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No. 14-35555

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTRODUCTION

The government's ongoing collection of Anna Smith's call records violates the Fourth Amendment. The government contends that *Smith v. Maryland*, 442 U.S. 735 (1979), controls this case, but that case involved the collection of a single criminal suspect's call records over a period of several days; it did not involve dragnet surveillance, which—as the Supreme Court has recognized—raises constitutional questions of an entirely different order. To accept the government's view that the Constitution is indifferent to that distinction is to accept that the government may collect in bulk not just call records, but many other records as well. It is to accept that the government may also create a permanent record of every person Americans contact by email; every website they visit; every doctor or lawyer they consult; and every financial transaction they conduct. The Constitution does not condone that result.

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collection of call records over an extended period of time or in bulk. It held only that the Fourth Amendment is not implicated by the government's collection of a single criminal suspect's call records over a period of a few days.

The Fourth Amendment analysis is not indifferent to the scale and intrusiveness of the government's surveillance. Just four years after it decided *Smith*, the Supreme Court explicitly recognized that the distinction between narrow surveillance and dragnet surveillance is a constitutionally significant one. *See* Pl.

doctrine to surveillance that is substantially more intrusive "has to rest on its own bottom." *Id.* at 2489.

The government characterizes the obvious and glaring distinctions between this case and *Smith* as "immaterial." Gov't Br. 44, 47. But this characterization disregards the express acknowledgment in *Knotts* and the later holding of this Court in *United States v. Nerber* that the duration of surveillance *does* matter. *Knotts*, 460 U.S. at 283–84 (stating that "different constitutional principles may be applicable" to "twenty-four hour surveillance"); *United States v. Nerber*, 222 F.3d 597, 600 (9th Cir. 2000). As this Court stated, "We reject the government"

in original) (quoting *United States v. Garcia*, 474 F.3d 994, 998 (7th Cir. 2007)), *vacated on other grounds*, 132 S. Ct. 1533 (2012).

Finally, the government's argument ignores the teaching of *Riley*: that quantitative changes can make a qualitative difference. In *Riley*, the government argued that "a search of all data stored on a cell phone is 'materially indistinguishable' from searches of [analogous] physical items." *Riley*, 134 S. Ct. at 2488. The Supreme Court dismissed that argument:

That is like saying a ride on horss21 (r) (g) 13cm BT 58 02(l) -89 (i2(l) 1 (a) 1 (e)) 2 (

see also Felten Decl. ¶¶ 38-

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it were, many previous cases would have come out the other way. *See* Pl. Br. 24–25 (citing cases).

The government's contention that call records are unprotected because they are "business records," *see* Gov't Br. 40–43, is equally misguided. As an initial matter, it is not clear why Plaintiff's call records should be characterized as business records—the government has not pointed to any evidence that Verizon Wireless uses the records to make business decisions. Moreover, the government has said previously that the call-records program is necessary because many telecommunications providers do not keep their subscribers' call records for long periods. In other words, the program is predicated on the reality that some phone carriers do not maintain the call records as business records.

In any event, the question of Mrs. Smith's expectation of privacy in her call records cannot be answered by a mechanical appeal to formalism. It must be answered, instead, by considering the expectations that society is prepared to accept as reasonable. *See Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) ("Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.").

The government argues that it would be more convenient for law enforcement if the courts established a bright-line rule that extinguished all privacy

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era allows it to. *Id.* at 2485. Indeed, new technology "allows even just *one type* of information to convey far more than previously possible." *Id.* at 2489 (emphasis added).

In other words, technological advances have vastly augmented the government's surveillance power and exposed much more personal information to government inspection and intrusive analysis.

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B. The Call-Records Program Is Unconstitutional Because It Is Unreasonable.

The phone-records program violates the Fourth Amendment's warrant clause.

The same logic applies here. It would not be impracticable for the

communications across multiple providers"); see also Klayman v. Obama, 957 F. Supp. 2d 1, 39–40 (D.D.C. 2013). But the claim that bulk collection is more efficient for the government does not establish that obtaining a warrant would be impracticable

drivers for sobriety); Camara v. Mun. Court, 387 U.S. 523 (1967) (conducting sporadic building inspections for health-code purposes).

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Moreover, the zone of privacy is pierced whether the government uses a human agent or simply a computer or device it controls to conduct its searches. *See Cotterman*, 709 F.3d at 958 (treating government's use of "forensic software that often must run for several hours to examine" files stored on hard drives as a Fourth Amendment "search"); *see also United States v. Crist*, 627 F. Supp. 2d 575, 585 (M.D. Pa. 2008) (government's use of "hash" analysis to review all computer files a Fourth Amendment "search" notwithstanding fact that no human agents looked at any files); *United States v. Saboonchi*, 990 F. Supp. 2d 536, 568 (D. Md. 2014) (similar). For instance, the privacy intrusion caused by surreptitious video recording has never turned on whether a government agent was actually reviewing the footage. *See, e.g., United States v. Taketa*, 923 F.2d 665, 676 (9th Cir) (e)952 (4) -2 (th)

On the other side of the balance—"the promotion of legitimate governmental interests," *King*, 133 S. Ct. at 1970—the government conflates its interest in combating terrorism, which is substantial, with the incremental benefit (if any) offered by the call-records program. Again, however, the PCLOB, the PRG, and the President have come to the conclusion that the government can accomplish its aims using individualized court orders. Moreover, as Judge Leon observed in *Klayman*, "the Government does *not* cite a single instance in which analysis of the NSA's bulk metadata collection actually stopped an imminent

that the President, like many others, has concluded that

anything, it surely forbids indiscriminate searches where the government itself has conceded that "precise and discriminate" demands for private information would suffice. *Berger v. New York*, 388 U.S. 41, 58 (1967).⁷

II. MRS. SMITH HAS STANDING TO CHALLENGE THE CALL-RECORDS PROGRAM

The district court correctly concluded that Mrs. Smith has standing to bring this challenge. Dist. Ct. Op. 3 n.2 (ERI 3). In fact, this Court in *Jewel v. NSA*, 673 F.3d 902, 909 (9th Cir. 2011), already ruled that another set of plaintiffs had standing to raise a Fourth Amendment claim when considering, in part, the very same mass collection of call records.⁸ The *Jewel* court reached its conclusion after finding that the plaintiffs had alleged a concrete and particularized injury, noting:

⁷ The government has suggested that in the absence of legislation it cannot obtain information with the speed it requires, *see* Gov't Br. 18, but that is not supported by the record. The government already has the ability to serve targeted requests for call records on phone companies using a number of authorities, and to demand prompt compliance, including in emergencies. *See*, *e.g.*, 50 U.S.C. § 1842 (pen registers in foreign-intelligence investigations); 18 U.S.C. § 2709 (national security letters); 18 U.S.C. §§ 3122, 3125 (pen registers in law-enforcement investigations); 18 U.S.C. § 2703

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you wouldn't want to check a database that only has one third of the data, and say there's a one third chance that I know about a terrorist plot, there's a two thirds chance I missed it because I don't have that data." 10

The government appears to be asking this Court to believe that the call-records program is comprehensive enough to be very effective but not so comprehensive that Mrs. Smith should be permitted to challenge its constitutionality. This proposition is not just self-serving but implausible. Faced with the same argument from the government, the district court in *Klayman* observed: "[T]he Government asks me to find that plaintiffs lack standing based on the theoretical possibility that the NSA has collected a universe of metadata so incomplete that the program could not possibly serve its putative function. Candor of this type defies common sense and does not exactly inspire confidence." *Klayman*, 957 F. Supp. 2d at 27.

subsequent use of Mrs. Smith's records aggravates her injuries, Mrs. Smith need not establish anything about the government's subsequent use of her records in order to challenge the government's initial collection of them. The government's collection of Mrs. Smith's call records inflicts an injury sufficient by itself to support standing.¹¹

In fact, the government's argument that there is no case or controversy until

Americans' lives—let alone for the proposition that such surveillance does not even trigger Article III.

The government's reliance on

dog, however, . . . does not expose noncontraband items that otherwise would remain hidden from public view"); *Illinois v. Caballes*, 543 U.S. 405, 410 (2005) ("The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car."); *see also United States v. Young*, 573 F.3d 711, 720–21 (9th Cir. 2009). Here, however, the government is collecting not contraband but information relating to constitutionally protected associations.

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in order to obtain the call records of suspected terrorists and their contacts. See,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 16, 2014.