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16 **UNITED STATES DISTRICT COURT**
 17 **NORTHERN DISTRICT OF CALIFORNIA**
SAN FRANCISCO DIVISION

18 FIRST UNITARIAN CHURCH OF
 19 LOS ANGELES *et al.*,
 20 *Plaintiffs,*
 21 v.
 22 NATIONAL SECURITY AGENCY *et al.*,
 23 *Defendants.*

Case No. 3:13-cv-03287 JSW

**BRIEF OF AMICI CURIAE SENATOR
 RON WYDEN, SENATOR MARK
 UDALL & SENATOR MARTIN
 HEINRICH IN SUPPORT OF
 PLAINTIFFS**

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17 Nat’l Comm’n on Terrorist Attacks Upon the U.S., *9/11 Commission Report*
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12 Siobhan Gorman, Evan Perez & Janet Hook, *U.S. Collects Vast Data Trove*, Wall
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15 *Strengthening Privacy Rights and National Security: Oversight of FISA
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INTRODUCTION

1
2 *Amici Curiae* Ron Wyden, Mark Udall, and Martin Heinrich are United States Senators
3 and members of the Senate Select Committee on Intelligence. Senator Wyden has represented
4 the state of Oregon since 1996. Senator Udall has represented the state of Colorado since January
5 2009. Senator Heinrich has represented the state of New Mexico since January 2013. Together
6 with a number of other Senators, Senators Wyden, Udall, and Heinrich have introduced
7 bipartisan legislation to reform the nation’s surveillance laws, including the Foreign Intelligence
8 Surveillance Act. *Amici* submit this brief, in support of Plaintiffs’ Motion for Partial Summary
9 Judgment, to provide important context for the Court’s consideration of Plaintiffs’ claims and to
10 underscore the larger implications of this case.

11 As members of the Senate Select Committee on Intelligence, *Amici* Senators Wyden and
12 Udall have for years participated in the oversight of government surveillance conducted under
13 the Patriot Act that they knew would astonish most Americans. They sought to warn the public
14 about those activities as best they could without disclosing classified information. They also co-
15 sponsored an amendment to the Patriot Act’s reauthorization that sought to address the problem
16 of government officials “secretly reinterpret[ing] public laws and statutes” and “describ[ing] the
17 execution of these laws in a way that misinforms or misleads the public.” *See* 157 Cong. Rec.
18 S3360 (daily ed. May 25, 2011) (introducing SA 384 to S. 990, 112th Cong. § 3 (2011)); *see also*
19 157 Cong. Rec. S3386 (daily ed. May 26, 2011) (statement of Sen. Wyden) (“The fact is anyone
20 can read the plain text of the PATRIOT Act. Yet many Members of Congress have no idea how
21 the law is being secretly interpreted by the executive branch.”); 157 Cong. Rec. S3258 (daily ed.
22 May 24, 2011) (statement of Sen. Udall) (“Congress is granting powers to the executive branch
23
24

1 that lead to abuse, and, frankly, shield the executive branch from accountability.”).¹

2 Now that the government’s bulk call-records program has been exposed, the government
3 has defended it vigorously. *Amici* submit this brief to respond to the government’s claim, which
4 it is expected to repeat in this suit, that its collection of bulk call records is necessary to defend
5 the nation against terrorist attacks. *Amici* make one central point: As members of the committee
6 charged with overseeing the National Security Agency’s surveillance, *Amici* have reviewed this
7 surveillance extensively and have seen no evidence that the bulk collection of Americans’ phone
8 records has provided any intelligence of value that could not have been gathered through less
9 intrusive means. The government has at its disposal a number of authorities that allow it to
10 obtain the call records of suspected terrorists and those in contact with suspected terrorists. It
11 appears to *Amici* that these more targeted authorities could have been used to obtain the
12 information that the government has publicly claimed was crucial in a few important
13 counterterrorism cases.

14 In assessing the lawfulness of the government’s bulk call-records program, it is also
15 important to understand the implications of the government’s interpretation of Section 215. The
16 government’s legal interpretation of Section 215 could be extended to authorize bulk collections
17 of information far beyond the call records at issue in this case, such as financial or medical
18 records, or even records indicating the location of ordinary Americans. The Court should thus
19
20

21 ¹ Colleagues of *Amici* raised similar concerns. *See, e.g.*, Sen. Richard Durbin, Remarks at the
22 Senate Judiciary Committee Executive Business Meeting at 68:00, (Oct. 1, 2009),
23 <http://1.usa.gov/1fPvpwb> (“Section 215 is unfortunately cloaked in secrecy. Some day that cloak
24 will be lifted, and future generations will ask whether our actions today meet the test of a
democratic society: transparency, accountability, and fidelity to the rule of law and our
Constitution.”); 155 Cong. Rec. S9563 (daily ed. Sept. 17, 2009) (statement of Sen. Feingold).

1 treat with skepticism the government's claims that its use of the statute is cabined by the
2 supposedly unique characteristics of call records.

3 Because the government's call-records program needlessly intrudes upon the privacy
4 rights of hundreds of millions of Americans, *Amici* believe the bulk collection of these phone
5 records should be ended.

6 ARGUMENT

7 **I. AMICI HAVE SEEN NO EVIDENCE THAT THE BULK COLLECTION OF 8 AMERICANS' PHONE RECORDS HAS PROVIDED USEFUL INTELLIGENCE 9 UNOBTAINABLE THROUGH LESS INTRUSIVE MEANS.**

9 A. *Amici* have seen no evidence that the bulk collection of Americans' phone records
10 under Section 215 is uniquely necessary to the national security of the United
11 States.

11 The executive branch has claimed in public and in newly declassified submissions to the
12 Senate Select Committee on Intelligence ("SSCI") that the bulk collection of Americans' phone
13 records is a vital national security program that is uniquely valuable in protecting the American
14 people, that its aims cannot be achieved through alternative means, and that it has been effective
15 in preventing terrorist activity against Americans. *Amici* have reviewed the bulk-collection
16 program extensively, and none of these claims appears to hold up to scrutiny.

17 Since the executive branch began using Section 215 to collect the phone records of
18 Americans in bulk, it has asserted to the members of Congress to whom it revealed that
19 collection that the program was necessary to protect national security because it uniquely enables
20 the government to track the associations of suspected terrorists. For example, as votes in both
21 chambers of Congress on the reauthorization of the Patriot Act approached in 2009, the
22 Department of Justice made available to members of the SSCI and the House Permanent Select
23 Committee on Intelligence ("HPSCI") a report on the NSA's bulk collection under Section 215.
24

1 See Letter from Ronald Weich, Assistant Attorney General, to Silvestre Reyes, Chairman,
2 HPSCI at 1 (Dec. 14, 2009), <http://1.usa.gov/1i31wui> (“2009 Weich Letter”). The report
3 represented that the “NSA’s bulk collection programs provide important tools in the fight against
4 terrorism” that are “unique in that they can produce intelligence not otherwise available to
5 NSA.” See *Report on the National Security Agency’s Bulk Collection Programs Affected by USA*
6 *PATRIOT Act Reauthorization* at 1 (“2009 NSA Report”) (attached to 2009 Weich Letter).²

7 The executive branch has made the same assurances to the Foreign Intelligence
8 Surveillance Court (“FISC”) in its applications for orders renewing the bulk phone-records
9 program. In December 2008, the executive branch asserted to the FISC that “having access to the
10 call detail records ‘is vital to NSA’s counterterrorism intelligence mission’ because ‘[t]he only
11 effective means by which NSA analysts are able continuously to keep track of [redacted] and all
12 affiliates of one of the aforementioned entities [who are taking steps to disguise and obscure their
13 communications and identities], is to obtain and maintain an archive of metadata that will permit
14 these tactics to be uncovered.’” Order at 2, *In re Production of Tangible Things*, No. BR 08-13
15 (FISC Mar. 2, 2009) (alterations in original) (quoting NSA declaration submitted to FISC on
16 December 11, 2008), <http://1.usa.gov/14DDhzd>; see also *In re Production of Tangible Things*,

17
18
19 ² The executive branch has made similar representations to Congress in other settings. See,
20 e.g., *Report on the National Security Agency’s Bulk Collection Programs for USA PATRIOT Act*
21 *Reauthorization* (attached to Letter from Ronald Weich, Assistant Attorney General, to Dianne
22 Feinstein, Chairman, & Saxby Chambliss, Vice Chairman, SSCI (Feb. 2, 2011),
23 <http://1.usa.gov/1i38XSh>); Joint Statement for the Record by Michael Leiter, Director, National
24 Counterterrorism Center, & [Redacted], Associate Deputy Director for Counterterrorism, Signals
Intelligence Directorate, NSA, Before the HPSCI Closed Hearing on Patriot Act Reauthorization
2 (Oct. 21, 2009), <http://1.usa.gov/1i3bP1u>. Many of these documents also made representations
about the value and importance of the NSA’s bulk email-records collection program that later
proved to be inaccurate. See *infra* note 7–8.

1 No. BR 13-109, 2013 WL 5741573, at *7 (FISC Aug. 29, 2013) (discussing government
2 assertions of necessity).

3 In the months following the government’s official declassification of the bulk phone-
4 records program, government officials have told the American public much the same thing.
5 Immediately after the bulk phone-records collection program was disclosed, a White House
6 spokesman defended it as a “critical tool in protecting the nation from terror threats.” Siobhan
7 Gorman, Evan Perez & Janet Hook, *U.S. Collects Vast Data Trove*, Wall St. J., June 7, 2013,
8 <http://on.wsj.com/16RgOaf>; see *Administration White Paper: Bulk Collection of Telephony*
9 *Metadata Under Section 215 of the USA PATRIOT Act* 12 (Aug. 9, 2013),
10 <http://big.assets.huffingtonpost.com/Section215.pdf> (“215 White Paper”) (“[F]or Section 215 to
11 be effective in advancing its core objective, the FBI must have the authority” to engage in bulk
12 collection.). And executive-branch officials continue to publicly make similar claims.³

13 More recently and under public scrutiny, the government has retreated from its most
14 aggressive claims about the need for the bulk call-records program. See, e.g., Decl. of FBI
15 Acting Ass’t Dir. Robert J. Holley in Opp’n to Pls.’ Mot. for Prelim. Inj. (“Holley Decl.”) ¶ 23,
16 *Am. Civil Liberties Union v. Clapper*, No. 13-cv-3994 (S.D.N.Y. Oct. 1, 2013) (“Bulk metadata
17 analysis sometimes provides information earlier than the FBI’s other investigative methods and
18
19

20 ³ See, e.g., *Potential Changes to the Foreign Intelligence Surveillance Act: Hearing Before*
21 *the H. Permanent Select Comm. on Intelligence*, 113th Cong. at 55:40 (Oct. 29, 2013),
22 <http://www.c-spanvideo.org/program/AgencyPro> (“Oct. 29 HPSCI Hearing”) (statement of John
23 C. Inglis, Deputy Director, NSA) (“It needs to be the whole haystack.”); *Oversight of the*
24 *Administration’s Use of FISA Authorities: Hearing Before the H. Comm. on the Judiciary*, 113th
Cong. at 59:00 (July 17, 2013), <http://c-spanvideo.org/program/ISAO> (“July 17 HJC Hearing”) (statement of James M. Cole, Deputy Attorney General) (similar).

1 techniques.”)⁴ That retreat is justified, but the government continues to claim—without
 2 demonstrated evidence—that the bulk phone-records program is uniquely important for U.S.
 3 national security. As *Amici* and others have made clear, the evidence shows that the executive
 4 branch’s claims about the effectiveness of the bulk phone-records program have been vastly
 5 overstated and, in some cases, utterly misleading. *See* Sen. Ron Wyden, Keynote Address at
 6 Cato Institute Conference: NSA Surveillance: What We Know; What to Do About It at 31:24–
 7 32:07 (Oct. 9, 2013), [http://www.cato.org/multimedia/events/nsa-surveillance-what-we-know-
 8 what-do-about-it-morning-keynote](http://www.cato.org/multimedia/events/nsa-surveillance-what-we-know-what-do-about-it-morning-keynote) (“Wyden Cato Keynote”).

9 For example, the executive branch has defended the program by claiming that it helped
 10 “thwart” or “disrupt” fifty-four specific terrorist plots. *See* Sisi Wei, Theodoric Meyer & Justin
 11 Elliott, *How the NSA’s Claim on Thwarted Terrorist Plots Has Spread*, ProPublica, Oct. 23,
 12 2013, <http://projects.propublica.org/graphics/nsa-54-cases>; *see generally Media Leaks Facts &*
 13 *Context (Long Version)* (Aug. 1, 2013), <http://1.usa.gov/17wwh38> (“*Facts & Context*”). But that
 14 claim conflates the bulk-collection program with other foreign-intelligence authorities.⁵ In fact,
 15

16 ⁴ *See also, e.g.*, Brief for the United States in Opp’n, *In re Elec. Privacy Info. Ctr.*, No. 13-58,
 17 2013 WL 5702390, at *31 (U.S. Oct. 11, 2013) (Without bulk collection of phone records under
 18 Section 215, “it *may not be* feasible for the NSA to identify chains of communications that cross
 19 different telecommunications networks” (emphasis added)); Holley Decl. ¶ 9 (“[E]xperience
 20 has shown that NSA metadata analysis, *in complement with* other FBI investigatory and
 21 analytical capabilities, produces information pertinent to FBI counter-terrorism
 22 investigations, *and can contribute* to the prevention of terrorist attacks.” (emphases added)).

23 ⁵ *See* Press Release, Sen. Ron Wyden & Sen. Mark Udall, Wyden, Udall Issue Statement on
 24 Effectiveness of Declassified NSA Programs (June 19, 2013), <http://1.usa.gov/1brNWxz>
 (“Wyden–Udall Effectiveness Release”); *accord Strengthening Privacy Rights and National
 Security: Oversight of FISA Surveillance Programs: Hearing Before the S. Comm. on the
 Judiciary*, 113th Cong. (July 31, 2013), <http://1.usa.gov/1brQ0Wb> (“July 31 SJC Hearing”)
 (statement of Sen. Patrick Leahy, Chairman, Senate Judiciary Committee) (“Leahy Statement”)
 (“Some supporters of this program have repeatedly conflated the efficacy of the Section 215 bulk
 metadata collection program with that of Section 702 of FISA. I do not think this is a

1 as *Amici* know from their regular oversight of the intelligence community as members of the
 2 SSCI, “it appears that the bulk phone records collection program under section 215 of the USA
 3 Patriot Act played little or no role in most of these disruptions.” Wyden–Udall Effectiveness
 4 Release; *see* Wyden Cato Keynote at 31:39 (“The fact is that number has not held up The
 5 number seems to just keep going down, and down, and down.”).⁶ Indeed, of the original fifty-
 6 four that the government pointed to, officials have only been able to describe two that involved
 7 materially useful information obtained through the bulk call-records program. *See Continued*
 8 *Oversight of FISA Surveillance Programs: Hearing Before the S. Comm. on the Judiciary*, 113th
 9 Cong. at 43:00 (Oct. 2, 2013), <http://cs.pn/18jdL2b> (statement of Keith B. Alexander, Director,
 10 NSA). Even the two supposed success stories involved information that *Amici* believe—after
 11 repeated requests to the government for evidence to the contrary—could readily have been
 12 obtained without a database of all Americans’ call records. *See infra* Part I.C.

13 In both public statements and in newly declassified submissions to the SSCI, intelligence
 14 officials have significantly exaggerated the phone-records program’s effectiveness. Based on the
 15 experience of *Amici*, the public—and this Court—should view the government’s claims
 16 regarding the effectiveness of its surveillance programs with searching skepticism and demand
 17 evidence rather than assurances before accepting them. *See* Press Release, Sen. Ron Wyden &
 18 Sen. Mark Udall, Wyden, Udall Statement on the Disclosure of Bulk Email Records Collection
 19 Program (July 2, 2013), <http://1.usa.gov/1bs6wWa> (“Wyden–Udall Bulk Email Release”).⁷ With
 20

21 coincidence, and it needs to stop. The patience and trust of the American people is starting to
 wear thin.”).

22 ⁶ *Accord* Leahy Statement (“The list simply does not reflect dozens or even several terrorist
 plots that Section 215 helped thwart or prevent—let alone 54, as some have suggested.”).

23 ⁷ As the Wyden–Udall Bulk Email Release notes, the phone-records program is not the only
 24 example of inflated executive claims to the effectiveness of surveillance programs that grossly

1 respect to the bulk phone-records collection program specifically, *Amici* have not been shown
 2 evidence that it provides the value that intelligence officials have claimed.⁸

3 B. The government possesses a number of legal authorities with which it may obtain
 4 the call records of suspected terrorists and those in contact with suspected
 5 terrorists.

6 *Amici* have consistently argued that the bulk phone-records program needlessly tramples
 7 on Americans' privacy rights, particularly in light of the authorities available to the government
 8 that can also be used to acquire call records of suspected terrorists and those in contact with
 9 suspected terrorists in a targeted manner. *See* Press Release, Sen. Martin Heinrich, Udall,
 10 Heinrich Back Effort To End Dragnet Collection of Phone Data & Add Meaningful Oversight of
 11 Surveillance Programs (Oct. 29, 2013), <http://1.usa.gov/182XcHE>; Press Release, Sen. Mark
 12 Udall, Surveillance Reform Package Ends Bulk Collection of Phone Records, Creates
 13 Constitutional Advocate for Secret Court (Sept. 25, 2013), <http://1.usa.gov/1bBGLku> (“Udall
 14 Reform Release”). Even the valid claims by intelligence officials about certain useful
 15 information obtained through the bulk phone-records program fail to explain why the
 16 government could not have simply obtained this information directly from phone companies
 17 using more calibrated legal instruments. A number of legal authorities would have allowed the
 18 government to do so.

19 violate Americans' privacy rights. *See* Sen. Ron Wyden, Remarks as Prepared for Delivery for
 20 the Center for American Progress Event on NSA Surveillance (July 23, 2013),
 21 <http://www.americanprogress.org/wp-content/uploads/2013/07/7232013WydenCAPspeech.pdf>
 (“Wyden CAP Speech”) (In defending bulk email-records program, intelligence officials
 “significantly exaggerated the program’s effectiveness to both Congress and the [FISC]”).

22 ⁸ *See, e.g.*, Press Release, Sen. Ron Wyden, Wyden Statement on President Obama’s
 23 Proposed Reforms to the FISC and PATRIOT Act (Aug. 9, 2013), <http://1.usa.gov/1bBEyWb> (“I
 24 have seen absolutely zero evidence that the bulk collection of Americans’ phone records under
 Section 215 of the PATRIOT Act has provided any unique value to intelligence gathering or
 actually made Americans any safer . . .”).

1 For example, the Stored Communications Act permits the government to obtain precisely
2 the same call records that are now acquired through bulk collection under Section 215 when they
3 are “relevant and material to an ongoing criminal investigation.” 18 U.S.C. § 2703(d).
4 Individualized orders for phone records, as opposed to orders authorizing bulk collection, can
5 also be obtained under Section 215. 50 U.S.C. § 1861.⁹ National security letters, which do not
6 require a court order, can also be used by the government to obtain call records for intelligence
7 purposes. *See* 18 U.S.C. § 2709. The government can also acquire telephony metadata on a real-
8 time basis by obtaining orders from either regular federal courts or the FISC for the installation
9 of pen registers or trap-and-trace devices. *See* 18 U.S.C. §§ 3122, 3125; 50 U.S.C. § 1842. And
10 the government may also seek call records using standard criminal warrants based on probable
11 cause. *See* 18 U.S.C. § 2703(c)(A); Fed. R. Crim. P. 17(c). The government can use many of
12 these authorities without any more evidence than what is currently required to use the bulk
13 phone-records database, with less impact on the privacy interests of innocent Americans.

14 The executive branch has sometimes argued that the bulk collection of phone records is
15 unique because it allows the NSA to “quickly identify the network of contacts that a targeted
16 number or address is connected to.” 2009 NSA Report 5; *see id.* (“Importantly, there are no
17 intelligence collection tools that, independently or in combination, provide an equivalent
18 capability.”). As an initial matter, in exigent circumstances, the government already enjoys the
19 authority to issue emergency authorizations or national security letters to obtain these records

20
21 ⁹ *Amici* understand that there is an ongoing legal debate regarding whether 18 U.S.C.
22 § 2702(a)(3), which prohibits the disclosure of call records to the government subject to several
23 limited exceptions, permits the use of Section 215 to obtain call records at all. *Amici* take no
24 position on that legal question for the purposes of this brief, but note that the FISC currently
permits such use. *See In re Production of Tangible Things*, No. BR 08-13, 2008 WL 9475145, at
*3 (FISC Dec. 12, 2008).

1 quickly. *See* 50 U.S.C. § 1843; 18 U.S.C. § 2709. More fundamentally, the FISC orders
2 governing the bulk phone-records program permit the NSA’s querying of the bulk phone-records
3 database only when “there are facts giving rise to a reasonable, articulable suspicion (RAS) that
4 the selection term to be queried is associated with” a “foreign terrorist organization,” Primary
5 Order at 7, *In re Application of the FBI for an Order Requiring the Production of Tangible*
6 *Things from [Redacted]*, No. BR 13-80 (FISC Apr. 25, 2013). Intelligence officials have
7 indicated that the NSA queried the phone-records database with fewer than 300 such “selection
8 terms” last year. *Section 215 White Paper* 4. The RAS standard and the relatively few “selection
9 terms” used by the NSA demonstrate that the government could obtain targeted court orders or
10 issue national security letters on a case-by-case basis in lieu of querying bulk-collected data.

11 The government has also suggested that a comprehensive database of Americans’ phone
12 records is necessary to allow for the “three-hop analysis” of a suspected terrorist. *Amici* have yet
13 to see any evidence of such analysis contributing any value to a terrorism investigation. The
14 government does not “always exercise” even “a second hop,” let alone a third. *See* July 31 SJC
15 Hearing at 1:34:20 (statement of John C. Inglis). For cases in which intelligence agencies wish to
16 conduct “two-hop analysis” of the network of a particular suspect, *Amici* believe that the relevant
17 phone records could be obtained from the phone companies using the legal authorities discussed
18 above. An individual order for the phone records of a suspected terrorist and anyone in contact
19 with that suspect could be served on multiple phone companies simultaneously and be expected
20 to produce the same results as a query of a bulk phone-records database.

21 In addition, even though the NSA’s five-year retention period for phone records exceeds
22 the retention period mandated by federal regulation, the NSA has been unable to identify
23 instances in which the government gained valuable information from phone records that the
24

1 companies themselves did not continue to possess. *See* Wyden–Udall Effectiveness Release. The
2 government has also recognized that “numerous technical architectures” other than bulk
3 collection by the government are “viable” means to accomplish the same ends as the bulk phone-
4 records program. Oct. 29 HPSCI Hearing at 55:05 (statement of John C. Inglis). All of these
5 acknowledgments support *Amici*’s consistent warnings that the bulk phone-records program goes
6 far beyond what is required to protect national security.¹⁰

7 Respect for Americans’ privacy is not a matter of convenience—it is an imperative of the
8 Constitution. Despite years of receiving classified briefings and asking repeated questions of
9 intelligence officials in both private and public settings, *Amici* have seen no evidence that bulk
10 collection accomplishes anything that other less intrusive surveillance authorities could not. Bulk
11 collection therefore is not only a significant threat to the constitutional liberties of Americans,
12 but a needless one.¹¹

13 C. *Amici* have seen no evidence that bulk collection was necessary to obtain
14 information critical to specific counterterrorism investigations.

15 Even in the two cases that intelligence officials have been able to identify in which the
16 bulk phone-records program provided any useful information about an individual involved in
17 terrorist activity, it has not been demonstrated that bulk collection was necessary to the
18 outcomes. In both of the cases, *Amici* believe the government could have used its more targeted
19
20

21 ¹⁰ *See* Press Release, Sen. Martin Heinrich, Heinrich Statement on National Security Agency
22 Phone Records Program (June 6, 2013), <http://1.usa.gov/175aD94>.

23 ¹¹ *See* Press Release, Sen. Martin Heinrich & Sen. Tom Udall, Udall, Heinrich Back Effort to
24 End Dagnet Collection of Phone Data & Add Meaningful Oversight of Surveillance Programs
(Oct. 29, 2013), <http://1.usa.gov/182XcHE>; Wyden–Udall Effectiveness Release.

1 authorities to obtain the phone records it claims were valuable.¹²

2 For example, the executive branch has publicly claimed that the bulk phone-records
3 program was critical to the government's disruption of a plot to bomb the New York City
4 subway system. *See, e.g.*, July 17 HJC Hearing at 36:50 (statement of Stephanie Douglas,
5 Executive Assistant Director, National Security Division, FBI); *see also, e.g.*, HPSCI, *54 Attacks*
6 *in 20 Countries Thwarted by NSA Collection 1* (July 23, 2013), <http://1.usa.gov/182Zk1W> ("*54*
7 *Attacks*"). In particular, intelligence officials have claimed that a query of the bulk phone-records
8 database for numbers linked to known terrorism suspect Najibullah Zazi returned a previously
9 unknown number belonging to another known terrorism suspect, Adis Medunjanin. *See* July 17
10 HJC Hearing at 36:50 (statement of Stephanie Douglas). However, since the government had
11 already identified Mr. Zazi as a terrorism suspect prior to querying the bulk phone-records
12 database, it had all the evidence that it needed to obtain the phone records of Mr. Zazi and his
13 associates using an individualized section 215 order or other legal authorities. *See supra* Part I.B.
14 The executive branch has provided neither *Amici* nor the public with any evidence that bulk
15 collection produced any information of unique value in preventing the subway plot.

16 The executive branch has also pointed to the case of Basaaly Moalin, a San Diego man
17 convicted of sending \$8,500 to support al-Shabaab in Somalia. The intelligence community has
18 indicated that information from the bulk phone-records database "established a connection
19 between a phone number known to be used by an extremist overseas . . . and an unknown San
20 Diego-based number" that belonged to Mr. Moalin. *54 Attacks 2*. Yet there is no shortage of
21 authorities under which the United States can conduct surveillance on a "phone number known

22 ¹² *See* 159 Cong. Rec. S6056 (daily ed. July 30, 2013) (statement of Sen. Wyden) ("What I
23 don't see . . . is any evidence that the U.S. Government needed to operate a giant domestic phone
24 records surveillance program in order to catch these individuals."); *accord* Leahy SJC Statement.

1 to be used by an extremist overseas” and other phone numbers in contact with that phone
2 number. *See supra* Part I.B. To claim that Mr. Moalin’s case is a “but-for” example of the value
3 of the bulk phone-records collection program, July 31 SJC Hearing at 1:37:50 (statement of John
4 C. Inglis), is simply at odds with the available evidence. Worse, it appears to be a misleading
5 exaggeration that has distorted the public record.

6 Finally, the executive branch and others have also repeated the claim that “[i]f we had
7 had [the bulk phone-records] program in place at the time [of the September 11, 2001 attacks,]
8 we would have been able to identify” the phone number of one of the hijackers, Khalid al-
9 Mihdhar. *Oversight of the Federal Bureau of Investigation: Hearing Before the H. Comm. on the*
10 *Judiciary* at 26, 113th Cong. (June 13, 2013), <http://1.usa.gov/1aRWHm6> (statement of Robert
11 S. Mueller, III, Director, FBI); *see* 2009 Weich Letter 2. Just as in the cases of Mr. Medunjanin
12 and Mr. Moalin, however, it appears that Mr. al-Mihdhar’s phone number could also have been
13 obtained by the government using a variety of alternate means. Before September 11, the
14 government was surveilling a safe house in Yemen but failed to realize that Mr. al-Mihdhar, who
15 was in contact with the safe house, was actually inside the United States. *See, e.g., Nat’l*
16 *Comm’n on Terrorist Attacks Upon the U.S., 9/11 Commission Report* 266, 270, 272 (2004). The
17 government could have used any number of authorities to determine whether anyone in the
18 United States was in contact with the safe house that it was already targeting. It did not need a
19 record of every American’s phone calls to establish that simple connection.

20 The three cases discussed above—the three cases most heavily cited by government
21 officials to justify the existence of the bulk phone-records program—make clear that there
22 appears to be nothing uniquely valuable about the program, and that existing alternative legal
23 authorities are sufficient to accomplish the United States’ legitimate intelligence objectives
24

1 without systematically infringing on the privacy rights of hundreds of millions of Americans.

2 Of note, intelligence officials have repeatedly asserted that additional examples, which
 3 remain secret, show that the bulk phone-records collection program has “contributed to” or
 4 “provided value in” the investigation of a total of twelve different “homeland-related terrorist
 5 events.” *Facts & Context* 3. *Amici* have reviewed all twelve of these examples, and have yet to
 6 see any evidence that the bulk phone-records program provided any information that was
 7 materially useful to any terrorism cases other than those involving Mr. Moalin and Mr.
 8 Medjunanin. In the opinion of *Amici*, the claim that the bulk phone-records collection program
 9 has “contributed to” twelve different counterterrorism investigations would not withstand public
 10 scrutiny, unless it were accompanied by new evidence that has not been provided to *Amici*.

11 **II. THE GOVERNMENT’S LEGAL INTERPRETATION OF SECTION 215 COULD**
 12 **BE EXTENDED TO AUTHORIZE BULK COLLECTIONS OF AMERICANS’**
 13 **DATA BEYOND THE CALL RECORDS AT ISSUE IN THIS CASE.**

14 *Amici* also are concerned that the government’s theory interpreting Section 215 to permit
 15 the bulk collection of Americans’ records is not limited to phone records. For example, *Amici*
 16 have warned that the government’s authority to collect information on law-abiding Americans is
 17 essentially limitless:

18 the Patriot Act’s surveillance authorities are not limited to phone records. . . . and
 19 could be used to collect other types of records in bulk as well, including
 20 information on credit card purchases, medical records, library records, firearm
 21 sales records, financial information and a range of other sensitive subjects.

22 Wyden–Udall Bulk Email Release; *see* Wyden CAP Speech.¹³

23 *Amici* have not issued these warnings lightly. As disclosed several months ago, two of

24 ¹³ *Accord* Press Release, Sen. Martin Heinrich, Heinrich Says FISA Improvements Act
 Doesn’t Go Far Enough To Protect American Privacy Rights (Oct. 31, 2013),
<http://1.usa.gov/175by9z>; Letter from Sen. Ron Wyden & Sen. Mark Udall to Eric Holder,
 Attorney General, at 2 (Mar. 15, 2012).

1 *Amici* were involved in bringing an NSA bulk-collection program focused on internet metadata
2 to an end. *See* Wyden–Udall Bulk Email Release (“[W]e spent a significant portion of 2011
3 pressing intelligence officials to provide evidence of [the program’s] effectiveness. They were
4 unable to do so, and the program was shut down that year.”). Recent disclosures have produced
5 even more reasons to heed *Amici*’s words of caution. For example, one document released
6 through a Freedom of Information Act lawsuit publicly revealed that the executive branch has
7 interpreted its authority under Section 215 to allow the collection of information about
8 Americans’ locations. *See* Letter from [Redacted], Attorney, Office of General Counsel, NSA, to
9 SSCI at 1 (Apr. 1, 2011), <http://1.usa.gov/1gWqiy0>. And FISC opinions continue to refer to still-
10 undisclosed “secret law” interpreting crucial statutory terms in FISA related to bulk collection as
11 well as addressing the compatibility of bulk collection with the Fourth Amendment. *See In re*
12 *Production of Tangible Things*, 2013 WL 5741573, at *6 (FISC “has previously examined the
13 issue of relevance for bulk collections. *See [Redacted].*”).

14 *Amici* have long warned that Americans would be “stunned,” “angry,” and “alarmed” if
15 they were to see the government’s secret interpretation of Section 215. 157 Cong. Rec. S3386,
16 3389 (daily ed. May 26, 2011) (statements of Sen. Wyden & Sen. Udall). The disclosures to date
17 about the NSA’s activities have been significant, and they will surely be transformative.¹⁴ But
18 the government’s claimed authorities are vast, and the Court should treat with skepticism the
19 argument that the unique characteristics of call records cabin the government’s use of the statute.

20 CONCLUSION

21 Accordingly, the Court should grant Plaintiffs’ motion for partial summary judgment.

22 ¹⁴ *See* *Uniting and Strengthening America by Fulfilling Rights and Ending Eavesdropping,*
23 *Dragnet-collection, and On-line Monitoring Act*, S. 1599 / H.R. 3361, 113th Cong. (2013);
24 *Intelligence Oversight and Surveillance Reform Act*, S. 1551, 113th Cong. (2013).

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Respectfully Submitted,

2
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