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

Larry Elliott Klayman, et al., Appellees-Cross-Appellants, v. Barack Hussein Obama, et al., Appellants-Cross-Appellees.	Nos. 14-5004, 14-5005, 14-5016, 14-5017

MOTION TO FILE SUPPLEMENTAL BRIEF

The government appellants/cross-appellees respectfully move to file a supplemental brief addressing three recent developments bearing on this litigation: the Second Circuit's decision in *ACLU* v. *Clapper*, 785 F.3d 787 (2d Cir. 2015); the recently enacted USA FREEDOM Act, Pub. L. No. 114-23 (2015); and the Foreign Intelligence Surveillance Court's recent opinion and order granting the government's application to resume the Section 215 bulk telephony-metadata program during a temporary transition period. *See In re Application of the FBI for an Order Requiring the Production of Tangible Things*, Dkt. Nos. BR 15-75, Misc. 15-01 (F.I.S.C. June 29, 2015),

http://www.fisc.uscourts.gov/sites/default/files/BR%2015-75%20Misc%2015-01%20Opinion%20and%20Order_0.pdf.[1]

1. On May 26, 2015, plaintiffs, without seeking this Court's leave, filed a five-page document captioned "Notice of New Case Authority and Request to Issue Decision," which discussed the Second Circuit's *ACLU* decision as well as a number of other subjects. In *ACLU*, the Second Circuit concluded that Congress did not intend to authorize the Section 215 bulk telephony-metadata program, but declined to instruct the district court to impose an injunction against the program.

On June 2, 2015, Congress enacted the USA FREEDOM Act. As described in more detail in the Supplemental Brief being lodged with the Court along with this motion, the USA FREEDOM Act reauthorized Section 215, but ended the Section 215 bulk telephony-metadata program after a brief 180-day transition period, during which bulk collection is permitted under Section 215.

[1] On July 15, 2015, counsel for the government e-mailed Larry Klayman, counsel for plaintiffs, to ascertain plaintiffs' position on this motion, but did not receive a response as of the time of this filing.

On June 9, 2015, plaintiffs, without seeking this Court's leave, filed an eight-page document captioned "Supplement to Notice of New Case Authority," which discusses the USA FREEDOM Act and its impact on this litigation.

On June 29, 2015, the Foreign Intelligence Surveillance Court granted the government's application to resume the Section 215 bulk telephony-metadata program during a temporary transition period under the authority of the USA FREEDOM Act. *See In re Application of the FBI for an Order Requiring the Production of Tangible Things*, Dkt. Nos. BR 15-75, Misc. 15-01 (F.I.S.C. June 29, 2015), http://www.fisc.uscourts.gov/sites/default/files/BR%2015-75%20Misc%2015-01%20Opinion%20and%20Order_0.pdf. The FISC explained that the Second Circuit had erred in concluding that Congress did not authorize the Section 215 bulk telephony-metadata program, and that in any event, the Second Circuit issued its decision before Congress in the USA FREEDOM Act reauthorized the Section 215 program for a transition period. *Id.* at 10-12, 18-19.

2. The government respectfully moves for leave to file the attached Supplemental Brief. The Supplemental Brief discusses the Second Circuit's *ACLU* decision and the USA FREEDOM Act, and responds to plaintiffs' two recent substantive filings on the same subject.

Respectfully submitted,

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JULY 2015

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2015, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system.

I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Henry C. Whitaker
Henry C. Whitaker

Nos. 14-5004, 14-5016, 14-5005, 14-5017

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

LARRY KLAYMAN et al.

Appellees/Cross-Appellants,

v.

BARACK HUSSAIN OBAMA et al.

Appellants/Cross-Appellees

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

SUPPLEMENTAL BRIEF FOR THE APPELLANTS/CROSS-APPELLEES

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INTRODUCTION

The government's merits briefs explain why plaintiffs lack standing to sue and why there is no basis for holding the Section 215 bulk telephony-metadata program unconstitutional, let alone preliminarily enjoining it as the district court did. This supplemental brief by the government addresses, in response to plaintiffs' supplementary submissions, the Second Circuit's decision in *ACLU* v. *Clapper*, 785 F.3d 787 (2d Cir. 2015); the recently enacted USA FREEDOM Act, Pub. L. No. 114-23, 129 Stat. 268 (2015); and the Foreign Intelligence Surveillance Court's recent opinion and order granting the government's application to resume the Section 215 bulk telephony-metadata program during a temporary transition period. *See In re Application of the FBI for an Order Requiring the Production of Tangible Things*, Dkt. Nos. BR 15-75, Misc. 15-01 (F.I.S.C. June 29, 2015), http://www.fisc.uscourts.gov/sites/default/files/BR%2015-75%20Misc%2015-01%20Opinion%20and%20Order_0.pdf.

The FISC opinion explains that the USA FREEDOM Act establishes a 180-day transition period, during which the bulk collection under Section 215 of telephony metadata may continue, to allow for the

orderly termination of the National Security Agency's Section 215 bulk production program. Following the transition period, the statute prohibits the bulk collection of telephony metadata under Section 215 and authorizes the government to seek targeted production of certain telephony metadata records after first having obtained authorization from the Foreign Intelligence Surveillance Court (except in emergencies at the direction of the Attorney General). That framework, however, does not take effect until 180 days after enactment (November 29, 2015), reflecting the judgment of Congress that an orderly transition from the existing program is appropriate.

This is an appeal from the district court's earlier decision to grant plaintiffs a preliminary injunction against the Section 215 bulk telephony-metadata program, which the district court stayed pending appeal. That preliminary injunction granted plaintiffs Larry Klayman and Charles Strange two kinds of relief: prospective relief in the form of barring the government from collecting telephony metadata about those two plaintiffs, and a retrospective "purge" of any such metadata the government may have already collected about those plaintiffs. *See* Gov't Br. 24-25.

Plaintiffs' claims for prospective relief will be moot when the Section 215 bulk collection regime of telephony metadata ends in less than six months, though they are not moot now. In the meantime, however, the Court should respect Congress's decision to create an orderly transition away from the Section 215 bulk telephony-metadata program. Especially in light of Congress's considered judgment that the program should continue for this limited period, plaintiffs are not entitled to any of the equitable relief the district court granted, which standing alone is ample basis for reversing the district court's preliminary injunction—even if plaintiffs had standing and valid claims on the merits (which they do not).

ARGUMENT

1. Section 215 of the USA PATRIOT Act, enacted in 2001, amended 50 U.S.C. § 1861 and was the source of the government's statutory authority to conduct the Section 215 bulk telephony-metadata program. Section 215 expired, pursuant to the statutory sunset period, on June 1, 2015. *See* PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-14, § 2(a), 125 Stat. 216.

On June 2, 2015, Congress enacted the USA FREEDOM Act. First, Congress reauthorized Section 215 and set a new sunset date of December 15, 2019, for that provision, as amended, to expire. *See* USA FREEDOM Act § 705(a); *see* 161 Cong. Rec. S3439 (daily ed. June 2, 2015) (statement of Sen. Lee) (Congress's "intent in passing the USA FREEDOM Act is that the expired provisions be restored in their entirety just as they were on May 31, 2015, except to the extent they have been amended by the USA FREEDOM Act."); *In re Application of the FBI for an Order Requiring the Production of Tangible Things*, Dkt. Nos. BR 15-77, 15-78, at 8-13 (F.I.S.C. June 17, 2015) (holding that the USA FREEDOM Act reinstated Section 215 as amended by the statute), http://www.fisc.uscourts.gov/sites/default/files/BR%2015-77%2015-78%20Memorandum%20Opinion.pdf.

Second, the new statute will, as of November 29, 2015, prohibit the government from conducting the bulk collection of telephony metadata under Section 215. *See* USA FREEDOM Act § 103. Congress replaced bulk telephony-metadata collection under Section 215 with a new mechanism providing for the targeted production of call detail records and other tangible things subject to the statute. *See id.* § 101.

Finally, Congress provided for a 6-month transition period by delaying for 180 days the effective date of the new prohibition on bulk collection under Section 215, and also the corresponding implementation date of the new regime of targeted production under the statute. USA FREEDOM Act § 109(a). Congress specified that the USA FREEDOM Act does not during that period "alter or eliminate" the government's longstanding authority, as reflected in numerous opinions from the Foreign Intelligence Surveillance Court, to conduct bulk-collection activities under Section 215. *See id.* § 109(b). During that transition period, then, the former version of Section 215 remains fully in effect as part of that transition and permits the government to continue such bulk collection. 161 Cong. Rec. S3439-3440 (daily ed. June 2, 2015) (statement of Sen. Leahy) (noting that Congress "included a provision to allow the government to collect call detail records, CDRs, for a 180-day transition period, as it was doing pursuant to Foreign Intelligence Surveillance Court orders prior to June 1, 2015").

Pursuant to that authority, the government applied to the Foreign Intelligence Surveillance Court for authorization to resume the Section 215 bulk-collection program during the transition period. The FISC

granted that application. *See In re Application of the FBI for an Order Requiring the Production of Tangible Things*, Dkt. Nos. BR 15-75, Misc. 15-01 (F.I.S.C. June 29, 2015) ("June 29 FISC Op."), http://www.fisc.uscourts.gov/sites/default/files/BR%2015-75%20Misc%2015-01%20Opinion%20and%20Order_0.pdf. The FISC held that Congress in the USA FREEDOM Act explicitly authorized the government to continue the Section 215 bulk telephony-metadata program during the 180-day transition period as part of an orderly transition away from bulk collection of telephony metadata under that program. *See id.* at 10-12.

2. Prior to the enactment of the USA FREEDOM Act, the Second Circuit had held in *ACLU* v. *Clapper*, 785 F.3d 787 (2d Cir. 2015), that Section 215 does not authorize the bulk-telephony metadata program. In reaching that holding, the Second Circuit rested its decision wholly on statutory grounds, and did not decide whether the program infringes the Constitution. *See id.* at 825. That statutory holding has no bearing on plaintiffs' claims in this case because plaintiffs some time ago amended their complaints to remove any statutory claims. *See* Gov.

Resp. Reply Br. 27-28.[1] The *ACLU* opinion does, however, confirm that plaintiffs here are not entitled to a preliminary injunction; the Second Circuit remanded the case without ordering the district court to enjoin the program, noting the gravity of the "asserted national security interests at stake" and that Congress was considering legislation to reauthorize the program. *ACLU*, 785 F.3d at 826.[2]

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[1] The *ACLU* decision does not support plaintiffs' claim to standing in this case. The Second Circuit based its finding that the *ACLU* plaintiffs had standing on the fact that those plaintiffs were subscribers of Verizon Business Network Services (VBNS), and the fact that the government did not dispute that it had collected telephony metadata from VBNS under a now-expired FISC order. 785 F.3d at 795-96, 801. Here, by contrast, none of the plaintiffs are VBNS subscribers. *See* Gov. Resp. Reply Br. 7-8 & n.1. Plaintiffs' claim to injury is therefore speculative, and fails to establish standing for the same reasons the Supreme Court articulated in *Clapper* v. *Amnesty International USA*, 133 S. Ct. 1138, 1146 (2013). *See ACLU*, 785 F.3d at 801-02 (discussing *Amnesty International*).

Contrary to the Second Circuit's suggestion, moreover, the government has *not* conceded that the Section 215 program collects "virtually all" telephony metadata, and in fact has repeatedly explained that it does not. *See, e.g.*, Gov. Resp. Reply Br. 8-9. We have been unable to elaborate further not because we agree with that characterization, but instead because, among other reasons, the identities of telecommunications companies involved in the program remain classified. *Id.* at 9.

[2] On July 14, 2015, the *ACLU* plaintiffs filed a motion asking the Second Circuit to impose an immediate preliminary injunction against

Continued on next page.

The Second Circuit rendered its statutory holding without the benefit of the USA FREEDOM Act, which authorizes the government to continue the Section 215 bulk telephony-metadata program during a 180-day transition period, after which the program will end. The FISC's June 29, 2015 opinion makes clear that Congress did indeed reauthorize the program for the transition period. The FISC explicitly rejected the Second Circuit's analysis in *ACLU*, noting that the Second Circuit's decision was rendered before Congress enacted the USA FREEDOM Act, in which "Congress—with full knowledge and extensive public debate of this program and its legal underpinnings—permitted the continuation of the program until November 29, 2015." *Id.* at 18. The FISC also observed that Congress's approval of the continuation of this program for the transition period "has been clearly manifest." *Id.* at 19.[3]

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operation of the Section 215 bulk telephony-metadata program. That motion is pending.

[3] The Second Circuit has, since the enactment of the USA FREEDOM Act, requested supplemental briefing on the effect of that enactment on its decision. Those briefs are due July 24, 2015.

3. Congress's decision—confirmed by the FISC—to permit the government to conduct bulk collection of telephony metadata under Section 215 during the transition period makes clear that plaintiffs would not be entitled to any of the equitable relief they seek, even if they stated a claim on the merits and even if they had standing to sue. The district court's preliminary injunction should be reversed on that ground alone.

Now that Congress has provided for a transition period during which Section 215 bulk collection expressly continues to be permitted but is strictly time-limited, equitable relief is inappropriate. A plaintiff's entitlement to such relief should be informed by legislation that is enacted during the pendency of litigation. *See, e.g.*, *Miller* v. *French*, 530 U.S. 327, 347 (2000); *Salazar* v. *Buono*, 559 U.S. 700, 718 (2010). Congressional legislation is an appropriate basis on which a federal court can rely to determine the permissible remedies for an alleged constitutional violation. *See Brown* v. *Plata*, 131 S. Ct. 1910, 1944, 1946 (2011) (applying the requirements of the Prison Litigation Reform Act to remedies for unconstitutional prison conditions and giving the State two years to comply with determination that prison-

overcrowding conditions violated the Constitution); *cf. Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88-89 (1982).

The USA FREEDOM Act reflects Congress's determination to authorize Section 215 bulk telephony-metadata collection to continue during a brief winding-down period before the new framework of targeted telephony-metadata production takes effect. Congress thus judged that the sort of abrupt, immediate interference with the program that plaintiffs here seek through an injunction would be contrary to the public interest, confirming that equitable relief is inappropriate quite apart from the government's standing and merits arguments. The USA FREEDOM Act reflects the considered judgment of the political branches that the government's paramount interest in having this temporary transition program to combat the continuing terrorist threat strongly outweighs plaintiffs' minimal privacy interests, particularly because plaintiffs have not demonstrated that the government obtained, much less analyzed, any telephony metadata about their calls under the program at issue here. *See* Gov. Opening Br. 66-67; Gov. Response Reply Br. 7-12, 28-30.

4. Once the 180-day transition period ends, and with it the government's authority to conduct bulk collection under Section 215, plaintiffs' claim for prospective injunctive relief against the bulk telephony-metadata program conducted under that authority will be moot. *See, e.g.*, *Log Cabin Republicans* v. *United States*, 658 F.3d 1162, 1166-67 (9th Cir. 2011) (per curiam); *see also*, *e.g.*, *Burke* v. *Barnes*, 479 U.S. 361, 363-64 (1987); *Dep't of Treasury* v. *Galioto*, 477 U.S. 556, 559-60 (1986). The appropriate course at that juncture would be to vacate the district court's decision to grant preliminary prospective relief as moot. *See, e.g.*, *Camreta* v. *Greene*, 131 S. Ct. 2020, 2034-35 (2011); *Am. Bar Ass'n* v. *FTC*, 636 F.3d 641, 649 (D.C. Cir. 2011). Plaintiffs' claim for a prospective injunction is not moot during the 180-day transition period but is without merit as discussed above.

Plaintiffs appear to contend that their claims for prospective relief will not be moot even after expiration of the transition period, based on the exception to mootness that is applicable when a defendant voluntarily ceases the challenged practice. *See* Pl. Supp. to Notice of New Case Authority 7-8. That exception is inapplicable, however, because Congress's decision to terminate the Section 215 bulk-

telephony metadata program after the 180-day transition period was not voluntary action by the Executive Branch. *See Am. Bar. Ass'n*, 636 F.3d at 648. And even if it were, the decision of the political branches of government to terminate the Section 215 program after a period of transition was not made to avoid suit. *See Clarke* v. *United States*, 915 F.2d 699, 705-06 (D.C. Cir. 1990) (en banc).

5. The district court also granted in its preliminary injunction the request of plaintiffs Larry Klayman and Charles Strange for a retrospective "purge" of any metadata the government may have collected about them under the Section 215 bulk telephony-metadata program. We have already explained that the district court erroneously granted this remedy, which would require an irreversible purge of any telephony metadata the government may have collected under the Section 215 program, and thus improperly grants full relief on the merits in the guise of awarding mere "preliminary" relief. *See* Gov't Br. 67.

In any event, the USA FREEDOM Act makes clear that plaintiffs are not entitled to expungement either. Although this Court has concluded that federal courts have equitable authority in extraordinary

cases to expunge records as a remedy for an alleged constitutional violation, *see Abdelfattah* v. *U.S. Dep't of Homeland Security*, 787 F.3d 524, 534 (D.C. Cir. 2015), expungement is not an available remedy as a matter of right, and instead depends on a "careful weighing of the litigants' respective interests," *id.* at 537; *see Doe* v. *Webster*, 606 F.2d 1226, 1230 (D.C. Cir. 1979) (expungement available in "unusual and extraordinary circumstances"). We have already demonstrated that plaintiffs are not entitled to an equitable remedy in light of the USA FREEDOM Act, and their failure to demonstrate any harm to them as a result of the Section 215 program.

To be sure, the Supreme Court has adopted in certain circumstances the exclusionary rule as a remedy in criminal cases. But the Court has also held that, outside the context of criminal trials, that rule does not foreclose the government from using the fruits of unlawful searches or seizures. *See, e.g.*, *Penn. Bd. of Prob. & Parole* v. *Scott*, 524 U.S. 357, 362 (1998); *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1042-50 (1984). A decision to exclude evidence can be justified only when the social costs of the rule are substantially outweighed by its deterrent value. *See, e.g.*, *Herring* v. *United States,* 555 U.S. 135, 141 (2009).

Here, no deterrence is needed, or even possible, in light of the imminent end of the Section 215 bulk telephony-metadata program. It is even less plausible that plaintiffs would have a right to have expunged whatever business records the government may have acquired under Section 215 that contain telephony metadata about their calls (which again there is no evidence the government has done). *See Grimes* v. *Comm'r of IRS*, 82 F.3d 286, 291 (9th Cir. 1996) (holding that the Internal Revenue Service was entitled to retain copies of unlawfully seized tax records); *Ramsden* v. *United States*, 2 F.3d 322, 327 (9th Cir. 1993) (similar).

6. For the foregoing reasons, plaintiffs are not entitled to the preliminary injunctive relief granted by the district court, even if they had standing and a valid claim on the merits. The Court may properly dispose of the appeal on that ground without reaching the constitutional claims in this case.

CONCLUSION

For the foregoing reasons, the Court should hold that plaintiffs are not entitled to injunctive relief in light of the USA FREEDOM Act and reverse the district court's judgment.

Respectfully submitted,

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