Exhibit A

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; NEW YORK CIVIL LIBERTIES UNION; and NEW YORK CIVIL LIBERTIES UNION FOUNDATION, Plaintiffs, v. JAMES R. CLAPPER, in his official capacity as Director of National Intelligence; KEITH B. ALEXANDER, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service; CHARLES T. HAGEL, in his official capacity as Secretary of Defense; ERIC H. HOLDER, in his official capacity as Attorney General of the United States; and ROBERT S. MUELLER III, in his official capacity as Director of the Federal Bureau of Investigation, Defendants.	ECF Case Case No. 13 Civ. 3994 (WHP)

BRIEF *A* *C* *C* *A* OF
CONGRESSMAN F. JAMES SENSENBRENNER, JR.
IN SUPPORT OF PLAINTIFFS

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INTEREST OF *A*

A F. James Sensenbrenner, Jr. is a Member of Congress who was the author the USA PATRIOT ("Patriot Act") in its original passage in 2001, and supported its revision in 2006 and its reauthorizations in 2009 and 2011. Rep. Sensenbrenner has represented the Fifth Congressional District of Wisconsin since 1978. He is a long-serving member of the House Judiciary Committee and the Committee on Science and Technology. Rep. Sensenbrenner was chairman of the judiciary committee when the United States was attacked on September 11, 2001. Five days later, he received a first draft of the Patriot Act from the Justice Department. Firmly believing that that original draft granted the government too much investigative power, he asked then-House Speaker Dennis Hastert for time to redraft the legislation. Following numerous meetings and negotiations with the White House, the FBI, and the intelligence community, Rep. Sensenbrenner authored a revised version of the Act that was ultimately adopted as law. Rep. Sensenbrenner also voted to amend the Patriot Act in 2006 and voted to reauthorize certain provisions of the law, including Section 215, in 2009 and 2011.

I. INTRODUCTION

The Defendants attempt to justify their practice of collecting the records of every telephone call made to or from the United States, including purely domestic calls, by claiming that Congress intended to authorize precisely such a program when it enacted and reauthorized Section 215 of the Act, 50 U.S.C. § 1861 ("Section 215"). Defs' Mot. to Dismiss (ECF No. 33) at 21-28. But Congress intended no such thing.

A is a Member of Congress who was the author of the original Patriot Act, in 2001, and supported its revision in 2006 and its reauthorizations in 2009 and 2011. *A* agrees with Defendants that in enacting Section 215, Congress granted the Executive branch

III. CONGRESS DID NOT INTEND TO AUTHORIZE THE COLLECTION OF DATA OF EVERY TELEPHONE CALL MADE TO OR FROM THE UNITED STATES, THUS CAPTURING THE INFORMATION, AND VIOLATING THE PRIVACY, OF MILLIONS OF INNOCENT AMERICANS

The parties can argue over the dictionary and legal definitions of the words "relevance" and "an." But regardless of how those words are defined, one thing is clear: , and the other Members of Congress who enacted Section 215, did not intend to authorize the program at issue in this lawsuit or any program of a comparable scope.

A does not dispute that "relevance" is customarily given a broad meaning, and that he and his colleagues in Congress were aware of this broad meaning when they enacted and reauthorized Section 215. Nor does dispute that Section 215 was intended to create a "sufficiently flexible" standard. Defs' Mot. to Dismiss at 24. But there is no suggestion in any legal precedent or in any statements in the legislative history that the relevance standard could justify the ongoing collection of the records of every telephone call made to or by every person on American soil, the vast majority of which Defendants concede will not be related even remotely to any terrorist activities.

To the contrary, understood that "relevance" was commonly construed by the Supreme Court as a factor that specifically prevented the bulk collection of records, even on a much smaller scale, on the belief that investigators might find the information useful at some point in the future. For example, in *B D C . .* , 341 U.S. 214, 218 (1951), the defendants obtained a subpoena that required the government attorneys prosecuting an antitrust case to produce, among other things, all documents which were "relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants." The Supreme Court rejected that part of the subpo

despite the expansive reach of Federal Rule of Criminal Procedure 17(c). . at 221. In the civil discovery

Moreover, Defendants' interpretation of Section 215 renders numerous other provisions of the USA PATRIOT Act as mere surplusage. As discussed above, certain categories of information are presumed to be "relevant" for the purposes of Section 215. 50 U.S.C. § 1861(b)(2)(A)(i)-(iii). If the meaning of "relevant" is as "flexible" as Defendants contend, then Congress wasted its time in articulating these more specific and focused categories.

Defendants do not explain why Congress would have enacted such meaningless provisions. The bulk data collection program is unbounded in its scope. The NSA is gathering on a daily basis the details of every call that every American makes, as well as every call made by foreigners to or from the United States. How can every call that every American makes or receives be relevant to a specific investigation?

IV. DEFENDANTS' CLAIM THAT CONGRESS IMPLICITY RATIFIED THE PROGRAM MUST BE REJECTED BECAUSE THERE IS NO EVIDENCE OF EXTENSIVE CONSIDERATION OF THE PROGRAM OR A BROAD CONSENSUS THAT IT WAS LEGAL

Defendants claim that Congress "legislatively ratified" a construction of Section 215 under which the mass call-tracking program was permitted by reauthorizing Section 215 after being notified about the details of the program. This claim is founded on the assertion that a "classified briefing paper, explaining that the Government and the FISC had interpreted Section 215 to authorize the bulk collection of telephony metadata, was provided to the House and Senate Intelligence Committees and made available for review, as well, by all Members of Congress." Defs' Mot. to Dismiss at 27.

Defendants vastly understate the quantum of consensus required for a court to find implied Congressional ratification of a statutory interpretation. Implied Congressional ratification is not appropriate merely upon a showing that Congress was notified about an interpretation of the statute. Rather, it will be found only where Congress both reenacted a statute

extensive deliberations or any rejected efforts at legislative correction specific to the mass call tracking program.

Defendants' only evidence supporting implied ratification is the assertion that a 5-page report was made available for Members of Congress to read in a secure location for a limited period of time

scope of the program when he voted to reauthorize Section 215. And attests that had he been fully informed he would not have voted to reauthorize Section 215 without change.

But, as set forth above, even if every member of Congress had been fully informed of the program, a mere awareness of a statutory interpretation is not sufficient to establish implied ratification. As wrote, "the suggestion that the administration can violate the law because Congress failed to object is outrageous. But let them be on notice: I am objecting right now."[4]

V.

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States