UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

AMERICAN CIVIL LIBERTIES UNION, et al.,

Plaintiffs,

v. 13 Cv. 3994 (WHP)

JAMES R. CLAPPER, et al.,

Defendants.

----------x

November 22, 2013
10:30 a.m.

Before:

HON. WILLIAM H. PAULEY III

District Judge

APPEARANCES

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
BY: JAMEEL JAFFER
ALEXANDER A. ABDO
PATRICK C. TOOMEY
BRETT M. KAUFMAN

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
BY: STUART F. DELERY
Assistant Attorney General

U.S. DEPARTMENT OF JUSTICE
BY: MARCIA BERMAN
JAMES J. GILLIGAN
BRYAN DEARINGER

APPEARANCES (CONT'D)

PREET BHARARA
United States Attorney for the
Southern District of New York
DAVID S. JONES
JOHN D. CLOPPER
Assistant United States Attorneys

CHAD BAYSE
SCOTT CHUTKA
Agency Counsel, NSA

(Case called)

THE DEPUTY CLERK: Appearances for the plaintiff.

MR. JAFFER: Jameel Jaffer, Alex Abdo, Patrick Toomey, and Brett Kaufman for the plaintiffs.

THE COURT: Good morning.

THE DEPUTY CLERK: Appearance for the defendants.

MR. JONES: David Jones from the U.S. Attorney's Office for the Southern District of New York. This is John Clopper, my colleague here in the Southern District, three attorneys from the Justice Department in Washington, who will not be arguing, Bryan Dearinger, Marcia Berman and Jim Gilligan, and arguing for the government is Stuart Delery, who is also from the Justice Department in Washington.

THE COURT: Good morning.

This is oral argument, both on the ACLU's motion for a preliminary injunction and the government's motion to dismiss. I propose to conduct the argument in the following manner. I will hear first from the ACLU and then from the Department of Justice on your principal arguments for approximately 30 minutes each, and then I will give each of you an opportunity to respond to what you have heard from your adversary. And, of course, I will allow some flexibility in that, but that's my general intention.

So with that in mind, do you want to be heard, Mr. Jaffer?

MR. JAFFER: Yes, please, your Honor.

Your Honor, I am going to address our statutory claims and my colleague Alex Abdo is going to address our constitutional claims. There are some issues that relate to both sets of claims, and we are both prepared to address those.

As you know, this case involves a challenge to the NSA's collection of data about virtually every telephone call made or received on U.S. networks. This vast dragnet is said to be authorized by Section 215 of the USA Patriot Act, but nothing in the text or legislative history of that provision remotely suggests that Congress intended to empower the government to collect information on a daily basis, indefinitely, about every American's phone calls.

The language of Section 215 is broad, but it's similar or identical to the language used in other authorities, and none of those authorities has been interpreted as the government interprets Section 215 here.

Moreover, Section 215 is part of a larger statutory scheme that reflects a sensitivity to the intrusive power of technology and a respect for individual privacy. If there were any doubt about the reach of the provisions of the doctrine of constitutional avoidance counsels against interpreting it as the government interpreted here, that is in a way that would raise substantial constitutional questions.

So I would like to address three questions. The first

is the Court's jurisdiction to hear the case, the second is whether the program exceeds statutory authority, and the third is whether plaintiffs' claim is precluded either by 18 U.S.C., Section 2712 or by Section 215 itself. But, of course, if you have questions on any other issue, I am happy to address those too.

On the jurisdictional question, your Honor, we think that this issue is pretty straightforward. The Court has subject matter jurisdiction under the federal question statute and the Administrative Procedure Act. To the extent the question that the Court asked at the original status conference in this case was a question about prudential considerations, our view is that all prudential considerations weigh in favor here of the exercise of the Court's jurisdiction. I am thinking of three things in particular.

The first is that plaintiffs can't bring these claims in any other court. The FISA court, as you know, is a court of limited jurisdiction, a specialized court that deals only with the government's applications for surveillance. There is a statutory provision, 50 U.S.C. 1803, that sets out that jurisdiction. This is not the kind of case that we can bring in the FISA court and the government agrees with that.

The second is that the government has conceded that this Court is the proper venue for these claims. In fact, in *In re EPIC*, the government asked the Supreme Court to dismiss a

mandamus petition that had been filed directly in that court on the grounds that petitioner in that case should have done precisely what the ACLU has done here, file an action in an ordinary district court. And I will just read you one sentence from the government's brief in that case. The government wrote, "The proper way for petitioner to challenge the telephony records program is to file an action in federal district court, as other parties have done."

Then, finally, your Honor, there is nothing unusual or inappropriate about a district court evaluating the lawfulness of a FISA court order. It happens routinely in criminal cases. When defendants move to suppress evidence obtained under FISA, the question that courts ask is, was the surveillance lawful? And in effect the court is assessing the original FISA court order.

So for all those reasons, we think that there is no question that the Court has jurisdiction here, and to the extent the prudential consideration should be factored in, all of them weigh in favor of the exercise of the Court's jurisdiction.

I will go on to the scope of the statute.

On the question of whether the program is authorized by Section 215, I think I think would like to focus on three things, unless your Honor feels that the focusing on one of them is unnecessary.

The first is whether Section 215 can lawfully be used to collect call records at all. The second is whether, even if Section 215 can be used to collect call records, it can be used to engage in collection on this scale. Then, finally, the question whether Congress ratified the call tracking program when it reauthorized Section 215 in 2010 and 2011.

As we explained in our briefs, your Honor, and I will try not to repeat what we have said in our briefs, but just highlight a few points, Section 215 can't lawfully be used to obtain call records at all. That's because at the same time that Congress enacted Section 215 in 2001, in fact, in the very same bill, it added a separate provision to the Stored Communications Act that specifically prohibits the disclosure of call records. Now, there are exceptions to that rule, but those exceptions don't include Section 215.

The government's argument, as I understand it, is that Section 215 constitutes an implicit exception to that privacy rule set out in 18-2702. That argument is unpersuasive for several reasons.

First, it's a well accepted canon of statutory interpretation that the inclusion of some things implies the exclusion of others. In its list of exceptions to 2702, Congress included some authorities, but it excluded others, and the Court should give significance to that decision.

THE COURT: What about the language in Section 215

stating that, "Any production or nondisclosure order not explicitly modified or set aside consistent with this subsection shall remain in full effect"?

MR. JAFFER: Two things about that. First, we are not asking this court to set aside the Section 215 order. This is a challenge to executive conduct, not a request that the Court review the 215 order. And that's a distinction I think that the government makes quite well in its response in the *In re EPIC* decision.

The second thing is the legislative history makes clear that the purpose of that particular provision was to ensure that if a provider brought a challenge to a Section 215 order, while the issues were going up through the FISA court of review and then eventually possibly to the Supreme Court, the Section 215 order would remain valid. That was the point of that provision. It was not meant to be this grand preclusive provision in the way that the government suggests it is. There is no suggestion of that in the legislative history.

THE COURT: If this Court were to enjoin the metadata collection, wouldn't that be an order not modified or set aside consistent with Section 215?

MR. JAFFER: I don't think so. I think the order we are asking you to issue is an order that goes only to executive officials. It restricts what they can do. It would create a an obvious tension with the Section 215 order, but the Section

215 order would not be set aside. It would remain valid and that provision would not be implicated at all in our view, your Honor. And again, I think that's consistent with the legislative history.

But I think your question goes to preclusion, and I would like to, if your Honor doesn't mind, just first set out our view of the scope of the statute and why, assuming our statutory claims aren't precluded, why we think that this program violates Section 215.

As I already said, the privacy rule sets out exceptions. 215 is on one of them. In our view, the Court should give significance to the distinction that Congress drew. But the other thing is that the government has itself recognized that reading in implied exceptions to the privacy rule set out in 2702 is inappropriate. And we go through some examples on page 5 of our reply brief, which I won't recite here, three different examples in which the government itself concluded that reading in the kind of implied exception that it's asking the Court to read in here would be inappropriate.

Then, finally, your Honor, a third prong of the government's argument that Section 215 constitutes an implicit exception to 2702 is that Section 215 lacks the "notwithstanding any other provision" language that appears in every other provision of FISA.

Now, the only authority that the government relies on

here for the proposition that Section 215 constitutes an implicit exception is Judge Walton's opinion from December of 2008. I am not sure that this is entirely clear from the briefs, but the program was launched several years before this, and my understanding is at some point it came to the government's attention that they had overlooked a statute when they first briefed this to the court, and to their credit they went to the court and said, it turns out that there is this statute that on its face forecloses us from collecting call records under Section 215. We believe there is a way to read Section 215 to allow us to do what we are doing. And three years after the program was first launched, Judge Walton was asked to address this question.

Obviously, it was not an adversarial process. The arguments we are making to this Court were not made to that court, and certainly they weren't made by anyone who had an incentive to make them forcefully and persuasively. And we think Judge Walton's opinion is wrongly decided. We think that he got this particular issue wrong. The sort of pivotal point in Judge Walton's opinion is the theory that Congress would not have wanted to foreclose the government from obtaining call records through a Section 215 order, which requires court review at the outset, when it authorized the government to obtain call records under Section 2709, the national security letter provision, which doesn't require court review at the

outset.

But there are actually many good reasons why Congress might have wanted the government to use 2709 rather than Section 215 to collect call records. I will just identify two of them. We identify others in the brief. One of them is that Section 2709 places limits on the kind of call records that the government can obtain. And if you allow the government to use Section 215 to obtain call records, then the government essentially has an end run around the limits in 2709.

This is something that we don't say in our brief, but 2709 also restricts the kinds of investigations in which the government can obtain call records. It says that the government can obtain call records in counterterrorism investigations and in clandestine intelligence investigations, but not in foreign intelligence investigations. Foreign intelligence investigations are a sufficient basis for Section 215 orders, but not for national security letters. So there are all sorts of reasons why Congress would have wanted the government to proceed under the NSL statute rather than under 215, and Judge Walton, respectfully, overlooked those reasons.

Now, ultimately, your Honor, I don't think it's necessary to get into this inquiry about what Congress intended. The statute is clear on its face, and I think that that should end the analysis.

So that's our first argument on the scope of the

statute. The one other argument which I thought I should highlight is just that even if the government can obtain call records under this statute, nothing permits it to obtain call records on the scale that it's obtaining them.

Your Honor, the statute, as you know, imposes two limits on the scope of the government's authority here. One is set out in 1861(b)(2)(A), which includes the language relating to relevance, reasonable grounds to believe that the tangible things are relevant. And the other is set out in (c)(2)(D), which states that the government can't obtain anything that can't be obtained by a grand jury subpoena or administrative subpoena or another court order.

So those are two distinct limits. But before I sort of dive into the weeds of those limits, I just want to note that the big problem with the government's theory is that it is absolutely without limit. And when I say that, I am thinking of three things. First, if the government can engage in collection on this scale under Section 215, there is no reason why it couldn't do so under many other authorities. As I said earlier, the same language that's used in Section 215, or language very similar to it, is used in many other authorities. So if the government can collect all call records under Section 215, why couldn't it collect all call records with a grand jury subpoena or an administrative subpoena or a national security letter?

THE COURT: What is the proper unit to be considered in determining relevance? Is it a single customer's records?

MR. JAFFER: I am not sure it would make a difference to the outcome in this case given how much information they are obtaining about every single person. But ultimately here, the court order that the government is relying on, or the argument that the government made to the FISA court, is that all American's call records are relevant. So I think that's the relevant unit. That is what the government is seeking. The question is, are all of those records relevant?

Now, I don't know if this is what you're getting at, your Honor, but the language in (b)(2)(A) uses the phrase "are relevant." I am not saying that every single record that the government obtains under Section 215 either has to relate to a suspected terrorist or it's not relevant. I am not making that argument. But I do think that it's worth noting that the language in (b)(2)(A) is, if anything, narrower than the language that the courts have used in a grand jury or administrative subpoena.

THE COURT: When the Congress added the word relevant in 2006, did it intend to raise the necessary showing?

MR. JAFFER: I think it did, your Honor. The language before 2006 obviously didn't include a relevance requirement. To be frank, the legislative history is mixed on this point.

THE COURT: That's nothing new, right?

MR. JAFFER: No, it's nothing new.

So I am not sure how much we can take from the legislative history on that particular point. But on the face of it, I think that the language of the 2006 statute is more restrictive than the language that existed before, and nobody made the argument that the 2006 amendments were meant to widen the aperture of the government's investigative authority under this provision. I think it's worth asking, if the government can get everything now under the 2006 language, what more could it have got before that additional restriction was put in the statute?

THE COURT: How does it affect the relevant standard that the government only has to show "reasonable grounds" to believe the items sought are relevant?

MR. JAFFER: That phrase is used in a lot of the grand jury cases and the administrative subpoena cases. In fact, it's used with respect to the whole category of information. So what courts will say is: Are there reasonable grounds to believe that this category of information will lead to relevant information? So it's actually a much more sort of attenuated standard. Certainly, a less stringent standard in the grand jury context. So it may be that the phrase "reasonable grounds" makes the standard less stringent than it would otherwise be. But it's still at least as stringent as the standard applied by courts in the grand jury and administrative

subpoena context, and arguably less permissive than that standard.

Your Honor, there are two other points I would like to just make very briefly about accepting the government's theory here. One I already made, which is that if they can collect these kinds of records under this authority, they can collect them under other authorities as well. The second is if they can collect call records under this authority, there is no reason why they can't collect all kinds of other records as well.

The government argues the call records are distinctive because they are interrelated, but many other kinds of records are interrelated. That's true of location information. It's true of financial records. It's true of some kind of medical records. We have submitted a declaration from Edward Felten, a professor of computer science, who explains how and why those kinds of records are also interrelated. So if you accept that the government can get these kinds of records, you are accepting that the government can get many others as well.

Then, finally, your Honor, if the government can obtain these kinds of records in terrorism investigations, there is no reason why it couldn't obtain these kinds of records in other kinds of investigations as well. The government says that terrorism and national security investigations are different, they are far-reaching, they are

broad, but that's true of many other kinds of investigations as well. It's true of some insider trading investigations. It's true of some securities fraud investigations. It's certainly true of some drug trafficking investigations. I think that if you accept the government's theory here, you are creating a dramatic expansion in the government's investigative power.

THE COURT: In your view, is it factually incorrect that the government needs to collect all metadata in order to sufficiently identify connections between terrorists, or is it your position that even if that is true, that it's not enough to make the bulk collection relevant?

MR. JAFFER: I am glad you have asked this question because this is a point that to our argument I think is crucial.

We are making both of those arguments. Even if all of this was necessary, it wouldn't be relevant in the sense that the statute requires it to be relevant. But I think maybe more important, it's not necessary. And we have submitted, again, the Felten declaration which explains why it's not necessary. You don't need all call records in order to do what the government says it wants to do. The government says it wants to track the associations of suspected terrorists, and we can certainly understand why the government would want to do that. But you don't need to collect everything in order to do that, and Professor Felten explains why that is true.

The other thing that is worth noting here, your Honor, is that even the government doesn't seem to argue anymore that it is necessary to have all call records in order to do what it wants to do here. If you look at Judge Walton's opinion from 2009, which we cite on page 13 of our reply brief, that opinion begins by saying, We authorize this program because the government asserted in sworn affidavits that collecting all call records was the only effective means to do what we want to do here, which is, again, track the associations of suspected terrorists. And if you look at Judge Egan's opinion that was issued in August over the summer and released over the summer, it says the same thing on page 19 of that opinion. It says that we authorize this program because the government asserted that this was the only way to track the associations of suspected terrorists.

But if you look at the government's declarations in this case, those phrases appear nowhere in the declarations. It's actually quite a very conspicuous absence. Where you would expect to find those phrases, instead you find phrases like, this is one tool that we could use, or, it may not be feasible. I am not saying that means that the government has no interest anymore in collecting any of this stuff, but I am saying that the interest that the FISA court relied on and said was crucial to its ultimate decision to authorize the program, the statements that the government made to the FISA court to

result in the authorization of the program it no longer makes.

There may be good reasons for that. Perhaps the government has just changed its mind or it has recognized that there are technological tools available to it that it didn't recognize were available five or six years ago. But for whatever the reason, the point is that the government is no longer saying what the FISA court thought was necessary for the government to say in order to justify the program.

Your Honor, unless you have further questions about the scope of the statute, I will just return to preclusion briefly. I want to make sure that I leave sufficient time for my colleague to address the constitutional claims.

So the government has two different preclusion arguments. The first is that 18 U.S.C. 2712, which provides a damages remedy for certain claims, implicitly precludes plaintiffs' claim here.

I think it's useful and important, your Honor, to start by remembering what the background rule is here because the government forgets it in its briefs. The background rule here is the Administrative Procedure Act. The Administrative Procedure Act creates a strong presumption that Congress intends judicial review of administrative action. And that presumption can be overcome only with clear and convincing evidence.

The presumption is different for damages claims. If

we were making a damages claim, if we were asserting a damages claim, it would be our burden to show that Congress intended to create the right of action, but that's not true with injunctive relief. It's the government's burden to show clear and convincing evidence.

I point that out in part because one of the cases that the government relies on in *Jewel*, a California case involving the warrantless wiretapping program, the whole premise of the court's reasoning in the section on injunctive relief is that it's the plaintiff's burden to show that Congress intended there to be a right of judicial review, which is wrong. It's not the plaintiff's burden, it's the government's.

THE COURT: For this Court to find that 2712 does not preclude the statutory claim, do I have to find that *Jewel* was wrongly decided?

MR. JAFFER: You don't, your Honor, because *Jewel* actually involved one of the subchapters listed in 2712. So three of FISA's four subchapters are listed and *Jewel* involved one of those subchapters. This case doesn't involve that.

That said, I do think *Jewel* was wrongly decided, and I think if you look at the section of the injunctive relief part of that opinion, you will see what I just said, that the court cites the wrong burden. So certainly the premise of the court's analysis was incorrect.

On Section 215 itself, your Honor, the government

argues that Congress precluded judicial review to people like us by providing judicial review to the telecoms, to the providers. A few things here, your Honor.

First, the legislative history shows that Congress added the judicial review provisions for providers not in order to preempt or preclude any other claim, but, rather, because the question of what process should be afforded to providers had been a subject of litigation under the National Security Letter statute. So there is a separate set of cases in this district before Judge Marrero involving a National Security Letter provision. Those cases involved a challenge by a provider, and the question that was presented in those cases was, what rights did the provider have to challenge the national security letter that's been served on it? And in response to those decisions, Congress made these additions to not just the national security statute, but to 215 as well, explaining precisely what process the providers should have.

So that was congressional intent here. And if you read the government's briefs, the most that the government can say on the other side is just that Congress never contemplated that the targets of these orders would ever come into court, because Congress never contemplated that they would learn of this kind of surveillance. I don't know whether that's true or not, but even taking it as true, that doesn't meet the government's burden. It's not enough for the government to say

Congress never considered. The government has to establish that Congress not just considered, but considered the claim of particularity. That's the language from the *Pottawatomi* case, Justice Kagan's opinion. It's the language from *Block* in the D.C. Circuit.

The last thing I want to say relates to *Block* itself, to the D.C. Circuit case that the government relies on heavily in this part of its argument. In that case, the D.C. Circuit rejected a milk consumer's argument that the Agricultural Marketing Agreement Act gave them an implied right of action to challenge orders setting milk prices.

There are three things that were crucial to the court's decision in that case. The first was that extending a cause of action to consumers would have undermined the statutory scheme by allowing an end run around administrative review requirements; the second is that the statutory scheme was enacted to protect the producers, not the consumers who are asking the court to recognize an action; and the third is that Congress had extended a cause of action to another group, handlers, milk handlers, whose interests were aligned with those of the consumers. No analogous thing can be said about this particular context.

First, extending a cause of action to the plaintiffs wouldn't allow us to do an end run around administrative requirements, administrative remedies. There is nothing to do

an end run around.

Second, the statutory scheme here, FISA, was intended, at least in part, to protect the privacy of people like our clients, people like the ACLU, organizations like the NYCLU, and all other Americans. That was the point of FISA, to put limits on the government's surveillance authority.

Finally, the interest of plaintiffs in the telecom companies, the other group that Congress has allowed to sue here, are not aligned. That's true because most telecoms have little interest in protecting the privacy of their subscribers. Challenging Section 215 is time-consuming and costly. Section 215 orders come from the same government that regulates them. They are shielded from liability under 1861(e). And even if a provider had an incentive to challenge orders, there are practical reasons why they wouldn't do so. Marc Zwillinger, the Yahoo attorney, sets out those reasons in testimony that we cite on page 25 to our opposition to the government's motion to dismiss.

Finally, as your Honor knows, no provider has yet challenged a Section 215 order. So the idea that providers are standing in the shoes of the ACLU and NYCLU is far-fetched.

Unless you have further questions about the statute, I will turn it over to my colleague.

THE COURT: I don't at this point in time. You can turn it over, and I want to let the government know that they

will get equal time. You have already used 30 minutes, but it's fine.

MR. JAFFER: I apologize.

MR. ABDO: Good morning, your Honor. Thank you for the Court's indulgence.

The argument so far has focused on the extraordinary breadth of the government's interpretation of the term relevant. But beyond the statutory problems with the government's theory are extraordinary constitutional ones. Never before has the government attempted a program of dragnet surveillance on Americans on this scale and the constitutional questions that the program raises are therefore novel and profound. They go to the very nature of the relationship between the citizens of this country and their government, and they provide an independent basis to invalidate the government's collection of plaintiffs' call records.

Moreover, to the extent there is any doubt about whether Section 215 authorizes the form of dragnet surveillance in which the government is now engaging, the substantial and serious constitutional questions that that dragnet surveillance raises counsel in favor of plaintiffs' narrower interpretation.

I will begin with the Fourth Amendment, your Honor. There are two questions I think that are relevant to our Fourth Amendment claim. The first is whether the government's collection or long-term collection of call records constitutes

a search for Fourth Amendment purposes and the second is whether that search is reasonable.

Long-term collection of call records constitutes a search because it places in the government's hands an extraordinary amount of information about Americans, including the vast majority of whom are innocent Americans. It reveals who you call and when, whether you call your doctor, the domestic violence hotline, an abortion provider, an ex-girlfriend, a suicide hotline, or a pastor. And it reveals not just one of those details about every American, but every one of those details. As Professor Felten summarizes in his declaration, telephony metadata, particularly when collected in the aggregate, can be a proxy for content.

THE COURT: Accepting the assertions of Professor Felten that aggregated call data can reveal much more intimate details of a person's life in just a person's call records alone, would the search for Fourth Amendment purposes happen when the government merely obtains the call records or when it queries them?

MR. ABDO: I think it would happen at the moment of the collection, your Honor. I think it's worth noting that the premise of essentially all Fourth Amendment case law has been that an individual's expectation of privacy is upset by government action when the government obtains information in which that individual has an expectation of privacy. This is

in part because the Fourth Amendment creates a private sphere that the government cannot penetrate without sufficient cause. And it's in part because the Fourth Amendment reflects an historic uneasiness with entrusting to the government vast quantities of information about Americans without individualized determinations of cause.

The implications of the government's argument to the contrary I think are really without limits. It would allow the government to wiretap and record every phone call in the country, store those calls in a database for future searching if and when a need arose. It would allow the government to photocopy every piece of mail sent in this country and store those photocopies in a database subject to future searching. It would allow the government to demand the membership lists of every organization, including the ACLU, including the New York Civil Liberties Union, and including every American to store for future searching.

So I think it's important to understand the implications of the government's argument that collection itself doesn't implicate the Fourth Amendment. I don't think there are any cases that stand for that proposition. Moreover, if there were, in fact, such a gaping exception to the Fourth Amendment, you would have expected the government to have run through that exception many years ago and not just in recent time.

One way, I suppose, of thinking about the question as well is to ask whether ordinary Americans expect that strangers would acquire this information and be assured by the promises of those strangers that they wouldn't look at them. That's a motive analysis the Supreme Court has often used. And I think most Americans would be shocked if they learned that strangers were acquiring this information, and they would not be at all consoled by the assurances of those strangers that they weren't looking at them. That's the expectation I think of most Americans. And that's an expectation that the Congress recognized when it enacted, for example, the Wiretap Act which criminalizes unlawful surveillance. That act doesn't just criminalize the government's unlawful use of information that it has acquired through a wiretap, it criminalizes the government's unlawful acquisition in the first instance.

Now, of course, future use of information can aggregate an initial search, but the search for constitutional purposes happens at the outset.

I would like to address one of the government's other arguments when it comes to the question of whether collection is a search. Because the government doesn't dispute Professor Felten's claims regarding how revelatory aggregated call records can be in the government' possession. They really quibble with the legal underpinnings of our claim. And, of course, their other primary claim is that the Supreme Court's

decision in *Smith v. Maryland* decides this case or controls this case, and that simply is not true.

Smith was a dramatically different case. It involved a targeted use of a pen register against an individual suspected criminal over the course of a matter of days, and it did not involve a dragnet collection or bulk collection of call records. It would have been, I think, a vastly different case and people would have understood its significance differently had the government, in targeting Michael Smith in that case, assembled a database of all American's call records and merely queried that database in pursuing Mr. Smith. I think everyone would have understood the constitutional questions presented in that case to have been different, and we certainly would have hoped that the outcome would come out differently had the Supreme Court understood the case to stand for that proposition.

THE COURT: If *Smith* doesn't control, what rule is this Court to apply?

MR. ABDO: I think the question the Court should attempt to answer is the one that the Supreme Court set out in *Katz*, which is whether plaintiffs have an expectation or a reasonable expectation of privacy in the sum of their call records in all of their associations? That's a question that the Supreme Court itself recognized in *United States v. Jones*, all nine justices recognized, presents a different question

when it comes to bulk collection. Four of the justices writing for the court would not have resolved that question because they thought they could resolve the case on a narrower ground of trespass theory. But five of the justices in *Jones* would have resolved that question against the government, recognizing that bulk collection implicates an expectation of privacy in a significantly different way.

THE COURT: Can this Court rely on concurring opinions in *Jones* to conclude that *Smith* doesn't control here?

MR. ABDO: I don't think the Court needs to or has to. We are not contending that *Jones* controls this case. We are simply contending that its analysis is relevant to the expectation of a privacy analysis. I think the antecedent question is whether *Smith* controls this case? And we don't think that's true for the reasons I have said.

THE COURT: How do the factual differences from *Smith* add up to a constitutional difference here?

MR. ABDO: I think that's right. The Supreme Court recognized that basic proposition in *United States v. Knotts*, which was a case in which the government used a beeper to track the public movements of a car that was suspected of being involved in drug trafficking. And the petitioner in that case didn't so much quibble with the general proposition that individuals generally have little expectation of privacy as they travel in public, but the focus of his argument in the

case was that accepting that rule in an individual case might allow pervasive surveillance of Americans all the time. And the Supreme Court was very careful to carve out that question and it said, bulk collection for pervasive surveillance raises a different question, and we will have time enough to address that question if and when it arises.

It first arose, I think, in a way that could serve as a model for this Court in the D.C. Circuit's decision in *United States v. Maynard*, which is the appellate decision that came before *U.S. v. Jones*. And the government argued very forcifully in that case that *Knotts* controlled the outcome, that using a GPS device to track an individual over the long-term is no different than the beeper in *Knotts*, and that therefore *Knotts* controlled the case. And the D.C. Circuit rejected that argument. It said *Knotts* does not control this case, in the same way we argue *Smith* does not control this case, and they explained at length why they thought the question was a different one and why the expectation of privacy question comes out differently.

So I don't think the Court needs to rely on *Jones* as binding, but of course I think it's persuasive precedent when it comes to the question of what Americans' expectation of privacy is in bulk collection of information.

THE COURT: You want to turn to your First Amendment?

MR. ABDO: I will be brief on the First Amendment. I

just want to emphasize three points.

THE COURT: Actually before we leave *Smith*, at what point is phone data collection no longer controlled by *Smith*?

MR. ABDO: I think that's a very difficult question and one that this Court doesn't have to address. I will try to address it in a moment, but I don't think the Court has to address it, in part for the same reason that the D.C. Circuit didn't feel the need to address it in *Maynard* and for the same reason that the five concurring justices in *Jones* didn't think it necessary to address. That no matter where the line is, surely it is unreasonable the government's indefinite and pervasive collection of Americans' call records.

In terms of taking your question on the merits and not trying to dodge it, it's a difficult question. It would require the Court to answer at what point Americans' expectation of privacy is upset. I think for guidance, the Court can look, for example, to some of the pen register authorities that the government has relied upon, some of which allow collection for 60 or 90 days, but those authorities are also only available to the government when it makes an individualized application to a court and obtains court approval. So it might mean that there would be a gradient of rules that would apply. For one or two days you wouldn't need to go to a court, for 60 or 90 you would need to go to a court, and for pervasive surveillance you would need to satisfy the

strict requirements of the Fourth Amendment, warrants and probable cause requirements. But again, I don't think this Court needs to answer those questions. Surely, unreasonable is pervasive surveillance.

To turn back to the First Amendment question, just to highlight a few points. The protection of the First Amendment is distinct from the protection of the Fourth Amendment, even when it comes to government's investigatory tools. And I think that's perhaps nowhere clearer than in the Second Circuit's decision in *Tabaa*, where it separately analyzed the Fourth Amendment question and the First Amendment question and made clear that the First Amendment imposed a different burden.

We are not suggesting that every Fourth Amendment search predicated on a warrant based upon probable cause needs to survive the strictest of court review, because as a general matter, most tailored Fourth Amendment searches will survive First Amendment scrutiny as well. But it is particularly important to apply the First Amendment when the government's surveillance reaches as broad as it does in this case, and indeed, when the government says that the Fourth Amendment provides no independent protection whatsoever.

Because the First Amendment applies and is independent of the Fourth Amendment, the Court really has two questions to answer. First is whether the government's collection of call records imposes a substantial burden on First Amendment rights.

And it clearly does. The government has collected essentially all of Americans' associational records. The case outstrips even the Supreme Court's decisions in *NAACP v. Alabama* or *Shelton v. Tucker* in which states have sought to acquire invasive --

THE COURT: Isn't this case different from the *Alabama* case, in that you can't know if the government will ever actually look at and analyze the ACLU's call records?

MR. ABDO: I don't think that distinction is a meaningful one. Those cases stand for the proposition that when the government collects associational information of that scale and of that intrusiveness, the First Amendment is violative because associational information has been handed over to the government. But they also recognize that there is a common sense way, in which allowing the government to acquire that sort of associational information infringes individuals' ability to associate with others; it chills context.

If you look, for example, at the Second Circuit's decision in *Local 1814*, in which an interstate commission sought to acquire payroll records for longshoremen in New York and New Jersey, the court was aware that there were differences between that case and *NAACP v. Alabama*. The commission wasn't going after the longshoremen. It was in fact going after the union itself. But the court recognized that the longshoremen would have been chilled in a very obvious and common sense way.

It didn't demand the kind of history that *Alabama* had to it.

THE COURT: Is there a substantial burden with no evidence of actual chill?

MR. ABDO: Yes. I think *Local 1814* stands for that proposition. Chill is an inherently difficult fact to prove. It generally requires proving a negative that someone didn't contact us who may have contacted us. Of course, at the moment they choose not to contact us, the evidentiary trail runs dry. So for that reason, the Second Circuit has taken this common sense approach.

It described *Shelton v. Tucker*, which is another associational case, as standing for the general proposition that when there is a common sense chill that would be worked upon the organization complaining, courts shouldn't turn a blind eye to that common sense.

I guess another way of thinking about it is this. If the NSA had knocked on the doors of every American in this country and demanded that they turn over a list of every call they had made that day and for the previous five years, there would be no question but that the First Amendment would be implicated, no matter what the government's intended use for that information, and no matter what limitations the government had put in place for itself on the use of that information. That case is, for all practical purposes, no different than this one.

If there are no other questions, I will sit down. Thank you.

THE COURT: Thank you, Mr. Abdo.

Mr. Delery.

MR. DELERY: May it please the Court. Over the past several months there has been significant public discussion about a number of alleged surveillance activities. This case concerns one specific program that the government has officially acknowledged, the NSA's collection of bulk telephony metadata pursuant to orders of the Foreign Intelligence Surveillance Court, and under a provision of FISA that Congress has twice extended, without change, after having been briefed on this program.

The details of the program are important and haven't much been discussed this morning, and I would like to start by just highlighting a couple of those elements.

The records collected are business records of telecommunications carriers that are prepared for other business purposes, and may include information such as the numbers placing and receiving calls, routing information, and the time and duration of calls. But under this program, the government does not collect the content of any conversation, listen to any calls, or even collect the identifying information about customers or parties to the calls.

In addition, the data may only be searched for

counterterrorism purposes, and only then, and then only, if there is reasonable articulable suspicion to believe that the selection term or the number to be queried is associated with specified foreign terrorist organizations. And as the briefs lay out, the FISC has established other controls on the program as well.

The public debate has focused on the wisdom of this program, given its scope, and Congress is currently considering various proposals to alter it. That's a discussion the Executive Branch has said it is important to have. But the merits question in this case is whether the program is lawful, and the answer is yes. It's authorized by statute and it's constitutional.

The Court, however, need not reach those questions because the complaint doesn't properly establish plaintiffs' standing and the Court lacks jurisdiction over the statutory claim. And so for all of those reasons, the threshold questions and the merits, the government urges the Court to grant the motion to dismiss, and obviously to deny the preliminary injunction which seeks to limit a national security program that has been repeatedly approved by all three branches of government.

So I would like to start, if I might, with the question of standing. Plaintiffs' claims of harm in the complaint are speculative, not the kinds of concrete,

particularized, or certainly impending injury that the Supreme Court has required. There are really two types of injury that the complaint alleges, and obviously on preliminary injunction these have to be proved and not just alleged.

The first is that the government has reviewed or might review plaintiffs' telephony metadata, call detail records, to identify people who associate with the plaintiffs. But under the FISC's orders, the NSA may only review records responsive to queries using identifiers that are believed, numbers believed, based on reasonable articulable suspicion, to be associated with a foreign terrorist organization. There is no allegation, much less proof, that the government has reviewed plaintiffs' metadata under this so-called RAS standard or otherwise, much less created the kind of comprehensive profile that plaintiffs reference.

The government has argued this expressly in their briefs and there has been no response on either motion. And the Supreme Court's decision in *Amnesty International v. Clapper* teaches that the kind of speculative harm then that the plaintiffs are claiming here would not be sufficient to allow the Court to pass on that claim.

THE COURT: Isn't there a difference between this case and the *Amnesty* case, in that there is no dispute here that the ACLU's call records have been collected by the government?

MR. DELERY: That is true, your Honor, at least as to

the 90 day period covered by the secondary order that has been publicly acknowledged and reclassified. That order, coupled with the plaintiffs' declarations, leads the government not to challenge the question of collection as to that time period.

But while we are not saying that collection alone could never lead to a concrete, actionable injury that might provide standing, the plaintiffs' complaint and supporting papers have not established such an injury here. The injuries that they identify, the creation of a comprehensive profile, or the second one, that persons who might be interested in talking to the plaintiffs might be chilled from doing so, are speculative. There is nothing to support that either of those things has happened. Indeed, the declarations don't identify anyone who has refrained from contacting the plaintiffs because of the kinds of concerns that are identified here.

So cases like *Clapper* and the *Laird* case from the Supreme Court suggest that therefore, at least on this record, the plaintiffs have failed to establish standing.

THE COURT: In the context of the Fourth Amendment, if the plaintiff can plausibly allege that its own Fourth Amendment rights have been violated, isn't that an injury in fact?

MR. DELERY: Your Honor, if you read the complaint to have alleged that much, I think we would agree that the plaintiffs have standing at least to argue that they have a

Fourth Amendment interest that has been put in issue here. However, there the inquiry quickly collapses into the merits, and we will come back to that later. The government's position, obviously, is that there is no Fourth Amendment privacy interest that is implicated by collection of the third-party business records that are at issue here as you were just discussing. But, in any event, the Fourth Amendment is not infringed unless and until the government or some person actually looks at the data, and that's the teaching of the *Horton* case and the *VanLeeuwen* case and others that we have cited in the brief.

I would submit, your Honor, this also quickly then collapses into the question of irreparable harm for the purposes of the preliminary injunction. So even if you are satisfied that there is a modicum of injury to clear the Article III standing hurdle, we think that the level of injury is clearly insufficient to support a preliminary injunction.

THE COURT: Is it possible that the ACLU has standing to bring some of its claims but not others?

MR. DELERY: Yes, your Honor. I think that goes to the second of the jurisdictional arguments that we have raised. The statutory claim here is impliedly precluded by FISA's detailed scheme for judicial review, which sets out who may challenge 215 orders and where those challenges have to be brought. And the answer is the organizations that are the

recipients of the production orders and in the FISC, the FISA court established by Congress to hear these and other foreign intelligence matters.

The APA's waiver of sovereign immunity does not apply when Congress specifies a particular forum for limited parties for judicial review. And that's what the Supreme Court said in the *Block v. Community Nutrition Institute* case. The APA itself in Section 702 recognizes this issue of implied preclusion. And here there are several elements of the statute that establish that the FISA court process is the exclusive mechanism for hearing challenges to applications under the statute.

The first is 215 itself, which together with Section 1803, which establishes the FISA court, the statute provides that recipients may challenge the production order with the FISC's so-called review pool. That's in subsection (f). Then either the recipient or the government can appeal to a court of review and then ultimately seek certiorari in the Supreme Court if necessary. But 215 does not allow challenges by third parties who, as plaintiffs have acknowledged, should not know about the existence of the orders. And this was a deliberate choice by Congress reflected in the legislative history to create a secret given the national security interests at stake and expeditious process. And the legislative history references are cited at page 6 of our motion to dismiss brief.

There are several other relevant parts of the statute as well. The first is that unlike some other provisions of FISA, the statute does not provide for a suppression remedy or an opportunity to challenge adequacy under the statute. And the other FISA examples are in footnote 7 of our motion to dismiss brief. 215 is not one of them. As your Honor pointed out earlier, 1861(f)(2)(D) provides that an order issued pursuant to this provision shall remain in full effect unless it has been explicitly modified or set aside under the procedure that's specified in the statute, which is quite a strong statement by Congress, that a validly issued procedurally regular order of the FISA court shall remain valid, unless the appeal process, which could go up to the Supreme Court, that is specified is followed.

The other statute was also discussed earlier, your Honor, and that's 18 U.S.C. 2712, which provides for damages actions for violations of three specific provisions of FISA, again, not including Section 215, and does not provide for injunctive relief.

THE COURT: 2712 has another phrase in it that the government didn't focus on. It says "for any claims within the purview of this section" before it lists the three FISA provisions. Wouldn't violations of other sections of FISA be outside the purview of Section 2712 given that qualifying language.

MR. DELERY: I think what 2712 establishes, your Honor, again, together with the other provisions of FISA that create suppression remedies for particular types of orders, is that where Congress intended to allow third parties outside of the recipients of a particular order to challenge the order in one way or the another, it knew how to do it, and it did do it in certain specific instances, but not with respect to Section 215.

THE COURT: What about the government's argument in *EPIC* that a district court challenge is not a challenge to a FISA order, but rather it's a challenge to executive action?

MR. DELERY: I think, your Honor, if you look at the *EPIC* brief in totality, in addition to pointing out that as opposed to bringing a case as an initial matter in the Supreme Court it should be brought in district court in the first instance, the brief made clear that we would be making the preclusion argument that we are making here in district court as well. It laid out that that was a reason to follow the regular order because the same preclusion argument would apply to an original action in the Supreme Court, and the brief detailed why original or appellate jurisdiction in that context didn't lie in the Supreme Court.

The last thing thing I would highlight on this question, your Honor, is Congress actually considered and rejected a proposal for district court challenges to 215 orders

in 2006. That's the references on page 18 of our motion to dismiss brief. Which is further confirmation that this was not a question that Congress didn't think about at the time. Section 215 and the related provisions of FISA reflect a deliberate choice about where and by whom challenges to orders under this provision could be brought. And under the Supreme Court's decision in *Block* and others, that means that claims like the ones that the plaintiffs have brought here is precluded.

THE COURT: Did it mean to preclude suits altogether or just presume that there wouldn't be any because everything was confidential?

MR. DELERY: I think that if you look at the legislative history, there was consideration to providing for other types of challenges. Certainly, one of the reasons why third parties should not be invited into this process was the fact that given the national security interests at stake, it was contemplated that the procedures would be in secret, and, in fact, the statute requires that the filings and proceedings be conducted pursuant to appropriate security arrangements. But I think that the statutory language and the absence of a 215 remedy, as was provided with respect to other types of FISA orders, suggests a stronger intent than just an assumption that they would remain secret.

In fact, under the plaintiffs' theory, there wouldn't

be any reason why other requirements other than relevance couldn't be challenged in district court, including the adequacy of particular minimization procedures or compliance with Executive Order 12333, also elements of the overall scheme. The government would submit that that kind of intrusion into the workings of this type of national security program is inconsistent with the framework and the statute that Congress established.

I think if I could then turn to the statute itself, your Honor, and the scope of Section 215.

The collection of bulk telephony metadata is relevant within the meaning of Section 1861(b)(2)(A) because the key investigative purpose of terrorism investigations is to find connections between known and unknown terrorists, and unless the NSA aggregates records created by different companies and over time, the analytical tools that are available to NSA to identify chains of communications and those connections would not operate as effectively. And I would like to highlight three main reasons why that conclusion is correct. The text and structure of the statute, the nature of counterterrorism investigations, and third, the ratification by Congress.

So, first, on the text and structure instructor of the statute. Congress clearly intended a broad scope for 215. It used the term "relevant," that under its ordinary definitions, even plaintiffs recognize, has a broad meaning, appropriate to

or bearing on the matter at hand. And not only has Congress presumed to adopt ordinary background assumptions about statutory terms that the legislative history suggests that it did so here, and was intending to invoke broad investigatory authority, the addition of the relevant requirement in 2006, and I think it's clear from the legislative history, was not meant to narrow or create a narrowing of the authority under Section 215, contrary to plaintiffs' suggestions.

If you look at the legislative history that we cited in the reply brief at page 12, footnote 15, I think that statement is clear. In fact, the House report made clear that the 2006 addition of relevance was intended to basically codify the then existing understanding and practice, again, not to narrow it further.

THE COURT: Does the insertion of the word "relevant" then have any meaning?

MR. DELERY: It certainly does have meaning, your Honor, and obviously it's the obligation of the courts, as the FISC has done, to give it effect. But the legislative history explains how it came to be, which was to clarify an existing practice.

THE COURT: Are grand jury subpoenas an appropriate place to look for the definition of relevance?

MR. DELERY: Certainly, the grand jury analogy has a bearing on this question and legislative history refers to that

to some extent. I don't think it's the end of the inquiry, however, because of some of the other elements of the structure of the statute and Congress's attempt that I will come to in a moment. But even looking at grand jury practice itself, it's long established that grand juries have broad and wide-ranging investigative powers. They don't need to be focused at the outset on an individual potential target.

THE COURT: But 17(c) is not really a relevance requirement, is it? It's really a question of whether it's, in the words of 17(c), unreasonable or oppressive?

MR. DELERY: And the Supreme Court has made that clear in resisting attempts to impose on the government or the grand jury at the outset a tight focus on a particular target of an investigation. As the Supreme Court said in *R. Enterprises*, a grand jury can be investigating to find out whether a crime has even been committed at the earlier stage, even than focusing on who might have done it, or even to satisfy itself that a crime has not been committed. So it has quite a wide-ranging authority.

I think if you take the term "relevant" and then focus on where it comes in the sentence though, it's clear that Congress has established a deferential standard, reasonable grounds to believe that they are relevant to an authorized investigation, which seems to contemplate an element of judgment on the part of the government and national security

professionals.

Again, Congress considered and rejected a proposal in 2006 to limit the scope of this provision to individuals who are actually suspected of terrorist activity, and that was done at the same time that the relevant standard was added to the statute, which again suggests that the type of analysis that at least in the briefs at times the plaintiffs seem to urge a much narrower focus was something that Congress considered and rejected.

The last thing I will say on the structure of the statute is that it also built in protections recognizing the broad scope of the material that could be collected under 215, designed to ensure that the government gets all the information it needs for national security investigations, but protects U.S. person information. So in Section 1861(g)(2), which requires minimization procedures, it reflects an understanding that the government will get records from unconsenting U.S. persons, and that the court would need to ensure that there were protections built in for the handling of that information. And that's, of course, what the FISC has done repeatedly here.

These terms in the statute and these phrases, we would submit, need to be understood in light of the nature, purpose and scope of counterterrorism investigations. The Supreme Court in *Oklahoma Press* made clear that that's the question for any kind of relevance inquiry, and it's certainly true here.

These investigations are different from ordinary or what we might think of as ordinary criminal investigations, which are focused on a particular event in the past that you may be trying to explore. These investigations are designed to detect, disrupt, and prevent ongoing or even future terrorist attacks, terrorist plots, so that they can prevent attacks before they occur. The investigations are necessarily predictive. They are prospective. They are looking for patterns. They are far-reaching in terms of across time and geographic scope. And the declaration submitted from an FBI official, the Holley declaration, at paragraph 17 and 18, describes these attributes.

A key focus here is that information or connections that are important to the investigation may not be known at the outset. That's why a historical retrospective analysis of a data set that is compiled across time and across telecommunications carriers is critical. The same type of analysis could not practically be done with the kind of targeted intelligence gathering focused on just the call records of somebody who you already know or suspect to be associated with terrorism. And the Supreme Court in the *Keith* case highlighted this distinction between ordinary criminal investigations and the broader requirements of intelligence investigations.

Significantly, your Honor, the plaintiffs have not

offered any theory of Section 215 or any relevant standard that would make sense for the statutory purpose and the nature of investigations that it was clearly designed to address. As I indicated earlier, in fact, at least the position in their briefs, which I think they may have walked away from some this morning, that it should be enough to get the records of somebody that you actually suspect of having a connection to terrorism, was considered and rejected by Congress. So that is not a reading that would comport with congressional intent. And they haven't offered any other definition of relevance that would be an appropriate fit for the scope of this statute.

THE COURT: The government appears to focus on relevance to the authorized investigation by limiting it only with respect to the application of investigative techniques.

Couldn't it just as easily mean relevant to the subject matter of the investigation as opposed to investigative techniques?

MR. DELERY: I do think it says relevant to an authorized investigation, so that might have several components. I think it's true that we have focused on the relevance to this particular analytical tool that NSA uses.

THE COURT: The technique here is limitless, right?

MR. DELERY: I do think you're correct, your Honor, that relevance often has a subject matter component and analogies to other types of investigations, grand jury or even

civil discovery, and in many ways it's closely related to the idea of the technique. The point of the NSA's analysis is to, as the declarations made clear, identify connections between known and unknown terrorists, particularly those who might be in the United States, ongoing plots. So I think whichever way you look at it, the information is relevant and tied to the purpose for which it is being collected.

I think, your Honor, it's significant then that the restrictions that the FISC has imposed and the minimization procedures are carefully calibrated to this purpose so that the information can be used only for counterterrorism purposes. It can only be queried where there is articulable suspicion that the number you want to inquire about has a connection to terrorism. And the government is expressly precluded from using the data for other purposes, including many of the things that the plaintiffs are concerned about.

THE COURT: If all of the call records are relevant, why aren't they all turned over to the FBI?

MR. DELERY: There are a couple of answers to that, and these are reflected in the declarations.

One is the sharing of information with the FBI has a practical element and the NSA has the analytical capability to identify the connections that would be useful investigative needs for the FBI. As I think the Shea declaration makes clear, NSA exercises its own analytical judgment, intelligence

judgment, to identify which of the hits that might be returned from a query are worth following up on which don't seem to be. So there is a practical element to providing the FBI with investigative leads that would be useful for the purpose for which they would be provided.

Second, I think -- again, this is a reflection of the minimization procedures. I think the government in its application, you can see it in the recently released application from 2006, the FISC in its orders has recognized that the scope of this program raises certain concerns. And so the FISC has been very careful to provide, as required by statute, for restrictions on the use and dissemination of information, particularly related to U.S. persons.

So that's why I say the program is carefully calibrated to the purpose for which it is being used and isn't the kind of indiscriminate use of the data that plaintiffs suggest.

THE COURT: There seems to be a tension here. If it's simply a practical consideration, namely, that it's the NSA that has the analytical capacity to go through the metadata, why the legal prohibition on providing all of it to the FBI?

MR. DELERY: I think it is, again, your Honor, a combination of the practical aspect and --

THE COURT: Why should the practical impinge on the legal? Shouldn't be the FBI have access to all relevant

material?

MR. DELERY: The FBI certainly is getting the benefit of all of the relevant material. The analysis is being conducted by the NSA. And this structure, which again reflects the application that the government made in 2006 and the order of the FISC, reflects a balance which should be relevant for, to use a word, the statutory analysis and also for any reasonableness inquiry under the Fourth Amendment.

I think significantly, your Honor, that brings me to the third main point about the text of this statute, which is that Congress has ratified this construction of Section 215 to allow the collection of bulk telephony metadata by extending the authority of Section 215 twice, in 2010 and 2011, without change, after having been notified and provided information about the bulk telephony metadata program. There were, as we have detailed, many briefings of the intelligence committees and the judiciary committees. In December of 2009, a classified paper setting out the scope of the program under the 215 authority was provided to the intelligence committees of both the House and Senate, and was made available to all members, and that was before the 2010 extension of the sunset date. And in 2011, similarly, an updated paper was provided to the intelligence committee and made available at least on the Senate side.

THE COURT: How can you argue that Congress ratified

this understanding of Section 215 when, for example, in the papers submitted I learned that the classified document describing the program was not even made available to the House of Representatives in 2011?

MR. DELERY: It was made available to the House of Representatives to all members in 2010. In 2011, it was made available only to certain committees, the intelligence committee, not to all members. The intelligence committees of both the House and Senate, I think it is long established, serve a critical function in overseeing national security affairs, and in particular the activities of the intelligence community, and the purpose for structuring them the way they are is so that they can stand in the shoes of the broader membership and the public when dealing with individual programs that deal with classified information. I think the test that the Supreme Court has identified is that Congress ordinarily is presumed aware of administrative and judicial interpretations of a statute.

THE COURT: A veteran congressman, Congressman Sensenbrenner, submitted an amicus brief in this case, didn't he, in which he said he had no idea of what was happening?

MR. DELERY: It is certainly true that some members of Congress have expressed sentiments like that, and he is one of them. I think the record establishes that the intelligence and judiciary committees of both houses were briefed, and again,

there were materials made available on both sides, and certainly at the time of the first reauthorization in 2010 made available to all members of Congress that again made clear the scope of the program.

THE COURT: Were the FISC opinions made available to Congress?

MR. DELERY: I believe certainly some of the FISC opinions, at least over time, has now been revealed in some of the materials released.

THE COURT: That's since June 15, right?

MR. DELERY: They have been released publicly since June 15. Some of the materials that have now been released reflect the -- I want to say in 2009, although I am not positive, we can get back to that -- provision of some of the opinions, for example, on the compliance incidence, that those were provided to the oversight committees at the time, not just this year after the disclosures.

THE COURT: Even when you say in your brief, and as you have said here, they were "made available," that's in one location for a very limited period of time in 2010 and to only one house of Congress in 2011, right?

MR. DELERY: Not quite, your Honor. I think in 2011, it was made available to all senators. As I indicated before, in 2010, the actual classified paper was kept in the secure space on Capitol Hill, as classified documents would be kept in

a particular location.

THE COURT: In a SCIF for a limited period of time.

MR. DELERY: But as I understand it, a letter went out to all members on both sides, both the House and the Senate, telling them that significant information about a program relevant to the reauthorization was available here, and not only making that available, but making members of the intelligence committee staffs available to answer questions that members might have about the program.

So I think in ratification cases, often there is no real expectation that any member of Congress has focused on a particular provision.

THE COURT: It's a presumption, right? And a presumption can be overcome, right?

MR. DELERY: Certainly, ordinarily here.

THE COURT: If a presumption that Congress is aware of the Court's interpretation of a statute can ever be overcome, isn't this the case?

MR. DELERY: I would submit not, your Honor, because here, regardless of the limits, given the need to handle the document in a classified way, there was much more of a direct effort to get information to the members.

THE COURT: The Executive Branch worked to do it, but they didn't succeed, did they?

MR. DELERY: Your Honor, I am not saying that every

member read these materials. I think what we can say is that the members of the relevant committees on both sides were briefed, and that the chairs of those committees drew the attention of all members to this issue and the need to focus on it.

The plaintiffs have identified a statement in one of the briefs from Senator Wyden where he expresses many of the concerns that are expressed here. And he did that in connection with the debate on the reauthorization of 2011, again, trying to emphasize what was at stake in the vote to extend the authority. So, again, unlike often in ratification cases with invariably obscure provisions, I think the record establishes that this was focused on more than you would have in the ordinary case.

If I could turn now to the Stored Communications Act issue--

THE COURT: Fine.

MR. DELERY: -- that the plaintiffs have raised.

I think the significant point is that 1861 (c)(2)(D), part of Section 215, added in 2006, is a later enacted provision than 18 U.S.C., Section 2703. And it authorizes production under Section 215 of tangible things that could be obtained by a grand jury subpoena or "with any other order issued by a court of the United States directing the production of records of tangible things." Section 2703(d), a subsection

of the statute that plaintiffs have identified, allows the production of call detail records by order in a criminal case. So by structure of the statute, which was intended to provide Section 215 authority for categories of documents that could be obtained through other forms of legal process, Congress has expressly authorized the collection of call detail records under this provision.

So that is an express authorization that you don't even need to reach the question of implied exceptions to the list. As your Honor pointed out earlier, Section 215 also allows the government to obtain any tangible things without restriction. There is certainly nothing that I am aware of in the legislative history that suggests that 2703 was a limit on that broad authority. And as was discussed, the FISC considered and rejected this argument in 2008, that having 2703 carve out a category of records that would otherwise be available under 215 would be inconsistent with the statutory structure. The point that I have just made about Section (c)(2)(D) is referenced in Judge Walton's opinion in footnote 1 where he notes the connection between these two.

The plaintiffs have identified in their reply brief a couple of other sources unrelated to 215 that they suggest are inconsistent with this argument. I submit that neither of them are. The first two examples again relate to implied exemptions which is, given (c)(2)(D), not what the Court has to do here.

And the third, which was an inspector general report, reflects a debate within the Department of Justice about Stored Communications Act before 2006 so before Section (c)(2)(D) was added.

THE COURT: Do you agree that the plain language of Section 2702(a)(3) would prohibit the government from collecting the telephone data?

MR. DELERY: I think again, your Honor, you need to read Section 2702 and 2703 -- 2702 is for voluntary production, 2703 has a provision for various forms of compelled production -- in light of Section 215, and I think they are different authorities. They are providing different authorities to the government. 215 is the one that's relied on here.

Just two other points about the scope of the statutory argument that I would like to address. One goes to the discussion about the usefulness of the program as a tool that was raised here and also in the briefs. I think, first of all, Section 215 doesn't require the program to be crucial or the least restrictive means of obtaining information. The test is relevant to an authorized investigation, which is clearly met here. Second, I think that some of the discussion has confused or melded two different types of usefulness that I think it's useful to separate. One is the role of bulk collection for the analytical tools that the NSA applies.

So, therefore, both we and the FISC have said that the NSA analysis would not be effective, at least on the scale that it is, without the bulk history and the collection of cross carriers. So the 2006 application, for example, that has been released in the FOIA production says that NSA can effectively conduct metadata analysis only if it has the data in bulk. Judge Egan's opinion from August of this year includes a similar term.

So the point is that the same level of historical analysis, discovery of contacts, links between known and unknown terrorists, can't practically be accomplished through sequenced NSL's or some of the other ideas that have been identified, although certainly, as I indicated at the beginning, some other options are being debated in Congress that seems like the place for those.

The second sense of usefulness is the contribution that this telephony metadata program has made to counterterrorism investigations. There, I think the discussion of this subject is inconsistent. The program, as the declarations identify here, has made important contributions that assists the FBI, including as a complement to other investigative tools. I don't think that there has been an assertion that this should be examined in isolation. Again, the key to thwarting future attacks is to identify before they occur what plans are occurring and to identify connections

between people that are identified in counterterrorism investigations, and others with whom they might be working, including here in the United States.

So it's in that respect that this tool has been important, one of significant value as the Holley declaration reads and Judge Egan's opinion expresses in similar terms.

So with that, unless there are more questions about the statute, I will turn to -- one other point if I might, which is that the suggestion has been made that this authority is limitless. Respectfully, I think that is not the government's position. This program is tailored and focused on the distinctive features of telephony metadata, in that they are highly standardized, they are structured, and that analysis of large data sets allows for the drawing of the connections that I have been talking about. Upholding the program here doesn't sanction all bulk data collection. There wouldn't be, obviously, any other type of collection unless the FISA court is willing to grant it. But again, you need to look in any other context to these same types of considerations -- the nature of the records, the connection to an investigation, the scope of the production sought -- and as we have said, other types of bulk data, including medical records or library records, would not have the same connections.

THE COURT: Should the Court credit statements of Senators Udall, Wyden and Heinrich, who are members of the

Senate Intelligence Committee in the Northern District of California case, where they assert that they have seen no evidence that this monitoring program has provided any uniquely valuable intelligence?

MR. DELERY: I think, your Honor, respectfully, I would start with the declarations that have been submitted in this case, which do detail the role that the program plays and some examples that could be discussed publicly about its connection to particular investigations.

As to the uniqueness question, again, I think there is a blending there of the two. Certainly, as the declarations establish, we are not aware of another currently available mechanism that would accomplish the contact chaining inquiry and the analysis of connections in as timely or effective manner as the one that's at issue in this program. Obviously, to the extent that those senators have different views on that, again, they are currently debating proposals that include potential changes to the program, it seems like that's the venue. But ordinarily, I think, in national security matters, the Supreme Court has said courts should defer to the professional judgment of the national security professionals, here that would be reflected in the declarations that have been submitted in this record.

With that then, your Honor, I will turn to the Fourth Amendment. The government's position is that the Fourth

Amendment challenge is foreclosed by *Smith v. Maryland*, which held that there is no reasonable expectation of privacy in the non-content information that's held by third parties. So the metadata at issue here or the same type of information was at issue in *Smith*, telephone numbers.

THE COURT: Doesn't the information collected here reveal far more about a person than the information collected on one suspect for a few days in *Smith*?

MR. DELERY: Potentially, the aggregation of the data can be a powerful tool. That's the reason for the collection. In fact, going back to the usefulness point that we were just making, the Felten declaration confirms the value of the tool. The reasons why Professor Felten identifies, you can use the data to draw connections, learn information, for a different purpose, but the same type of analysis that the NSA applies. The key question is, who are you using it for? And here the program is tailored to people who are suspected of having a connection to terrorism and not for other purposes.

I think the other key distinction between *Smith*, and *Jones* for that matter, is that there you're gathering information about a known person, about an individual person, and the metadata is associated with that person. In the telephony metadata program, the business records that are collected from the telecommunications carriers are not tied to identifying information. Therefore, it's only later, after an

appropriate query triggered by a suspicion of an association with terrorism, that you could identify the information with an individual. It's a key distinction. So in some ways the relevant analogy is not the collection, but the querying here to the framework that was at issue in *Smith*.

Smith's holding, though, it's true it was about an individual and a couple of days, as opposed to the program that has a broader scope as we have here, but its holding was about the expectation of privacy that everyone has in a particular type of data. And the court's clear conclusion was that there is no reasonable expectation of privacy in this type of metadata that is conveyed to third parties, the phone companies. People assume that when they use the phone, the phone company is recording the number dialed and how long the call lasts and the like, and we know that because all of us get the bills that detail the calls. That was the key insight of the Supreme Court's decision in *Smith*. In fact, the dissent in that case made many of the same arguments that are being made here. Noted that from a pattern of calls, if the calls are associated with an individual, you could learn information about that person, and, nevertheless, the court held that there is no reasonable expectation of privacy in that information.

Couple that holding with the Supreme Court's clear statement in *Rakas* and other cases that the Fourth Amendment right is personal, can't be asserted vicariously, then those

holdings control the outcome of the Fourth Amendment question in this case. Certainly, in *United States v. Jones*, as has been identified, Justice Sotomayor in her conferring opinion, and in Justice Alito's, but particularly Justice Sotomayor's, suggested that this question, this so-called third party doctrine, may at some point warrant reconsideration.

THE COURT: Is the expectation of privacy affected by the Stored Communications Act's prohibitions on turning that information over?

MR. DELERY: I don't think so. I think given *Smith* and given the ways in which the information is used, and people understand that this information is in the hands of a third party, in the hands of a business, uses it for its own purposes, billing and fraud detection, and, also, under the Stored Communications Act, may be required to provide it to the government for various purposes. And certainly Section 215, like the Stored Communications Act, would be one of the background authorities under which, when a provider says we are going to handle the records consistent with applicable law and authority, that would be one of them.

THE COURT: Haven't Justice Sotomayor and Justice Alito and several others in *Jones* indicated that the third party doctrine relied on in *Smith* may no longer be appropriate in light of modern technology?

MR. DELERY: Certainly, your Honor, Justice Sotomayor

and Justice Alito, but again, particularly Justice Sotomayor, suggested that it may warrant reexamination, but she did not identify what the answer would be to that question. So hasn't provided any standard that could be applied in a case like this in place of the very clear *Smith* standard.

In fact, that's a conclusion that the FISC has already reached. Judge McLaughlin's most recent opinion addressed that question. Last week, the Southern District of California in the *Roland* case came to that conclusion, and the District of Maryland last year in a case called *Graham* noted that the Supreme Court had not yet resolved this question about the effective aggregation and new technology on the third party doctrine, and until then the established law needed to apply. Given the Supreme Court's repeated admonitions that predictions of an overruling of clear prior rulings should be avoided and that all of us, the government and the court, should wait for the Supreme Court's own resolution of those questions, leads to the conclusion that *Smith* still controlled here on the question of whether there is a search.

I should indicate that even before *Jones*, lower courts, a number of cases cited in our briefs, had made clear that call detail records, like the ones at issue here, don't come with a reasonable expectation of privacy so collecting them is not a search.

Obviously, as we have argued, to the extent that the

Court turned to a reasonableness inquiry, we think that we would still prevail. Any search, if one existed, would be reasonable in light of the government's compelling interest in the purpose of the statute, counterterrorism investigations. The tailored intrusion, if there is any one, on the data of the plaintiffs, again, given the restrictions on the querying and the lack of any evidence that the plaintiffs' data has actually been reviewed by any person is likely in any way, that's not in the record.

Indeed, I will point out as to that, the plaintiffs don't seem to challenge the RAS standard. In fact, again in their briefs, to the extent that they suggest anything as an alternative, it would be to seek the phone records only of people who have an articulable suspicion of being associated with terrorism. So to the extent that there is a querying of data that would happen to turn up records of any individual person, I don't read the plaintiffs to be challenging that as a Fourth Amendment problem, even under the existing framework.

And as I indicated earlier, the framework was imposed for a reason. It is designed to be carefully tailored. And the safeguards, by limiting both the use and the retention and the dissemination of the information outside of the NSA, and then an oversight structure on top of that, are protective of Fourth Amendment interests. Under a standard reasonableness inquiry, this program would pass muster.

THE COURT: Do you want to turn to the First Amendment?

MR. DELERY: The First Amendment claim fails as a matter of law because the plaintiffs haven't alleged or proved, for purposes of the preliminary injunction, that the telephony metadata program is directed at their expressive or associational activities in any way. Good faith government investigations, conducted consistent with the Fourth Amendment, do not violate the First Amendment, as long as they are not pursued with the purpose to deter or penalize protected expression. And that distinguishes this situation directly from the *Tabaa* case to which Mr. Jaffer referred.

In that case, the investigation was being pursued because individuals had attended a particular conference in Canada. It was based on expressive activities. Here, there is no sense of that. The First Amendment claim is based on a hypothesis that, as we have established, is wrong that associational activities are actually being pursued, and there is also no evidence of an actual chilling effect and any actual person has declined to speak to the plaintiffs or otherwise has changed their course of conduct.

THE COURT: How can it be though that the Fourth Amendment is the only protection of interest started by the First Amendment?

MR. DELERY: That is not the position of the

government, your Honor. Although that was attributed to us, that is not the case. The point is that where an investigation is being conducted in good faith, consistent with the Fourth Amendment, in order for there to be a First Amendment violation, there needs to be some actual targeting of expressive activity or a desire to deter or punish First Amendment activity, and that's the element that is missing here. So it's not that the First Amendment doesn't add anything to the analysis. It's not applicable to this program and certainly hasn't been proved on the record in this case.

THE COURT: Could a good faith investigation substantially impair the freedom of association?

MR. DELERY: As a theoretical matter?

THE COURT: Yes.

MR. DELERY: That, as I understand it, there has been some debate in the cases about whether it is possible at any level. Certainly here I don't think that that is the case, and we are not at a situation where that would be put into play. And for that reason, I think this is very different from the cases like *NAACP v. Alabama* or the *Shelton* case that the plaintiffs have cited, all of which involve, again, the obtaining of membership information, or in the case of the *Shelton* case, a listing of one's associations, but attributed to a particular organization or individual. Again, the tying of information to an individual or a particular organization.

Here, the metadata, as collected by the telephony metadata program, is not tied to the identification of any individual. And so there is no mechanism just from the collection to identify which of all of the numbers in there, if any, show connections between the plaintiffs and any of the other people that they are concerned about. And so that's a fundamental distinction from the types of cases that the Supreme Court has recognized require exacting scrutiny.

We further submit that if that test did apply, given the fact that this serves compelling governmental interests that are unrelated to the expression of ideas and the careful tailoring, the protections that are imposed on the identifying ability to connect metadata to identifying information, this program would satisfy that kind of First Amendment inquiry if you got there. But given the threshold issues, we don't think that would be appropriate.

Thank you.

THE COURT: Thank you very much, Mr. Delery.

A brief rebuttal, Mr. Jaffer.

MR. JAFFER: First, on the provision you raised earlier, 1861(f)(2)(D), I just wanted to give you a fuller response to your question, a few things that you should keep in mind when you read that provision.

First, it appears in the section that it is entirely about challenges by providers, and I think that it has to be

read in that limited context.

Second, the point I made earlier, which is that we are not seeking modification of the 215 order. We are challenging the conduct of executive officials.

Third, the legislative history, as I mentioned earlier, makes clear that that provision was meant to protect the 215 order on appeal. That was the narrow purpose that that provision was meant to serve.

Fourth, to the extent there is ambiguity in the meaning of that provision, there is of course the background rule from the APA that requires a court interpret the provision in a way to preserve the right of judicial review rather than to preclude it.

Fifth, if you want to see what a real preclusion provision looks like, you can look at the Stored Communications Act. Section 2708 says, "The remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter." I think that is clear language. The language in (f)(2)(D) does not read anything like that.

Then, finally, your Honor, if you do find that that particular provision precludes our statutory claims, I just want to remind you of what is probably obvious. It doesn't preclude our constitutional claims. And if it were read to preclude the constitutional claims, that in itself would raise

difficult constitutional questions.

Finally, your Honor, the government says, I think correctly, that we have not spelled out the precise contours of Section 215. We can't do that. I think that's in part because the application of the statute in any particular case will depend on the context, it will depend on the factual context.

The point that I was trying to make earlier is just that to accept the government's theory of the statute is to accept that Congress used familiar language, the same language that it has used in many other authorities, or similar language to the language it has used in many other authorities, to authorize collection on a truly massive scale, collection far beyond what any court has previously sanctioned, and indeed, far beyond what the government has ever previously proposed. The Supreme Court has admonished many times that Congress doesn't hide elephants in mouse holes. I think that is what the government is proposing here. At the very least, your Honor, this Court should require Congress to say that it wants the government to collect all of this data, if it does indeed want it.

Thank you.

THE COURT: Thank you, Mr. Jaffer.

Mr. Abdo.

MR. ABDO: Just quickly to address the government's discussion of standing. I think it's quite clear that we have

at least three separate injuries, and we have standing for each one, but I don't really want to spend much more time discussing our principal claim, which is that collection of plaintiffs' call records is sufficient for purposes of both our statutory claim and our constitutional claims. That much is clear at least from the Second Circuit's decision in *Amidax*, which upheld that if the plaintiff in that case could demonstrate that their financial records had been transferred to the government, that would have been sufficient to raise their claims on the merits.

We separately are injured by the government's later querying of the database. Every time they query it, they test to see whether a call is within three hops of those of suspected terrorists. I think there is no question but that that would separately give us standing. But again, our principal claim is that the government's collection alone is sufficient.

I also want to briefly discuss the government's discussion of necessity, which I think cuts across all three of our claims. Our position is, I think, best articulated in the declaration of Professor Felten, the supplemental declaration, which makes clear that the government could accomplish the very same type of analysis it is trying to accomplish through the construction of this database without in fact constructing a database. It could use orders directed at the telecoms to

acquire the phone records of anyone within three hops of their suspect. That's at paragraphs 6 to 8 of the supplemental declaration.

With respect to your Honor's question about what deference is owed either to the amicus brief filed in California on behalf of the intelligence committee senators versus the government's declarations in this case, it's of course appropriate to consider the government's declarations, but to also apply a sense of common sense. None of the examples that the government has provided as supposed success stories of this program even involve the sort of multi-hop analysis that they claim the program is necessary for. Both of the examples they relied upon employed only a simple one-hop analysis, one that would be very easy for the government to accomplish through targeted means. And even if they involved more complicated investigations, Professor Felten lays out how they could analyze multi-hop investigations using those same target authorities.

A word on the government's First Amendment arguments before just one final word on the Fourth Amendment.

I think it's misleading to say that our case doesn't involve one directed at First Amendment activities. The very purpose of the government's program is to collect plaintiffs' associational information for the purpose of determining whether we are in association with those that the government

suspects of wrongdoing. It could not be more directly addressed to information protected by the First Amendment.

But even if it weren't, all of the cases that we cite, particularly in our reply brief, make clear that even indirect burdens on the First Amendment require exacting scrutiny analysis by the court. I am thinking particularly about the Supreme Court's decision in *Arizona Free Enterprise*, but also decisions of the Second Circuit in *Local 1814* and the decision of the D.C. Circuit in *Clark v. Library of Congress*.

Finally, just a general comment on the government's Fourth Amendment position. I think it's worth stepping back and appreciating the consequences of the government's position. Under the government's interpretation of the Fourth Amendment, it would be free to construct databases housing all manner of extraordinarily sensitive information about even innocent Americans, information in which they have not only an expectation of privacy, but that would reveal extraordinarily sensitive details about their personal lives.

The government's position is not just that that information is not protected by the Fourth Amendment, but that the government's collection doesn't even raise a controversy within the meaning of Article III of the Constitution. I think it's worth pausing before accepting that principle because the end result of it will be extraordinarily sensitive databases that ordinary Americans will have no recourse for unless they

can prove in a rare case that the government has specifically targeted them.

THE COURT: Mr. Delery, do you wish to be heard?

MR. DELERY: Yes, just briefly to respond to a couple of points.

I think on the question of (f)(2)(D) and the provision that says the order shall remain in full effect, I think there is no question that the order that the plaintiffs are requesting would affect the scope of the currently existing orders of the FISC. Obviously, those orders allow for certain collection pursuant to the terms of the primary order, the most recent one of which was attached to Judge McLaughlin's opinion, and the relief that the plaintiffs seek would carve out exceptions to that, and so I do think necessarily would reflect a modification of the authority, and certainly the insight of this provision (f)(2)(D) was to avoid exactly that kind of result.

Certainly, I think when we are talking about preliminary injunctive relief, where obviously there is no right to an injunction in this context, the fact that they are asking for an injunction that would at the very least modify, if not otherwise interfere with an ongoing order of an Article III court that has been issued pursuant to the framework that Congress allowed, all of those factors counsel strongly, and I would argue dispositively, against the issuance of a

preliminary injunction here.

On the question of ratification, which obviously relates to the repeated argument about the scope of Section 215 as interpreted by the FISC and the government, Judge Egan's opinion in August from the FISC actually addressed this question and noted that given that information was provided to Congress on a number of occasions, that was sufficient to meet the Supreme Court's test for ratification.

And similarly, in our opposition to the preliminary injunction motion on page 22, we address some of the individual statements by legislators that your Honor highlighted, and noted the cases there that counsel I guess is relying on those as opposed to the actual congressional votes, in terms of the scope of congressional action, and that's certainly relevant not only for the ratification point, but also for how you interpret the statute as a whole when you put it together in the context of the type of investigations that are here.

In terms of the scope of the Fourth Amendment argument, I think it's important to note that the holding of *Smith* was about non-content information. It was not about collecting the types of information that the plaintiffs sometimes reference, including information about content or associations of individuals. Certainly, that's a different type of information of a different order. It wasn't at issue in *Smith* and it is not at issue here. And the type of records,

the phone numbers and related information, that are at issue in this program are exactly the types of records that the Supreme Court in *Smith* said individuals have no reasonable expectation over.

As to standing, there was a reference to the *Amidax* decision from the Second Circuit. The sentence that was referenced comes in a discussion of whether the plaintiffs had to prove the collection of an entire database or just collection of their information in order to establish standing, and it was not directed at the point that we are now debating in this case. And I think for the reasons that I have said earlier, the plaintiffs have not identified any concrete harm that flows from your collection. Even if you think that the mere collection provides enough injury to qualify for Article III standing, when evaluated for purposes, for example, of the preliminary injunction against the important interest in national security and the harm that would come from disrupting a valuable program for national security efforts, that type of injury doesn't provide enough of a basis to justify the injunctive relief that they ask.

So for purposes of the bottom line here, the motion to dismiss I think can be disposed of. Statutory claims under preclusion grounds, I think when you take together all of the statutory references, it's clear that statutory claims are appropriately presented in the FISC structure and not

elsewhere. And on both of the constitutional claims, binding Supreme Court precedent at the topline legal level resolves the threshold legal questions on the expectation of privacy and on the need to show some actual effect on associational interest. Those cases are enough to dispose of the claims in the case, and we therefore submit that the motion to dismiss should be granted.

On the preliminary injunction, obviously the same legal issues apply. And, certainly, where we are talking about an ongoing program that has been approved by the Article III court established to hear that repeatedly, 35 occasions by 15 different judges, and where we submit has been briefed to Congress, and where Congress has extended the authority with information about how it is being used, the ordinary analysis that the Court would ordinarily apply in evaluating a preliminary injunction counsel is strongly against doing so here. To the extent that the program should be modified, the appropriate forum for that is the current debate ongoing in Congress. This Court should, respectfully, leave this important national security program on its firm footing as approved by the FISC.

THE COURT: Thank you, Mr. Delery.

Counsel, I want to thank all of you for your arguments. This has been a wide-ranging discussion. I have an a lot to think about. Decision reserved.

Have a good weekend.

(Adjourned) r