with only the Little plaintiffs. Opposing counsel Larry Klayman has requested that we inform the Court that plaintiffs oppose the government's motion and wish to be heard by this Court before it considers whether to grant any administrative stay pending appeal.

This case arises out of a challenge to the Section 215 bulk telephony-metadata program, an important intelligence-gathering program designed to detect and prevent terrorist attacks, which is authorized by orders issued by the Foreign Intelligence Surveillance Court. Under that program, the government acquires business records from certain telecommunications companies, in bulk, that contain telephony metadata reflecting the time, duration, dialing and receiving numbers, and other information about telephone calls, but that do not identify the individuals involved in, or the content of, the calls. Pursuant to new legislation, that program will end in less than three weeks when the government transitions to a new intelligence program based on targeted rather than bulk collection of telephony metadata.

Despite the imminent termination of the program, the district court enjoined the government from collecting certain plaintiffs' telephony metadata, concluding that those plaintiffs were likely to succeed in showing that the program violates the Fourth

Amendment. That decision is contrary to the Second Circuit's recent decision, which denied an injunction against the government's Section 215 bulk collection program because, regardless of whether the program was lawful prior to passage of the USA FREEDOM Act, Pub. L. No. 114-23, 129 Stat. 268 (2015), Congress authorized the continuation of the program during the 180-day transition period to the new intelligence program. *See generally Clapper*, 2015 WL 6516757. The district court decision is also contrary to the conclusions of numerous district courts and judges of the Foreign Intelligence Surveillance Court who have upheld the program's constitutionality. The district court's issuance of an injunction was also in error because plaintiffs lack standing to obtain any relief, have shown no irreparable injury, have little chance of succeeding on the merits, and lose the balancing of equities in favor of Congress's considered judgment that continued operation of the Section 215 program is necessary during the transition period to avoid an intelligence gap.

Absent a stay, complying with the district court's preliminary injunction, which is purportedly limited to data concerning the Little plaintiffs, would effectively require the government to terminate the Section 215 program prematurely, creating an intelligence gap during the transition and thereby impairing the government's ability to timely gather intelligence that the government relies upon to identify and disrupt terrorist threats. Congress, however, made a considered judgment through a reasonable balancing of the various public interests associated with the program, including as to how to bring the program to an orderly end, consistent with national

security concerns. By entering an injunction, the district court improperly rejected the balance that Congress has struck in a statute.

Indeed, where a single district judge prohibits enforcement of a statute on constitutional grounds, as the district court here has done, the government is almost invariably entitled to a stay pending appeal. *See Bowen* v. *Kendrick*, 483 U.S. 1304, 1304-05 (1987) (Rehnquist, J., in chambers); *Walters* v. *National Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers); *cf. Maryland* v. *King*, 133 S.Ct. 1, 3 (2012) (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.").

STATEMENT

1. The district court's preliminary injunction prohibits the government from collecting the business records of telecommunications service providers containing telephony metadata concerning the calls of plaintiffs J.J. Little and his law firm, J.J. Little & Associates, P.C. (collectively, the "Little plaintiffs"), as part of the bulk telephony-metadata program that the government operates under the authority of the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1810. As the government explained to the district court, the only practicable way for the NSA to comply with the court's preliminary injunction is immediately to cease *all* collection and queries of metadata under the Section 215 program because the technical steps required to prevent further collection and segregation of the metadata associated with the Little plaintiffs would

take the NSA at least several weeks to complete. *See* Potter Decl. (Dkt. # 150-4) ¶¶ 20-27 (*see* Attachment D).

Pursuant to Section 215 of the USA PATRIOT Act, codified at 50 U.S.C. § 1861, the United States, for a few more weeks, operates a telephony-metadata intelligence-gathering program as part of its efforts to combat international terrorism. Companies that provide telecommunications services create and maintain records containing telephony metadata for the companies' own business purposes, such as billing and fraud prevention, and they provide those business records to the federal government in bulk pursuant to court orders issued under Section 215. The data obtained under those court orders do not include information about the identities of individuals; the content of the calls; or the name, address, financial information, or cell site locational information of any telephone subscribers. The government uses the Section 215 telephony-metadata program as a tool to facilitate counterterrorism investigations – specifically, to ascertain whether international terrorist organizations are communicating with operatives in the United States.

As the FBI has explained, the United States faces an "increasingly diffuse threat environment," Paarmann Decl. ¶ 9 (Dkt. # 150-6) (*see* Attachment E), in which the Islamic State of Iraq and the Levant and other foreign terrorist organizations encourage small-scale attacks against the United States that can be planned and carried out more quickly than large-scale attacks, yet can be more difficult to detect. *Id.* ¶¶ 5-7. Although various sources of information can each be used to provide separate and

independent indications of potential terrorist activity, the best and most timely analysis occurs when intelligence information obtained from all of those sources can be considered together to compile as complete a picture as possible of that threat. *Id.* ¶ 10. Information gleaned from NSA analysis of telephony metadata can be an important component of the information the FBI relies on to dependably execute its threat detection and prevention responsibilities. *Id.*

Consistent with the President's objective to replace the Section 215 program with a targeted collection program that provides greater privacy protections, just several months ago Congress enacted the USA FREEDOM Act. The Act prohibits the government from conducting the bulk collection of telephony metadata under Section 215 as of November 29, 2015, and provides for a new system of targeted production of call detail records. *See* USA FREEDOM Act §§ 101, 103.

Congress provided for a six-month transition period by delaying for 180 days the effective date of the prohibition on bulk collection under Section 215, and also the corresponding implementation date of the new regime of targeted production under the statute. USA FREEDOM Act § 109. The design and effect of delaying the prohibition on bulk collection preserves the government's intelligence capabilities by permitting the Section 215 program to continue for six months while the NSA creates the technical ability to operate under the new model of targeted production. *See* 161 Cong. Rec. S3439-40 (daily ed. June 2, 2015) (statement of Sen. Leahy); 161 Cong. Rec. S3275 (daily ed. May 22, 2015) (statement of Sen. Leahy). As the government

explained to Congress, the implementation of the new production regime requires a six-month transition period for the government to provide to telecommunications companies "the technical details, guidance, and compensation to create a fully operational" new querying model. *Id.*

Pursuant to the authority conferred by the USA FREEDOM Act, the government applied to the Foreign Intelligence Surveillance Court for authorization to resume the Section 215 bulk-collection program during the transition period, which that court granted. *See Primary Order, In re Application of the FBI for an Order Requiring the Prod. of Tangible Things*, No. BR 15-75, 2015 WL 5637563, at *5 (FISA Ct. June 29, 2015) (holding that the USA FREEDOM Act explicitly authorized the government to continue the Section 215 bulk telephony-metadata program during the 180-day transition).

After the transition period ends, no further bulk collection of telephony metadata will occur under Section 215, and analytic access to previously collected metadata will also cease – the data will not be used for intelligence or law-enforcement purposes, and will not be disseminated. Further, the underlying data will be destroyed as soon as possible.[1] Potter Decl. ¶¶ 15-17; *ODNI*, *Statement by the ODNI on Retention of Data Collected Under Section 215 of the USA PATRIOT Act*, July 27,

[1] If permitted by order of the Foreign Intelligence Surveillance Court, the government will retain technical access for a three-month period to ensure the proper function of the replacement program and any additional retention required for compliance with the government's preservation obligations as a civil litigant.

2015, http://www.dni.gov/index.php/newsroom/press-release/210-press-release-2015/1236-statement-by-the-odni-on-retention-of-data-collected-under-section-215-of-the-usa-patriot-act.

2. Plaintiffs previously moved for a preliminary injunction prohibiting bulk collection of metadata, which the district court granted. The district court concluded that two plaintiffs (Klayman and Strange) had standing to challenge the Section 215 program. As to the merits, the district court concluded that the Section 215 program constitutes a "search" within the meaning of the Fourth Amendment. The district court determined that *Smith* v. *Maryland*, 442 U.S. 735 (1979), which held that individuals have no reasonable expectation of privacy in the telephone numbers they dial, is not controlling. *Klayman* v. *Obama*, 957 F. Supp. 2d 1, 32-37 (D.D.C. 2013). The court next held that such a search does not meet the test of reasonableness under the Fourth Amendment, because the program's intrusion on plaintiffs' "significant expectation of privacy" outweighs its contribution to national security (as the court assessed it). *Id.* at 39-42.

The court also held that plaintiffs Klayman and Strange had demonstrated irreparable injury because "the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury,'" *Klayman*, 957 F. Supp. 2d at 42, and that providing relief to those two plaintiffs alone would not harm the public, *id.* at 43. "[I]n light of the significant national security interests at stake,"

however, and the perceived novelty of the constitutional issues, the court stayed its injunction pending the government's appeal. *Id.*

3. This Court vacated the district court's preliminary injunction and remanded the case for further proceedings. *Obama* v. *Klayman*, 2015 WL 5058403, at *2 (D.C. Cir. Aug. 28, 2015) (per curiam). Two of the judges on the panel held that plaintiffs had not demonstrated standing because they had not adequately established that the government had collected call records from their carrier, Verizon Wireless. *Id.* at *8 (Williams, J.); *id.* at *10 (Sentelle, J.).

4. On remand, plaintiffs added the Little plaintiffs, who are alleged to have been subscribers of Verizon Business Network Services, Inc. "[a]t all material times." Plaintiffs renewed their motion for a preliminary injunction against the Section 215 program.

5. The district court yesterday entered an injunction barring the government from collecting any telephony metadata associated with the Little plaintiffs and requiring the government to "segregate out all such metadata already collected from any future searches of its metadata database." Order of Nov. 9, 2015 (Dkt. # 159) (*see* Attachment B). Although the injunction nominally extends relief only to the Little plaintiffs, the district court recognized that its injunction could require the government to abruptly terminate the Section 215 program, given that the government would otherwise need to undertake a burdensome and technically

difficult process to cease collection and analytic access as to only the Little plaintiffs. Opinion of Nov. 9, 2015 (Dkt. # 158) ("Slip Op.") at 41-42 (*see* Attachment A).

The district court relied on its earlier opinion to conclude that the bulk collection of telephony metadata under Section 215 constitutes an unconstitutional search within the meaning of the Fourth Amendment. Slip Op. at 26. Although the district court conceded that the government's intrusion on that privacy interest is "finite," given the imminent termination of the Section 215 program, the court nevertheless concluded that the intrusion was not sufficiently limited to uphold it under the "special needs" doctrine. Slip Op. at 32-33.

Finally, the district court concluded that both plaintiffs and the public will suffer irreparable harm to their privacy interests absent injunctive relief. Slip Op. at 37-39. The court rejected the government's argument that the public interest weighs against an injunction and that the court should defer to Congress's judgment to continue the Section 215 program during the transition period, stating that "Congress did not *explicitly* authorize a continuation of the Program." Slip Op. at 39.

6. That same day, the government moved for a stay, which the district court denied today.

ARGUMENT

This Court should grant a stay pending appeal (and, at a minimum, an administrative stay pending the Court's resolution of this motion) to prevent the unwarranted and disruptive termination of the government's Section 215 program

during the final weeks of the transition provided for by Congress. Particularly where the bulk collection program that plaintiffs challenge will expire in less than three weeks, and Congress has already determined that it is necessary and appropriate to continue that program until the government can put into operation the new targeted system of collection, the equities weigh decisively in favor of a stay. Indeed, the Second Circuit recently declined to enjoin the Section 215 program given Congress's considered judgment to continue that program during the transition period and that any constitutional claims would soon be rendered moot by the program's termination on November 29, 2015. *Clapper*, 2015 WL 6516757, at *6-9.

A. In Light of the Immediate Harm to the Government and the Public, the Balance of Harms Warrants a Stay.

Absent a stay, the government is prohibited from collecting under Section 215 or conducting analytic queries of any business records reflecting telephony metadata associated with the Little plaintiffs' Verizon Business Network Services accounts. As explained in the attached NSA declaration, 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. The Section 215 program, however, is an important component of the government's counter-terrorism arsenal. Compelling the termination of that program before the transition to the new targeted collection will impair the United States' ability to detect and prevent potential terrorist attacks. When the Government is enjoined from effectuating a statute

enacted by Congress, it almost invariably suffers a form of irreparable injury entitling it to a stay pending appeal. *See opinions cited supra at p.* 4.

The USA FREEDOM Act reflects the judgment of Congress and the President that a targeted collection approach can appropriately serve the United States' interests in national security while further enhancing the substantial protections for personal privacy already built into the Section 215 program. But until that system can come on-line, the statute ensures that the important function of the bulk telephony-metadata program will continue during the transition period. *Clapper*, 2015 WL 6516757, at *6 ("The 180-day transition period represents Congress's considered judgment that there should be time for an orderly transition from the existing program to the new, targeted surveillance program."). The district court's injunction would create the very intelligence gap that Congress sought to avoid. Where the political branches have already reasonably weighed the policy considerations concerning the best way to terminate the Section 215 program and transition to the new targeted collection framework, it was inappropriate for the district court to impose an injunction that requires the abrupt termination of the program. *See Clapper*, 2015 WL 6516757, at *6 (refusing to enter injunction because "[t]he intention of the democratically elected branches of government is thus clear").

Any potential harm of a stay to the Little plaintiffs is minimal. Even assuming these plaintiffs could show that bulk collection of telephony metadata under Section 215 injures them in some way, that program will come to an orderly and planned end

in less than three weeks. Thus, any risk of ongoing injury would be exceedingly modest at most. The Little plaintiffs, moreover, waited over two years – and more than four months into the 180-day transition period – to seek judicial relief, which not only gives rise to a laches bar to their claim but also demonstrates that it is not plausible for them to contend that the program inflicts more than a minimal injury on them. *See* Gov't Prelim. Inj. Opp. (Dkt. # 150) at 24 n. 12.

In any event, plaintiffs have not even demonstrated that the Section 215 program injures them in any way. Pursuant to court orders, NSA analysts may only review records responsive to queries using selectors the Foreign Intelligence Surveillance Court has approved based on reasonable, articulable suspicion that they are associated with identified foreign terrorist organizations. Primary Order, No. 15-99, at 6-7 (*see* Attachment D); Potter Decl. ¶ 23. As a result, only a "tiny fraction" of the records is ever seen by any person. Shea Decl. (Dkt. # 150-2) ¶ 23 (*see* Attachment C). Plaintiffs do not even suggest that the NSA has accessed records of their calls as a result of queries made under the "reasonable, articulable suspicion" standard or otherwise. Thus, there is no basis to conclude that records of plaintiffs' calls have been reviewed (much less that they will be during the remaining three weeks of the Section 215 program), or "used against" plaintiffs in some unexplained way. The district court's conclusion that plaintiffs were entitled to an injunction, therefore, was in error. *See Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 311-13 (1982).

On balance, therefore, a stay is necessary to protect the government's and the public's strong interest in continuing an important counter-intelligence program to avoid harm to national security during the transition, as Congress has provided. Indeed, even absent Congress's determination, a transition period would have been appropriate to implement an injunction against the program. As the Second Circuit has explained, "[a]llowing the program to remain in place for the short period that remains is the prudent course," and "would likely have been appropriate even had [that court] held § 215 unconstitutional" before Congress enacted the USA FREEDOM Act. *Clapper*, 2015 WL 6516757, at * 9.

B. The Government Has a Strong Likelihood of Success on Appeal.

The government has a strong likelihood of success on appeal, a factor that also favors issuance of a stay. The government need not establish "an absolute certainty of success" to obtain a stay, but rather must demonstrate, at a minimum, "serious legal questions going to the merits." *Population Inst.* v. *McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986).

1. Plaintiffs Lack Standing and Therefore Lack Any Right to Relief.

Standing is an essential element of ultimate success on the merits, without which plaintiffs are not entitled to any relief. To establish standing, plaintiffs must show that they have suffered injury in fact, "an invasion of a legally protected interest," *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992), that is "concrete, particularized, and actual or imminent." *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138,

1147 (2013). A "threatened injury must be *certainly impending* to constitute injury in fact," whereas "[a]llegations of *possible* future injury are not sufficient." *Id.*

As explained above, the Little plaintiffs have failed to satisfy that standard because, even assuming, *contra Smith* v. *Maryland*, 442 U.S. 735 (1979), that they have a protected Fourth Amendment privacy interest in metadata relating to their calls, they have not shown that any collection of that metadata under Section 215 has resulted in an actual injury. Given that the bulk collection under Section 215 will continue for less than three weeks, and any queries of the metadata must be court-approved under the "reasonable, articulable suspicion" standard, plaintiffs have failed to show any imminent injury sufficient to establish standing.[2]

2. Bulk Collection of Telephony Metadata Does Not Constitute a Search Within the Meaning of the Fourth Amendment.

Even if plaintiffs could establish standing, the Supreme Court has already rejected plaintiff's underlying Fourth Amendment argument that there is a reasonable expectation of privacy in telephony metadata such that the Section 215 program constitutes a search within the meaning of the Fourth Amendment. In *Smith* v. *Maryland*, the Supreme Court held that the government's recording of the numbers dialed from an individual's home telephone, through the installation of a pen register

[2] In addition, the Little plaintiffs presented no evidence that their provider, Verizon Business Network Services, currently participates in the Section 215 program. The district court improperly speculated that that was true. Slip Op. at 24-25. But such speculation does not rise to the level of certainty required by *Amnesty International* for standing purposes in this context. 133 S. Ct. at 1147.

at a telephone company, is *not* a search under the Fourth Amendment. 442 U.S. 735, 743-44 (1979); *see also United States* v. *Miller*, 425 U.S. 435, 440-45 (1976) (holding that bank customers have no reasonable expectation of privacy in bank records pertaining to them). Except for the district court below, every other court to have decided this constitutional issue – including numerous decisions of the Foreign Intelligence Surveillance Court – has correctly looked to the Supreme Court's holding in *Smith* to conclude that the acquisition from telecommunications companies of business records consisting of bulk telephony metadata is not a search for purposes of the Fourth Amendment.[3]

The grounds on which the district court purported to differentiate the pen-register recording in *Smith* from the Section 215 program – in brief, the duration, breadth, and quantity of data collection – did not factor into the Supreme Court's decision in *Smith*. *See* 442 U.S. at 742-45. Rather, *Smith*'s holding was anchored in the established principle that individuals have no protected expectation of privacy in information they provide to third parties. *Id.* at 743-44. For those reasons, the district court's conclusion that *Smith* is distinguishable is wrong. Indeed, the Second

[3] *See Opinion & Order, In re Application of the FBI for an Order Requiring the Prod. of Tangible Things*, No. BR 14-01, 2014 WL 5463097 (FISA Ct. Mar. 20 2014); *Mem. Op., In re Application of the FBI for an Order Requiring the Prod. of Tangible Things*, No. BR 14-96, 2014 WL 5463290 (FISA Ct. June 19, 2014); *Smith* v. *Obama*, 2014 WL 2506421, at *4 (D. Idaho June 3, 2014); *ACLU* v. *Clapper*, 959 F. Supp. 2d 724, 752 (S.D.N.Y. 2013), *rev'd on other grounds*, 785 F.3d 787 (2d Cir. 2015); *United States* v. *Moalin*, 2013 WL 6079518, at *5-8 (S.D. Cal. Nov. 18, 2013); *cf. ACLU* v. *Clapper*, 785 F.3d 787, 821-25 (2d Cir. 2015) (reserving the question).

Circuit found it "difficult to conclude" that litigants such as plaintiffs here are likely to succeed "in arguing that new conditions require a reconsideration of the reach of [such] a long-established precedent" as *Smith*. *Clapper*, 2015 WL 6516757, at *8. Thus, given the conclusive, controlling effect of *Smith*, plaintiffs are not likely to succeed on the merits of their Fourth Amendment claim.

3. Even if Bulk Collection of Telephony Metadata Could Constitute a Fourth Amendment Search, it was Reasonable for Congress to Continue the Program During the Transition Period.

Even if plaintiffs were correct that obtaining bulk telephony metadata from the business records of telecommunications companies constitutes a Fourth Amendment search, it would nevertheless be constitutionally permissible, and especially so to permit continued operation of the Section 215 program for less than three weeks until NSA implements the new statutory system of targeted collection. The Fourth Amendment bars only unreasonable searches and seizures, and continuance of the Section 215 telephony-metadata program for less than three weeks is reasonable under the standard applicable to searches that serve "special needs" of the government. *See, e.g., Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 653 (1995); *Hartness* v. *Bush*, 919 F.2d 170, 173 (D.C. Cir. 1990). The national security and safety interests served by the Section 215 program are special needs of the utmost importance. *See Hartness*, 919 F. 2d at 173; *Cassidy* v. *Chertoff*, 471 F.3d 67, 82 (2d Cir. 2006).

To assess reasonableness under the "special needs" doctrine, courts must "employ[] a balancing test that weigh[s] the intrusion on the individual's [constitutionally protected] interest[s]" against the "'special needs' that support[] the program." *Ferguson* v. *City of Charleston*, 532 U.S. 67, 78 (2001). The purpose of the Section 215 program – identifying unknown terrorist operatives and preventing terrorist attacks – is undisputed and weighty, as even the district court recognized. *Klayman*, 957 F. Supp. 2d at 39; Slip Op. at 37.

The district court, however, refused to acknowledge the important contribution that the Section 215 program makes to the Nation's security, because the government had "still not cited a single instance in which telephone metadata analysis actually stopped an imminent attack." Slip Op. at 35. But that misunderstands the reasonableness inquiry under the special needs doctrine. The precedents of the Supreme Court and this Court (among others) upholding searches as reasonable do not depend on specific instances of success in achieving a particular goal but instead assess whether the program is at least a "reasonably effective means" of advancing the government's paramount interest in preventing terrorism. *Bd. of Educ.* v. *Earls*, 536 U.S. 822, 837 (2002). The Fourth Amendment's reasonableness inquiry does not turn on the identification of specific threats prevented by the program. In any event, the reasonableness of the program and the importance of its aims are further supported by the FBI's views that the capabilities of the Section 215 program remain an important part of its counter-terrorism arsenal, especially in the current, heightened

threat environment. Paarmann Decl. ¶¶ 6-12. The district court improperly gave short shrift to those serious concerns. *See* Slip Op. at 35 n.21.

Balanced against the important purposes served by the Section 215 program during the transition period is the minimal impact the program will have on the Little plaintiffs' privacy interests before it terminates on November 29, 2015.

First, any infringement on plaintiffs' privacy interests attributable to NSA collection of bulk telephony metadata is diminished by its upcoming termination. Indeed, the Second Circuit recently denied a preliminary injunction against the Section 215 program, in part because the plaintiffs' constitutional claims would soon be rendered moot by the program's termination. *Clapper*, 2105 WL 6516757, at *8-9.

Moreover, the district court virtually ignored the restrictions on review and dissemination of the metadata, which have been enhanced since the district court's December 2013 ruling, stating that "there continues to be *no minimization procedures* applicable at the collection stage." Slip Op. at 33. But those restrictions, which require court authorization for any selectors used to conduct queries and limit query result to metadata within two steps of suspected terrorist selectors, greatly diminish the potential for unwarranted intrusions on plaintiffs' privacy interests.

Indeed, now that the USA FREEDOM Act has established a definite end to the Section 215 program, the odds that any metadata pertaining to the Little plaintiffs' calls will be reviewed *in the next three weeks* are miniscule. Similarly, any infringement on plaintiffs' privacy due to the NSA's accumulating another three weeks of bulk data

is substantially mitigated by the fact that, after November 29, 2015, NSA analysts will no longer be permitted to query that data for analytic purposes.

These developments strengthen the government's special-needs argument. The government's interest in preserving its capacity to detect terrorist threats, in the midst of an evolving threat environment, during the brief remainder of the transition until the targeted program of telephony metadata becomes fully operational, far outweighs the now-reduced potential for infringement of plaintiffs' privacy.

CONCLUSION

The district court has enjoined operation of a counter-terrorism intelligence-gathering program authorized by statute and by numerous court orders. For the reasons explained above, this Court should (1) stay the district court order pending appeal or (2) enter an immediate administrative stay until this motion is resolved, and should it be denied, until ten days after such denial so that the government can seek relief from the Supreme Court, if warranted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2015, I caused the foregoing Emergency Motion for Stay Pending Appeal and for Immediate Administrative Stay to be filed with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by causing an original to be electronically filed via ECF, along with four copies to be hand delivered to the court, and by causing one copy to be served on the following counsel by ECF:

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