

**ORAL ARGUMENT SCHEDULED FOR NOVEMBER 4, 2014**

Nos. 14-5004, 14-5005, 14-5016, 14-5017 (Consolidated)

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

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LARRY ELLIOTT KLAYMAN, *et al.*,

Appellees/Cross-Appellants,

v.

BARACK HUSSEIN OBAMA, *et al.*,

Appellants/Cross-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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**CORRECTED MOTION OF *AMICI CURIAE* THE ELECTRONIC FRONTIER  
FOUNDATION, THE AMERICAN CIVIL LIBERTIES UNION, AND THE ACLU  
OF THE NATION'S CAPITAL FOR LEAVE TO PARTICIPATE IN ORAL  
ARGUMENT**

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Pursuant to D.C. Circuit Rule 34(e), *amici curiae* the Electronic Frontier Foundation (“EFF”), the American Civil Liberties Union Foundation (“ACLU”) and the ACLU of the Nation’s Capital (“ACLU-NC”) respectfully move this Court for leave to participate in oral argument in this case and request that they be allotted 10 minutes of argument time taken from neither party.

Counsel for *amici* has consulted with counsel for the parties regarding their positions on *amici*’s participation in oral argument: (1) Counsel for appellees/cross-appellants Larry Klayman, *et al.* (“Klayman plaintiffs”) opposes participation by *amici* to the extent it would reduce the time allotted to the Klayman plaintiffs; (2) Counsel for appellants/cross-appellees Barack Obama, *et al.* (“government defendants”) takes no position on *amici*’s motion, provided that the total argument time allotted to the Klayman plaintiffs and *amici* collectively is equal to the argument time allotted to the government defendants.

1. *Amici*’s participation in oral argument is warranted in light of the alternative grounds offered in their brief for affirming the district court’s decision. At issue in this appeal is whether the district court was correct in its conclusion that the Klayman plaintiffs are likely to succeed on their claim that the government’s bulk collection of Americans’ telephone records is a violation of the Fourth Amendment. *See Klayman v. Obama*, 957 F. Supp. 2d 1, 29 (D.D.C. 2013). The district court determined that this claim is not governed by the Supreme Court’s

decision in *Smith v. Maryland*, 442 U.S. 735 (1979), which upheld the installation and use of a pen register to track the numbers dialed by a robbery suspect over a few days. The district court held that the long term, mass collection of phone records at issue here is a “far cry” from the limited surveillance authorized in *Smith*. 957 F. Supp. 2d at 31.

On appeal, the Klayman plaintiffs have argued that the Supreme Court’s recent decision in *Riley v. California*, 134 S. Ct. 2473 (2014), “renders *Smith* inoperative and obsolete, particularly in the context of this case.” Br. of Appellees/Cross-Appellants at 45. *Amici*’s brief, by contrast, expands on the district court’s conclusion and draws on precedent from the Supreme Court and this Court to argue alternatively that dragnet surveillance of the kind at issue here is a constitutionally distinct question from *Smith* and that such dragnet surveillance is unconstitutional. See Br. of *Amici Curiae* EFF *et al.* at 22-24 (citing *United States v. Knotts*, 460 U.S. 276 (1983); *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010)).

Hence, it is *amici*’s position that this Court can affirm without holding that *Smith* has been abrogated or overturned. *Amici* therefore believe their participation in oral argument would aid the Court in its resolution of this complex Fourth Amendment issue.

2. *Amici* also bring to this case extensive experience litigating civil liberties issues raised by the specific government surveillance program challenged here. Together, EFF and ACLU are counsel in four additional cases that present very similar issues to those presented here, two of which are currently before federal circuit courts of appeal. *See ACLU v. Clapper*, 959 F. Supp. 2d 724, 752 (S.D.N.Y. 2013), *appeal pending*, No. 14-42 (2d Cir. filed Jan. 2, 2014) (ACLU counsel);<sup>1</sup> *Smith v. Obama*, No. 2:13–CV–257–BLW, 2014 WL 2506421 (D. Idaho June 3, 2014), *appeal pending*, No. 14-35555 (9th Cir. filed July 1, 2014) (EFF and ACLU joint counsel); *First Unitarian Church of Los Angeles v. NSA*, No. 4:13-cv-03287 JSW (N.D. Cal. filed July 16, 2013) (EFF counsel); *Jewel v. NSA*, No. 4:08-cv-4373 JSW (N.D. Cal. Filed September 18, 2008) (EFF counsel). As this list indicates, *amici* have been active in this area since 2008, with a predecessor case involving telephone records collection that stretches back to 2006. *See Hepting v. AT&T*, No. 3:06-cv-00672-VRW (N.D. Cal. filed January 31, 2006); *see also ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007). Moreover, *amici* have extensive understanding of how metadata such as the telephone records at issue in this case can be analyzed, aggregated and used to determine sensitive information about individuals such as the Klayman plaintiffs. As a result, *amici* are uniquely

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<sup>1</sup> The Second Circuit heard oral argument on September 2, 2014. A video recording of that argument is available at <http://www.c-span.org/video/?321163-1/aclu-v-clapper-oral-argument-phone-record-surveillance>.

positioned to provide history and expertise on issues elaborated upon in their brief that may be beyond the central focus and expertise of the parties.

Dated: September 19, 2014

Respectfully submitted,

/s/ Mark Rumold

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**CERTIFICATE OF FILING AND SERVICE**

I HEREBY CERTIFY that on this 19th day of September, 2014, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: September 19, 2014

Respectfully submitted,

/s/ Mark Rumold

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