No. 14-42

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, and NEW YORK CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs-Appellants,

v.

JAMES R. CLAPPER, in his official capacity as Director of National Intelligence, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York, Case No. 13-cv-3994

BRIEF OF AMICUS CURIAE THE RUTHERFORD INSTITUTE IN SUPPORT OF APPELLANTS AND REVERSAL

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
923 Gardens Boulevard
Charlottesville, VA 22901
(434) 978-3888
johnw@rurtherford.org

Daniel L. Ackman
LAW OFFICE OF DANIEL L. ACKMAN
222 Broadway, 19th Floor
New York, NY 10038
(917) 282-8178
d.ackman@comcast.net

Counsel for Amicus Curiae

March 13, 2014

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amicus curiae* The Rutherford Institute is a nonprofit, non-stock corporation. There are no parent corporations and no publicly-held corporation which owns 10% or more of the stock in the corporation.

TABLE OF CONTENTS

RULE 26.1 CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iv

IDENTITY AND INTERESTS OF AMICUS CURIAE 1

ARGUMENT 2

THE ORDER ALLOWING THE BULK COLLECTION OF TELEPHONE METADATA IS A MODERN-DAY GENERAL WARRANT AND VIOLATES THE FUNDAMENTAL PROTECTIONS THE FRAMERS ESTABLISHED WITH THE FOURTH AMENDMENT.....................................2

CONCLUSION...10

CERTIFICATE OF COMPLIANCE 11

CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

Cases

Berger v. State of New York, 388 U.S. 41 (1967) 3, 8

Boyd v. United States, 116 U.S. 616 (1886), *abrogated on other grounds*, *Fisher v. United States*, 425 U.S. 391 (1976) 4

California Bankers Assoc. v. Shultz, 416 U.S. 21 (1974) 9

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 9

Entick v. Carrington, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (C.P. 1765) 5, 6

Huckle v. Money, 19 How. Str. Tr. 1404, 95 Eng Rep. 768 (C.P. 1763)..................... 5

In re Application for an Order Requiring Production of Tangible Things from [Redacted], No. BR06-05 (FISC May 24, 2006), http://1.usa.gov/1f28pHg 2

Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979) 7

Stanford v. State of Texas, 379 U.S. 476 (1965)... 4, 5, 6, 7

Steagald v. United States, 451 U.S. 204 (1982) 7

Wilkes v. Wood, 98 Eng. Rep. 489 (CP 1763) 5, 6, 8

Other Authorities

Candor, *A Letter from Candor to the Public Advertiser* (London, J. Almon 1764)...9

Donald A. Dripps, *"Dearest Property": Digital Evidence and the History oif Private "Papers" as Special Objects of Search and* Seizure, 103 J. Crim. L. & Criminology 49 (2013) 9

Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 Va. L. Rev. 869 (1985)...5

Jeffrey Rosen, *The Naked Crowd: Balancing Privacy and Security in an Age of Terror*, 46 Ariz. L. Rev. 607 (Winter 2004) 3, 7, 10

John W. Whitehead, *A Government of Wolves: The Emerging American Police State* (New York: SelectBooks, 2013) 3

Randy E. Barnett & Jim Harper, *Why NSA's Bulk Data Seizures Are Illegal and Unconstitutional*, The Federalist Society October 21 2013(available at http://www.fed-soc.org/publications/detail/why-nsas-bulk-data-seizures-are-illegal-and-unconstitutional) 9

Constitutional Provisions

U.S. Const., Fourth Amendment.. passim

IDENTITY AND INTERESTS OF AMICUS CURIAE

Since its founding over thirty years ago, The Rutherford Institute has emerged as one of the nation's leading advocates of civil liberties and human rights, litigating in the courts and educating the public on a wide variety of issues affecting individual freedom in the United States and around the world. The Institute's mission is twofold: to provide legal services in the defense of civil liberties and to educate the public on important issues affecting their constitutional freedoms. Amicus curiae is interested in this case because it involves the rights of citizens to be free from pervasive government surveillance and whether the law of the land limits the power of government to monitor the intimate and private activities of citizens.

All parties to this appeal have consented to the filing of this Brief.[1]

[1] No counsel for any party authored this Brief in whole or in part or contributed money intended to fund preparation or submission of this Brief, nor did any other person (other than amicus curiae, its members or counsel) contribute money intended to fund preparation or submission of this Brief.

ARGUMENT

THE ORDER ALLOWING THE BULK COLLECTION OF TELEPHONE METADATA IS A MODERN-DAY GENERAL WARRANT AND VIOLATES THE FUNDAMENTAL PROTECTIONS THE FRAMERS ESTABLISHED WITH THE FOURTH AMENDMENT

The District Court below determined that no violation of the Fourth Amendment is set forth by the allegations of the Appellants' Complaint. Still, it is plain that the order challenged in this case, runs headlong against the principles and purposes that were the foundation for the adoption of Bill of Rights prohibition on unreasonable searches and seizures. It is undisputed that the bulk telephony metadata collection order, initially approved by the Foreign Intelligence Surveillance Court in 2006, In re Application of the FBI for an Order Requiring Production of Tangible Things from [Redacted], No. BR06-05 (FISC May 24, 2006), http://1.usa.gov/1f28pHg, and reauthorized since, allows the government to collect information on substantially every telephone call in the United States, whether or not the call involves a foreign country, a person associated with a foreign country, or is entirely within the United States (SPA006, SPA 010). This unprecedented intrusion into the activities that citizens heretofore considered private and personal is effected without any suspicion and without any limitation to information related to some known threat from a foreign actor considered

dangerous to the United States. *See* John W. Whitehead, *A Government of Wolves: The Emerging American Police State* (New York: SelectBooks, 2013), pp. 120-22.

As such, the bulk metadata collection order is no different from the abusive general warrants colonies suffered under and which were intended to be outlawed with the adoption of the Bill of Rights. It is well-established that the Fourth Amendment's guarantees to privacy and security were born of the American colonists experience with general warrants known as writs of assistance. Under these general warrants, the British Crown's officials were given blanket authority to conduct general searches in order to discover if any goods had been imported into the Colonies in violation of the tax laws. *Berger v. State of New York*, 388 U.S. 41, 58 (1967). They "allowed the king to break into the homes of any number of citizens in search of suspicious information without particularized suspicion and without limitation on its use." Jeffrey Rosen, *The Naked Crowd: Balancing Privacy and Security in an Age of Terror*, 46 Ariz. L. Rev. 607, 611 (Winter 2004). Writs of assistance not only authorized these invasions of privacy, but allowed British agents to enlist the assistance of other government officials and private citizens to assist with the searches and seizures. These writs were nothing less than open-ended royal documents which British soldiers used as a justification for barging into the homes of colonists and rifling through their belongings.

James Otis, a renowned colonial attorney, "condemned writs of assistance because they were perpetual, universal (addressed to every officer and subject in the realm), and allowed anyone to conduct a search in violation of the essential principle of English liberty that a peaceable man's house is his castle." Otis also called the practice of issuing and executing general warrants "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law-book." *Stanford v. State of Texas*, 379 U.S. 476, 481 (1965).

Indeed, the indignities inflicted by the use of general warrants and writs of assistance by the British that sparked the colonists to revolt and assert their independence. In 1761, Otis represented a group of Boston merchants in opposition to writs of assistance in a lawsuit used as a soap box for decrying the practice of general searches and to inspire resistance. Known as Paxton's Case, John Adams described Otis's denouncements of the use of writs of assistance as "then and there was the first scene of the first act of the opposition to the arbitrary claims of Great Britain. Then and there the child of independence was born." *Boyd v. United States*, 116 U.S. 616, 625 (1886), *abrogated on other grounds*, *Fisher v. United States*, 425 U.S. 391 (1976).

Colonial Americans also were influenced by the controversy involving general warrants which was raging in England at about the same time as Otis was

fighting against writs of assistance. In an effort to suppress "libelous" publications that opposed the government and to apprehend the authors of these publications, the English Secretary of State resorted to the issuance of general warrants to ransack unnamed places in an effort to determine and find those critical of the government. Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 Va. L. Rev. 869, 876-77 (1985). In a series of cases, the English judiciary found in favor of those injured by the intrusions under general warrants, asserting that reliance upon the legality of general warrants is an attempt "to destroy the liberty of the kingdom[.]" *Id.* at 879 (quoting *Huckle v. Money*, 19 How. Str. Tr. 1404, 95 Eng Rep. 768, 769 (C.P. 1763)).

The most famous of these cases, *Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (C.P. 1765), and *Wilkes v. Wood*, 98 Eng. Rep. 489 (CP 1763), are cited by the U.S. Supreme Court as "the wellspring of rights now protected by the Fourth Amendment." *Stanford*, 379 U.S. at 483. In *Wilkes*, a trespass action arising from the execution of a general warrant was upheld, and the presiding justice commented as follows on the crown's position in the case:

> The defendants claim a right, under precedents, to force persons houses, break open escrutores, seize their paper &c. upon a general warrant, where no inventory is made of the things thus take away, and where no offenders names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a Secretary of State, and he can delegate this power, it certainly may

> affect the person and property of every man in his kingdom, and is totally subversive of the liberty of the subject.

Wilkes, 98 Eng. Rep. at 498. *Entick* similarly upheld a claim for trespass liability arising from the execution of a warrant allowing the wholesale examination and seizure, in the discretion of the officer, of Entick's books and papers in search of evidence that Entick was the author of libelous matters. Rejecting the defendants' attempts to justify the search and seizure, Lord Camden wrote "if this point should be determined in favor of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel." *Entick*, 19 How. St. Tr. at 1063.

Out of this experience, the Fourth Amendment was adopted as a fundamental bulwark against government invasion of the privacy of citizens. The provisions of the Fourth Amendment

> are precise and clear they reflect the determination of those who wrote the Bill of Rights that the people of this new Nations should forever "be secure in their persons, houses, papers, and effects" from intrusion and seizure by officers acting under the unbridled authority of a general warrant.

Stanford, 379 U.S. at 481. The commitment to prevent any resurrection of general warrants has been repeatedly restated in court decisions applying the constitution's ban on unreasonable searches and seizures; to this day it informs the judicial

conception of the protection of privacy afforded to persons by the Constitution. *See Steagald v. United States*, 451 U.S. 204, 220 (1982) (the Fourth Amendment's roots in the outlawing of general warrants requires a ruling that a warrant to arrest an individual does not authorize the search of a third-party's residence) and *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 325 (1979) (warrant allowing executing officers to seize "obscene materials" was tantamount to a general warrant and violated the Fourth Amendment).

The order at issue in this case is a modern-day incarnation of a general warrant. By authorizing the government to force telecommunications providers to divulge telephony metadata in bulk, without any limitation relating to suspicion or particularity, the order violates the most fundamental safeguards against intrusion that the Fourth Amendment was intended to make impossible:

A. Absence of Suspicion: General warrants and writs of assistance gave the Crown's officers blanket authority to search where they pleased for goods imported in violation of the customs law. They allowed the king to invade the security of any number of citizens and search for information without particularized suspicion. Rosen, *supra*, 46 Ariz. L. Rev. at 611. The power to intrude was untethered to any modicum of suspicion, much less probable cause. Stanford, 379 U.S. at 481. "The purpose of the probable cause requirement of the Fourth Amendment [is] to keep the state out of constitutionally protected areas

until it has reason to believe that a specific crime has been or is being committed[.]" *Berger*, 388 U.S. at 59.

The telephony metadata collection order is plainly contrary to this fundamental guarantee of the Fourth Amendment. Under it, the government is authorized to collect, store, and examine personal information on each and every citizen who uses a telephone within the United States, not on the basis of suspicion, but in order to generate suspicion.

B. Lack of Particularity: General warrants also were condemned because they authorized searches which were not carefully circumscribed. They did not specify the things to be seized, but instead left unbridled discretion to the executing officer of what could be taken from the person who was the target of the search. They gave officers a roving commission to seize any and all property and engage in a fishing expedition. *Berger*, 388 U.S. at 58-59. As the anonymous writer "Candor" wrote on the ransacking of papers at issue in the *Wilkes* case, general warrants

> would lead to the seizing of a man and his papers for a libel, against whom there was no proof, merely slight suspicion, under a hope that, among the private papers of his bureau, some proof might be found which would answer the end. It is a fishing for evidence, to the disquiet of all men, and to the violation of every private right; and is the most odious and infamous act, of the worst sort of inquisitions, by the worst sort of men, in the most enslaved counties[.]

Donald A. Dripps, *"Dearest Property": Digital Evidence and the History oif Private "Papers" as Special Objects of Search and* Seizure, 103 J. Crim. L. & Criminology 49, 70 (2013) (quoting Candor, *A Letter from Candor to the Public Advertiser* (London, J. Almon 1764)).

With this history in mind, the Supreme Court has established that the Fourth Amendment's search and seizure clause does not permit an "indiscriminate rummaging", *California Bankers Assoc. v. Shultz*, 416 U.S. 21, 62 (1974), or "a general exploratory rummaging", *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971), through the records or belongings of individuals.

Yet this is precisely what is at issue in this case. The mass seizure of telephony metadata under the order is indistinguishable from the supposedly forbidden general warrants of yore. "As with general warrants, blanket seizure programs subject the private papers of innocent people to the risk of search and exposure, without their knowledge and with no realistic prospect of a remedy." Randy E. Barnett & Jim Harper, *Why NSA's Bulk Data Seizures Are Illegal and Unconstitutional*, The Federalist Society October 21 2013 (available at http://www.fed-soc.org/publications/detail/why-nsas-bulk-data-seizures-are-illegal-and-unconstitutional). The kind of "mass dataveillance" authorized by the order at issue here possess the same dangers the Framers meant to prohibit by adopting the Fourth Amendment, i.e., general warrants under which the

government is allowed to commit intrusions "in search of suspicious information without particularized suspicion and without limitations on its use." Rosen, *supra*, 46 Ariz. L. Rev. at 611.

CONCLUSION

The decision of the District Court here cannot be squared with the fundamental protections the Fourth Amendment was meant to establish. At its core, the Fourth Amendment was adopted to eliminate the danger to liberty posed by general warrants. The bulk telephony metadata collection order is a modern-day general warrant and precisely the kind of intrusion into the privacy of citizens the Framers meant to eliminate. Therefore, for the aforementioned reasons and those set forth by the Appellants, amicus curiae respectfully requests that this Court reverse the decision of the District Court.

Respectfully submitted,

/s Daniel L. Ackman

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
923 Gardens Boulevard
Charlottesville, VA 22901
(434) 978-3888
johnw@rutherford.org

Daniel L. Ackman
LAW OFFICE OF DANIEL L. ACKMAN

222 Broadway, 19th Floor
New York, NY 10038
(917) 282-8178
d.ackman@comcast.net

Dated: March 13, 2014

CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 2,309 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This Brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because this Brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s Daniel L. Ackman
Daniel L. Ackman

CERTIFICATE OF SERVICE

I certify that on March 13, 2014, I caused the foregoing Brief of Amicus Curiae The Rutherford Institute in Support of Appellees with the Clerk of Court to be electronically filed via the Court's CM/ECF System; all of the parties listed on the attorney service preference report have been served via the Court's CM/ECF system.

I further certify that on March 13, 2014, I caused six (6) copies of the foregoing Brief of Amicus Curiae to be delivered next day by a third-party commercial carrier to the Clerk of the United States Court of Appeals for the Second Circuit.

I further certify that on March 13, 2014, I caused two (2) copies of the foregoing Brief of Amicus Curiae to be delivered next day by a third-party commercial carrier to the following counsel of record for the parties:

Jameel Jaffer
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, New York 10004

David S. Jones, Assistant United States Attorney
U.S. Attorney's Office, Southern District of New York
3d Floor
86 Chambers Street
New York, New York 10007

/s Daniel L. Ackman
Daniel L. Ackman