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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

FIRST UNITARIAN CHURCH OF LOS ANGELES, *et al*.,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY, *et al*.,

Defendants.

Case No: 3:13-cv-03287 JSW

PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Date: April 25, 2014
Time: 9:00 a.m.
Courtroom 11, 19th Floor
The Honorable Jeffrey S. White

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I. INTRODUCTION

> *This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.*

NAACP v. Alabama ex rel Patterson, 357 U.S. 449, 462 (1964). The 24 plaintiff associations filed this action because the Associational Tracking Program has caused and continues to cause them harm, and does so in the ways that were the basis of the Supreme Court's recognition of associational harm in such seminal cases as *NAACP v. Alabama*. As a result, the mass collection program must pass First Amendment scrutiny, a scrutiny the government here makes no serious attempt to meet.

The Associational Tracking Program is also beyond the NSA's statutory authorization. Congress has already prohibited this broad collection of phone records in the much more specific Stored Communications Act. Nor is the mass collection program within the boundaries Congress set in section 215 of the Patriot Act when it authorized the FBI (not the NSA) to collect "tangible" business records that are "relevant to an authorized investigation." As the Executive Branch Privacy and Civil Liberties Oversight Board observed only yesterday: "We find that there are multiple and cumulative reasons for concluding that Section 215 does not authorize the NSA's ongoing daily collection of telephone calling records concerning virtually every American."[1]

For these reasons, plaintiffs' motion for partial summary judgment on Counts One (First Amendment) and Four (not authorized by statute) must be granted. Moreover, the government's motion to dismiss all counts, on both standing and substantive grounds, must be rejected since plaintiffs have validly stated a claim for each count included in the First Amended Complaint.

This reply first addresses plaintiffs' First Amendment claims, explaining both why the government's motion to dismiss Count One must be denied and why plaintiffs' motion for

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[1] Declaration of Cindy Cohn ("Cohn Decl.") Ex. C, Privacy and Civil Liberties Oversight Bd. ("PCLOB"), Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court at 57 (January 23, 2014), *available at*: http://www.pclob.gov/SiteAssets/Pages/default/PCLOB-Report-on-the-Telephone-Records-Program.pdf ("PCLOB Report").

summary judgment on Count One should be granted. Next, this reply does the same for Count Four, plaintiffs' statutory arguments. Finally, this reply explains why this Court should reject the remaining aspects of the government's motion to dismiss, in particular, plaintiffs' Fourth and Fifth Amendment claims.

Additionally, Plaintiffs hereby move to strike the Shea and Skule Declarations to the extent that the government has offered them in support of its motion to dismiss. (ECF No. 67, Ex. A Declaration of Teresa H. Shea ("Shea Decl."); Ex. B, Declaration of Joshua Skule ("Skule Decl.")). The declarations are cited in support of the government's statutory arguments at 20:20, 23:1, 23:25, 24:1, 4-5, 27:17, 28:11-12, 15-16; 29:4, 35:12-13, in the First Amendment section at 38:24-27 and are repeatedly cited in the government's statement of facts from pages 3-9. (Gov't Opp., ECF No. 66). With only minor exceptions not applicable here, in the context of a motion to dismiss the moving party is obliged to assume that the allegations of a complaint are true. A motion to dismiss that is supported with declarations is a "speaking" motion to dismiss and is improper. Thus, the Shea and Skule declarations, in their entirety, are precluded from use in support of the government's motion to dismiss.

II. DISCUSSION

A. The Mass Collection Program Infringes Plaintiffs' First Amendment Rights.

1. Plaintiffs Have Standing to Assert Their First Amendment Rights.

Plaintiffs have alleged an injury-in-fact due to the seizure and collection of their phone records.[2] That injury—which plaintiffs allege in detail—is concrete and particularized, and it is

[2] In order to establish standing under Article III of the Constitution, a plaintiff must allege the following three familiar elements:
1) A plaintiff must allege an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical" (a "particularized" injury is one that "affect[s] the plaintiff in a personal and individual way");
2) "[T]here must be a causal connection between the injury and the conduct" of which the plaintiff has complained; and
3) It must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."
Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 & n.1 (1992) (internal citations and quotation marks omitted); *Jewel*, 673 at 908. The government only challenges the first element of standing—the question of whether plaintiffs have adequately alleged injury in fact. There is no dispute that plaintiffs, as the victims of the statutory and constitutional violations committed by the government, have adequately alleged causation and redressability. *See Lujan*, 504 U.S. at

actual, not conjectural or hypothetical (*see* ECF No. 9, ¶¶ 5-8, 53-65, 68-72).[3] There is no speculation that the government collects Americans' phone records. The government has admitted it. (ECF No. 25, Declaration of Thomas E. Moore III ("Moore Decl.") Ex. B, p. 3-4; Ex. F p.3). The Ninth Circuit rejected the government's identical standing argument in the related case *Jewel v. NSA*, 673 F.3d 902, 906, 908-909 (9th Cir. 2011).[4]

Other Ninth Circuit precedent also supports plaintiffs' standing here. In *Presbyterian Church (USA) v. United States*, 870 F.2d 518 (9th Cir. 1989), the Ninth Circuit held that churches that had been subject to governmental surveillance had standing to challenge the practice in federal court as a violation of their First Amendment rights. In so holding, the Ninth Circuit distinguished *Laird v. Tatum*, 408 U.S. 1 (1972), and rejected the very argument the government makes here:

> Although *Laird* establishes that a litigant's allegation that it has suffered a subjective 'chill' does not necessarily confer Article III standing, *Laird* does not control this case. The churches in this case are not claiming simply that the INS surveillance has "chilled' them from holding worship services.Rather, they claim that the INS surveillance has chilled individual congregants from attending worship services, and that this effect on the congregants has in turn interfered with the churches' ability to carry out their ministries. The alleged effect on the churches is not a mere subjective chill on their worship activities; it is a concrete, demonstrable decrease in attendance at those worship activities. The injury to the churches is 'distinct and palpable.' *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324, 82 L.Ed.2d 556 (1984) (citations omitted). *Laird* has no application here.

Presbyterian Church, 870 F.2d at 522.

561-62 ("When the suit is one challenging the legality of government action . . . [, if] the plaintiff is himself an object of the action . . . at issue. . . . , there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing or requiring the action will redress it.");

[3] For the purposes of the motion to dismiss, this allegation must be accepted as true. *Jewel*, 673 F.3d at 907. For the purposes of plaintiffs' motion for partial summary judgment, the allegation is supported by abundant evidence, including admissions, that the government has collected domestic phone records *en masse*. *See Lujan*, 504 U.S. at 561 (explaining that for the purposes of assessing standing in the summary judgment context supporting evidence will taken to be true).

[4] The present case differs from *Jewel* in that it is directed only at the mass collection of phone records program rather than also raising the mass interception of Internet communications, is not a class action and focuses more directly on the associational rights of the plaintiff organizations. But, the factual claim about the mass telephone records collection in *Jewel* and in this case are identical.

As the Ninth Circuit explained in *Jewel*, *Clapper v. Amnesty International*, __ U.S. __, 133 S. Ct. 1138 (2013), does not require a different result. In *Clapper*, the plaintiffs' alleged injuries were founded on the mere passage of a law and the *probability* that the plaintiffs might be subject to governmental surveillance under it; indeed, the lawsuit was filed the day the FISA Amendments Act was enacted. The *Clapper* Court held only that there is no injury-in-fact, and thus no Article III standing, for *future* injuries unless the future injury is "certainly impending," not just probable. *Id*. at 1150-51, 1155. As the Ninth Circuit observed in *Jewel:* "Whereas [in *Clapper*] they anticipated or projected future government conduct, Jewel's complaint alleges past incidents of *actual* government interception of her electronic communications, a claim we accept as true." *Jewel*, 673 F.3d at 911 (italics original). Here, of course, plaintiffs' allegations of actual collection of their phone records have been publicly admitted by the government.

The government's argument—that plaintiffs have not been sufficiently harmed by the collection—is not a question of standing; it is a dispute on the merits that invokes this Court's Article III jurisdiction rather than withdraws it. *Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("[S]tanding in no way depends on the merits of the [ ] contention that particular conduct is illegal."); *Bond v. United States*, 131 S. Ct. 2355, 2362 (2011) ("[T]he question whether a plaintiff states a claim for relief 'goes to the merits' in the typical case, not the justiciability of a dispute . . . and conflation of the two concepts can cause confusion."); *Meese v. Keene*, 481 U.S. 465, 473 (1987) (affirming the district court's conclusions that "[w]hether the statute in fact constitutes an abridgement of the plaintiff's freedom of speech is, of course, irrelevant to the standing analysis"); *Equity Lifestyle Props., Inc. v. Cnty. of San Luis Obispo*, 548 F.3d 1184, 1189 n.10 (9th Cir. 2008) ("The jurisdictional question of standing precedes, and does not require, analysis of the merits."); *Jewel*, 673 F.3d at 907 n.4 (same, citing *Bond*).

Finally, the government half-heartedly contends in a footnote that it has not confirmed or denied that it has engaged in mass collection of phone records from any telephone company other than Verizon Business Services and thus a plaintiff lacks standing unless it identifies Verizon Business Services as its service provider. (Gov't Opp., ECF No. 66 at 14 n.5). As to the government's motion to dismiss, the government's contention is meritless, since the government

must accept the allegations of the First Amended Complaint as true. ECF No. 9, ¶¶ 59-67. *See Jewel*, 673 F.3d at 907.[5]

As to the plaintiffs' motion for partial summary judgment, plaintiffs have presented ample evidence to support the allegation that government has collected all domestic phone records, including the plaintiffs' records. As the court described the government's identical contention in *Klayman v. Obama*, ___F. Supp. 2d ___, Nos. 13-0881, 13-0851 (RJL), 2013 WL 6571596, (D.D.C. Dec. 16, 2013), "the Government wants it both ways:"

> The Government obviously wants me to infer that the NSA might not have collected records from Verizon Wireless (or perhaps any other non-VBNS entity, such as AT&T and Sprint). Curiously, the Government makes this argument at the same time it is describing in its pleadings a bulk metadata collection program that can function *only* because it 'creates an historical repository that permits retrospective analysis of terrorist-related communications across multiple telecommunications networks, and that can be immediately accessed as new terrorist-associated telephone identifiers come to light.

Klayman, 2013 WL 6571596, at *15 (emphasis in original). The same is true in this case.[6]

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[5] Several of the plaintiffs have alleged that Verizon is their service provider, so this argument does not result in dismissal of the case in its entirety in any event.

[6] To create a dispute of material fact sufficient to defeat summary judgment, the government must present evidence for each plaintiff showing that it has not, in fact, collected plaintiffs' phone records. Fed. R. Civ. Proc. 56(c)(1)(A). The government has not presented any such evidence. And of course, plaintiffs need not be Verizon customers to have had the records of their phone calls collected. Verizon's phone records include calls both *to and from* Verizon customers. *See* George Molczan, *A Legal And Law Enforcement Guide To Telephony* 34 (2005) (A "call originates from wireline subscriber A, routing through the long-distance carrier switch (IXC) and terminating to wireline subscriber B. For this call wireline carrier 1 would have phone records for billing of the long-distance call to subscriber A. The long-distance carrier will have phone records for billing transport of the call to the originating wireline carrier (wireline carrier 1). The terminating local carrier (wireline carrier 2) will have phone records used for billing terminating access to the long-distance carrier.").
In any event, there is independent evidence that the Associational Tracking Program extends at least to calls on AT&T's as well as Verizon's networks. The NSA Draft OIG Report describes in detail the NSA's relationship with two telecommunications companies described as "Company A" and "Company B" in the report and provides that Companies A and B were the two largest providers of international telephone calls into and out of the United States. *See* Draft OIG Report at 27, 33-34 (*Jewel v. NSA*, 08-CV-4373-JSW, ECF No. 147, Ex. A). FCC records confirm that AT&T and Verizon (formerly MCI/Worldcom) were the country's two largest international telephone call providers at that time. Wireline Competition Bureau, FCC, 1999 International Telecommunications Data at 33 fig. 9 (Dec. 2000), *available at*: http://transition.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/Intl/4361-f99.pdf.

2. The Government's Motion to Dismiss Count One Must Be Denied: Plaintiffs Have Stated a Valid Claim for the Violation of Their First Amendment Rights Because There Is No Requirement That Bad Faith Be Either Pled or Proven.

The Ninth Circuit has made clear that a violation of the First Amendment right to freedom of association exists "[e]ven when it is not the government's intention to suppress particular expression." *Acorn Investments, Inc. v. City of Seattle*, 887 F.2d 219, 225 (9th Cir. 1989). First Amendment scrutiny "is necessary even if any deterrent effect on the exercise of First Amendment rights arises not through direct government action, but indirectly, as an unintended but inevitable result of the government's conduct in requiring disclosure." *Buckley v. Valeo*, 424 U.S. 1, 65 (1975). *See Kusper v. Pontikes*, 414 U.S. 51, 58 (1973) ("[A] significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest."); *Acorn Investments*, 887 F.2d at 225. Indirect and unintended limitations on associational freedoms are potentially as unconstitutional as direct limitations. *Healy v. James*, 408 U.S. 169, 183 (1972); *Perry v. Schwarzenegger*, 591 F.3d 1126, 1139 (9th Cir. 2010); *see also Laird*, 408 U.S. at 11 ("[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights").[7]

The government's contrary claim, that investigations "not for the purpose of abridging first amendment freedoms" are, *per se*, not violative of the First Amendment, is thus incorrect. Even well-intentioned governmental actions must be weighed against the First Amendment interests they burden. Indeed, the government's chief authority, *United States v. Mayer*, 503 F.3d 740, 751-53 (9th Cir. 2007), confirms that a First Amendment violation may occur regardless of whether the government acted in bad faith. The Ninth Circuit in *Mayer* explained that the *Fourth Amendment's* good-faith requirement requires not only a First Amendment-neutral intent, but also "that an investigation threatening First Amendment rights, like any government investigation, be justified by a legitimate law enforcement purpose that outweighs any harm to

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[7] *Accord*. *Local 1814, Int'l Longshoremen's Ass'n v. Waterfront Comm'n of N.Y. Harbor*, 667 F.2d 267, 272 (2d Cir. 1981) ("Local 1814"); *Pollard v. Roberts,* 283 F. Supp. 248, 258 (E.D. Ark. 1968) (three-judge panel) *aff'd per curiam*, 393 U.S. 14 (1968).

First Amendment interests." *Id.* at 753 (clarifying *United States v. Aguilar*, 883 F.2d 662, 705 (9th Cir. 1989)).[8]

Thus, there is no requirement that bad faith or other ill intent be pled to state a valid First Amendment claim. *Presbyterian Church,* 870 F.2d at 522 (rejecting a requirement that one claiming a violation of associational freedoms based on a law enforcement investigation plead bad faith). Plaintiffs have thus stated a valid First Amendment claim for relief, and the government's motion to dismiss Count One on this basis must be denied.

3. Plaintiffs Are Entitled to Summary Judgment on Count One: They Have Proven That the Mass Collection of Their Call Detail Records Significantly Burdens Plaintiffs' Associational Freedoms and the Government Has Not Demonstrated That It Uses the Least Restrictive Means.

As described in plaintiffs' Opening Brief, a plaintiff proves infringement of First Amendment associational rights by first demonstrating a *prima facie* case of "arguable First Amendment infringement." *Perry*, 591 F.3d at 1140. A *prima facie* case is made where the plaintiff has "at least articulate[d] some resulting encroachment on their liberties." *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1355 (2d Cir. 1989). This burden is "light." *Id.* The Supreme Court has been cautious not to impose "unduly strict requirements of proof" and to provide "sufficient flexibility in the proof of injury." *Buckley,* 424 U.S. at 74.

If the plaintiff makes this *prima facie* showing, the evidentiary burden then shifts to the government to demonstrate that its collection of associational information is the least restrictive means of furthering a compelling governmental interest. *Perry*, 591 F.3d at 1140, 1143. *See also Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Infringements on that right may be justified

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[8] The government's other authority is similarly off-target. In *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978), the Supreme Court rejected the existence of the asserted First Amendment right – the right of journalists to gather news. The Court did not hold that an indirect or unintended infringement on an acknowledged, independent First Amendment right would be immune from judicial scrutiny. The same decision was reached in *Reporters' Committee for Freedom of the Press v. AT&T,* 593 F.2d 1030, 1047 (D.C. Cir. 1978); nevertheless, the court recognized the possibility of a First Amendment claim even in the presence of "good faith" investigatory techniques. The government also cites *Laird*, 408 U.S. at 11. But that case, which is distinguished above, *see supra* p. 4, says nothing that limits cognizable infringement on associational freedoms to those situations in which the government intended by its actions to burden such freedoms.

by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."); *Dole v. Service Employees Union AFL-CIO Local 280*, 950 F.2d 1456, 1462 (9th Cir. 1991); *Acorn*, 887 F.2d at 226 (finding that compelled disclosure of corporate shareholders did not adequately further the asserted governmental interest).

The government does not seriously attempt to demonstrate that its mass collection of phone records meets the First Amendment's requirement that it use the least restrictive means to achieve its goals. *Perry*, 591 F.3d at 1140. Its complete attempt to carry its evidentiary burden is in a single cursory footnote. (Gov't Opp., ECF No. 66 at 42 n.34). Nor could the government do so, given the sweeping nature of the program. The government's sole substantive argument is that plaintiffs have not established a *prima facie* case of First Amendment infringement.

But plaintiffs have submitted ample evidence to support their *prima facie* case; indeed, plaintiffs prove more than "arguable" infringement. (ECF Nos. 26-49). The government's mass collection program has resulted in a decrease in the communications that plaintiffs' members and associates are willing to have with them, has burdened plaintiffs' and their members' abilities to communicate with each other and has removed the prospect of having the existence of those communications remain unknown to the federal government.[9] The mass collection program has thus interfered, for example, with plaintiffs' abilities to offer anonymous hotline services[10] and

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[9] ECF No. 26 (Acorn Active Media) ¶¶ 7-10; No. 27 (BORDC) ¶¶ 4-5; No. 28 (CAIR-CA) ¶¶ 3, 9-18; No. 29 (CAIR, Inc.) ¶¶ 3-14; No. 30 (CAIR-OH) ¶¶ 6-16; No. 31 (California Association of Federal Firearms Licensees) ¶¶ 3-8; No. 32 (Calguns Foundation) ¶¶ 3-9; No. 33 (Chairty & Security Network) ¶¶ 3-9; No. 34 (Franklin Armory) ¶¶ 3-5; No. 35 (Free Press)¶¶ 3-7; No. 36 (Free Software Foundation) ¶¶ 3-8; No. 37 (First Unitarian Church-LA) ¶¶ 3-8; No. 38 (Greenpeace) ¶¶ 4-15; No. 39 (Human Rights Watch) ¶¶ 4-10; No. 40 (Media Alliance) ¶¶ 6-9; No. 41 (National Lawyers Guild) ¶¶3-6; No. 42 (California NORML) ¶¶5-9; No. 43 (People for the American Way) ¶¶ 4-6; No. 44 (Public Knowledge) ¶¶ 3-6; No. 45 (Patient Privacy Rights Foundation)¶¶ 3-12; No. 46 (Shalom Center) ¶¶ 4-8; No. 47 (Students for Sensible Drug Policy) ¶¶ 3-8; No. 48 (TechFreedom) ¶¶ 4-18; No. 49 (Unitarian Universalist Service Committee) ¶¶ 3-4.

[10] ECF No. 30 ¶ 2; No. 32 ¶¶ 4-6; No. 42 ¶ 9 ("California NORML experienced an abrupt drop in the number of hotline calls we received after revelation of NSA's phone surveillance program in late June. Prior to then, we received an average of about 15-20 calls daily on our hotline; afterwards, calls dropped to 5-10 per day. This data supports our belief that the NSA program

has caused them to alter the way in which they fulfill their missions and provide services to their associates, often rendering it impossible for them to do so without incurring significant expense.[11] Plaintiffs are receiving fewer telephone calls from their members and others who they serve as a result of the program.[12] Plaintiffs can no longer assure those who wish to associate

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had a chilling effect on our constituents' willingness to communicate with us. Moreover, several of our members have expressed similar concerns in this regard."); No. 45 ¶ 3; No. 47 ¶ 5.

[11] ECF No. 29 ¶ 5 ("Thus, the Associational Tracking Program activities have harmed us because we have assumed extra burdens and have otherwise been inhibited in providing our legal services with clients who had desired the fact of their communication to us to remain secret."); No. 30 ¶¶ 9, 11 ("Additionally, believing that the United States would possess records pertaining to any communication my organization makes, we have been forced to counsel clients in person rather than over the phone to avoid surveillance."); No. 33 ¶ 9 ("We have been forced to expend time and resources on exploring new technologies that may protect the privacy of our communications, although we cannot be sure they will actual ensure confidentiality. Some activities are delayed until in-person meetings can be arranged. On an ongoing basis, the surveillance program inhibits the ability of staff and membership to communicate about sensitive factual and strategic issues. This hampers our ability to effectively carry out our work."); No. 41 ¶ 4; No. 45 ¶ 12.

[12] ECF No. 26 ¶ 8-9 ("[A]s more information is gleaned about the nature of the NSA surveillance, local partners around the globe have been increasingly hesitant about communicating with our team. . . . [W]e have experienced a decrease in communications from associates, especially human rights workers and democracy advocates in the U.S. and around the world."); No. 31 ¶ 5; No. 29 ¶ 14; No. 32 ¶ 6 ("The Associational Tracking Program activities have harmed us because we have experienced a decrease in communications from members and constituents who had desired the fact of their communication to Plaintiff to remain secret. Many gun owners are distrustful of government or of having any record of their status as gun owners."); No. 34 ¶ 4 ("We know that we have been harmed by the NSA's activities because we have had customers articulate that they will be more careful about who they call and when so that they may avoid being targeted and identified as a gun owner. Undoubtedly, the government's actions have had a chilling effect. Concurrently, we have noticed that phone calls to our facility have decreased by over 70%."); No. 35 ¶ 5; No. 37 ¶¶ 4-6 ("The Associational Tracking Program activities have harmed us because we have experienced a decrease in communications from members and constituents who had desired the fact of their communication to Plaintiff to remain secret."); No. 39 ¶ 8 ("We have experienced an increase in questions from our researchers, other staff, external partners and potential associates expressing concern about the confidentiality of the fact of their communications with HRW itself and among our staff and associates. While it is difficult to get precise information about communications that did not occur, based on the concerns raised by others, I believe that some individuals may have refrained from reporting human rights abuses to us and some partners may have refrained from contacting us due to their concerns about security and confidentiality."); No. 40 ¶ 7; No. 41 ¶ 4; No. 44 ¶ 3; No. 45 ¶ 6 ("[P]rior to the revelations of NSA tracking, we received on average 40 calls per month. After the NSA revelations became public, we received on average only 20 calls per month."); No. 47 ¶ 5 ("[P]rior to the revelations of government

with them that the fact of their telephone communications with plaintiff will remain a secret from the government.[13] This inability is especially damaging to the missions of those organization that advocate for privacy rights[14] and for those organizations in which dissident communities associate. As plaintiff Council for American-Islamic Relations explained, "When communications to which we are a party trigger additional government scrutiny, our organizational mission is undermined. The Associational Tracking Program makes it more difficult for CAIR to effectively accomplish its mission of defending the civil liberties of American Muslims."[15] At least one plaintiff has experienced a decline in membership attributable to the collection of its call detail records.[16] Many plaintiffs have had to communicate less and less efficiently and effectively with those persons who wish to associate with them, and vice-versa.[17]

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tracking, we received on average 6 calls per day, but since the revelations became public, we have received on average only 3 calls a day."); No. 49 ¶ 3.

[13] ECF No. 26 ¶ 10; No. 27 ¶ 5; No. 28 ¶¶ 9, 17; No. 29 ¶¶ 5,13; No. 30 ¶ 13; No. 31 ¶ 5; No. 32 ¶ 8; No. 33 ¶ 6; No. 35 ¶ 6; No. 36 ¶ 7; No. 37 ¶ 7; No. 39 ¶ 10; No. 40 ¶ 8; No. 41 ¶ 6; No. 43 ¶ 6; No. 44 ¶ 4; No. 47 ¶ 8.

[14] ECF No. 36 ¶ 5 ("Many of our members, when they joined, have cited our work to support software that respects privacy and freedom as a primary reason for their association. Any revelation that the records of the communications with us are being collected discredits us as an organization capable of protecting the very interest that motivated them to associate with us."); No. 45 ¶ 11 ("As a privacy organization, PPR tries to hold itself to the highest privacy standards and practices. PPR promised users and members that any information shared with PPR would remain private. . . . The revelations that the NSA collects and stores all phone calls and metadata violates PPR's members' and users' expectations that their phone conversations with our staff were private and would not be disclosed.").

[15] ECF No. 29 ¶ 14. The CAIR plaintiffs have explained that one of their programmatic services is to provide advice to those suspected of being terrorists. They thus inevitably receive calls from those on a terrorist watch list. Because the NSA analyzes all calls made and received by those who receive calls from suspected terrorists, and then, as a third "hop," all calls made and received by those persons, one who calls CAIR or is called by CAIR faces a very high probability that her phone records will be analyzed by the NSA. As set forth in the CAIR declarations, this creates a very strong disincentive for members to call CAIR or for CAIR to reach out to its constituents. ECF No. 28 ¶¶ 15-16; No. 30 ¶¶ 10-15.

[16] ECF No. 40 ¶¶ 8-9 ("Media Alliance has experienced a significant increase in the number of individuals expressing concern about the privacy of their inquiries and transactions with our organization, more than doubling from any previous year. . . . Moreover, we have had a large number of individuals go beyond expressing concern to request the end of their memberships.").

[17] ECF No. 29 ¶ 4; No. 33 ¶ 9; No. 39 ¶ 4 ("HRW believes that many of these stakeholders now have heightened concerns about contacting us through our offices now that we are aware that the

The evidence plaintiffs presented is more than sufficient to establish a *prima facie* case of "arguable" First Amendment infringement. Indeed, the evidence presented compares favorably with other cases in which the *prima facie* case was found satisfied. In *Perry*, for example, the *prima facie* showing was made by way of "declarations from several individuals attesting to the impact compelled disclosure would have on participation and formulation of strategy." *Perry*, 591 F.3d at 1143. The Ninth Circuit found no fault in the fact that the declarations were "lacking in particularity." *Id.* It was sufficient that a declaration "created a *reasonable inference* that disclosure would have the practical effects of discouraging political association and inhibiting internal campaign communications that are essential to effective association and expression." *Id.* (emphasis added).

Similarly, in *Local 280*, the court found that letters stating that two members would no longer attend union meetings, and thus, "it goes without saying," would "no longer feel free to express their views on controversial issues at union meetings," were sufficient evidence to demonstrate *prima facie* infringement because "the letters clearly suggest 'an impact on . . . the members' associational rights.'" 950 F.2d at 1460 (*quoting Brock v. Local 375, Plumbers Int'l Union of Am., AFL-CIO*, 860 F.2d 346, 350 (9th Cir. 1988)). It was sufficient that the letters demonstrated that disclosure of the associational information "*might well cause*" the diminution of associational activities and communications. *Id.* at 1461.

Courts outside the Ninth Circuit have reached similar conclusions. In *United States v. Citizens State Bank*, 612 F.2d 1091, 1093 (8th Cir. 1980), the court found sufficient three declarations that explained that the requested disclosure would identify the members and contributors of a politically unpopular organization who as a result would be discouraged to join or contribute to the organization. In *Baldwin v. Comm'r of Internal Revenue*, 648 F.2d 483, 488 (8th Cir. 1981), the court found sufficient a pro se litigant's motion that explained that the requested disclosure of the lists of members of and contributors to his church would discourage others from joining the church. And in *U.S. Servicemen's Fund v. Eastland*, 488 F.2d 1252,

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NSA is logging metadata of these calls. This impairs HRW's research ability and/or causes HRW to rely more on face-to-face encounters or other costly means of holding secure conversations."); No. 41 ¶ 4; No. 45 ¶ 12; No. 46 ¶ 8; No. 47 ¶¶ 7-9; No. 48 ¶¶ 6-18.

1267-68 (D.C. Cir. 1973), *rev'd on other grounds*, 421 U.S. 491 (1975), the court found the *prima facie* burden satisfied by the expert testimony of professional fundraisers that the requested disclosure of contributors to an organization "could have a devastating effect on fund raising of any organization."[18]

The government's response to this evidence is to cast the freedom of association in terms that are far too narrow. To the government: (i) the freedom of association is only burdened by "content-based" programs "directed at curtailing or punishing free speech or association;" (ii) associational freedoms are only burdened when the government accesses, queries, analyzes or uses the information as opposed to simply collecting it; (iii) associational rights are only infringed when members are threatened with harassment, assaults or reprisals; and (iv) associational rights are not infringed when there is no risk that the information will be disclosed to the public.

The government is simply wrong on each of these points. The freedom of association is an expansive liberty founded on the common-sense recognition that "forcing an association engaged in protected expression to disclose the names of its members may have a chilling effect on that expression." *Acorn Investments*, 887 F.2d at 225.

For this reason, the Ninth Circuit has held that that even "a compelled *content-neutral* disclosure rule is unconstitutional" unless it survives First Amendment scrutiny. *Id.* (emphasis added). Thus in *Acorn Investments*, the Ninth Circuit did not have to find that the information collected by the government—the names of shareholders of companies operating panorams (movie-playing machines found most commonly in adult entertainment businesses)—was going

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[18] Indeed, some courts have not required evidence at all and have instead relied on the "obvious" deleterious effects of particular compelled disclosures. *See, e.g., Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960) ("It is not disputed that to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association."); *In re First National Bank, Englewood, Colo.*, 701 F.2d 115, 118-19 (10th Cir. 1983) (assuming that an IRS request for the membership list of a tax protest orgainzation would discourage membership in that organization); *Local 1814*, 667 F.2d at 270 (assuming that longshoremen would be discouraged from contributing to union fund for fear of being called before commission); *United States v. Garde*, 673 F. Supp. 604, 607 (D.D.C. 1987) (inferring that those who contact a whistleblower organization would be discouraged from doing so if their names were disclosed to the government); *Pollard*, 283 F.Supp. at 258 ("Apart from fear of actual reprisal, many people doubtless would prefer not to have their political party affiliations and their campaign contributions disclosed publicly.").

to be used, accessed, queried, or analyzed in any way. Indeed, the fault of the disclosure requirement, and why it was ultimately struck down, was that the information obtained was apparently not used at all. *Id.* at 225-26. But it was the mere collection of the information, and nothing else, that triggered the First Amendment analysis. *Id.*

The Ninth Circuit has also rejected the government's contention that there can be no infringement of First Amendment associational rights absent evidence that "it is the type of association where disclosure could incite threats, harassment, acts of retribution, or other adverse consequences that could reasonably dissuade persons from affiliating with it." ECF No. 66 at 41. Indeed, the Ninth Circuit has stated the exact opposite numerous times: a plaintiff may establish a *prima facie* case by showing *either* resulting harassment *or, alternatively,* "other factors suggesting a 'chilling' of members' associational rights." *Brock*, 870 F.2d at 350 n.1.

The government claims that these two alternative criteria set out in *Brock* are not alternatives at all, and that, despite the disjunctive language of *Brock*, the prospect of harassment must always be proven. ECF No. 66 at 40:15-41:5. But the government simply misreads its authority. *Dole v. Local Union 375*, 921 F.2d 969, 972 (9th Cir. 1990), did not reject the disjunctive *Brock* test with its two alternatives for establishing a *prima facie* case of infringement of associational rights. Rather, it only added a causation element as a "first tier" to each part of *Brock's* alternative criteria. *Id.* Indeed, the year after it decided *Dole v. Local 375*, the Ninth Circuit found a *prima facie* case of infringement established because the evidence satisfied *Brock's* "alternative criterion (2)," the "other factors" criterion. *Local 280*, 950 F.2d at 1460.

The government also contends that plaintiffs have not proved that their injuries were caused by the Associational Tracking Program because plaintiffs have supposedly only shown a temporal correlation between their decrease in telephone communications and the disclosure of the mass collection program. But the declarations submitted by the plaintiffs show more than mere coincidences of timing. Plaintiffs testify that the drop-off in telephone communications was accompanied by the expression of concern by their constituents that the government would now have records that they called the plaintiffs, when they called and for how long.[19] This degree of

[19] *See, e.g.,* ECF No. 29 ¶ 4; No. 30 ¶ 8; No. 31 ¶¶ 5-6; No. 32 ¶ 4 (explaining that gun owners calling hotline are especially concerned about creating an electronic trail of their

evidence is more than sufficient. *See Presbyterian Church*, 870 F.2d at 523 (alleged First Amendment injury need only be "fairly . . . traced" to government action). In addition, the government ignores the evidence, outlined above, that plaintiffs themselves, and not just their constituents, have diminished their associational activities and have lost the ability to assure those who call them that the fact of their call will be kept secret from the government.

The government seems to question the reasonableness of the plaintiffs' and their associates' reactions to the fact the government has been collecting and retaining records of their telephone communications. Surely, the government argues, plaintiffs and their associates do not understand the program. If they were to understand the program and all of the minimization features, then they would realize that their fears are overstated.

There are two responses to this argument. First, plaintiffs well understand the program; rather it is the government that seems oblivious to the fact that people do not want the government to collect and retain the records of every telephone call that they have made and received without any suspicion that they did anything wrong.[20] Second, and even more importantly, the government misunderstands the applicable test. Plaintiffs need only show that those who wish to associate with them are declining to do so. The decisions of those individuals to do so need not be objectively reasonable; they just need to have been made. *Local 280*, 950 F.2d at 1460. As the Ninth Circuit explained, the requirement that the record contain "objective and articulable facts," refers to the plaintiff organizations' fears, not the fears of the plaintiffs' associates who stop communicating with them:

> There is no requirement that an actual chill experienced by a union be objectively based. Our inquiry is directed to whether the governmental action 'would have the practical effect 'of discouraging' the exercise of constitutionally protected political rights.' *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461, 78 S. Ct. 1163, 1171, 2 L.Ed.2d 1488 (1958) (quoting *American Communications Ass'n*

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communications); No. 33 ¶ 5; No. 34 ¶¶ 3-4 (decrease in calls followed customers' claims that they fear being identified as gun owners by reason of telephone calls to plaintiff); No. 35 ¶¶ 4-5; No. 37 ¶¶ 5-6; No. 38 ¶¶ 5-11; No. 42 ¶ 9 (abrupt drop in hotline calls followed expressions of concerns by members).

[20] The government repeatedly emphasizes that it is only collecting telephone numbers and not the names of the callers. But as Judge Leon found, "it is extraordinarily easy to correlate a phone number with its unique owner." *See Klayman*, 2013 WL 6571596, at *21 n.58.

> *v. Douds,* 339 U.S. 382, 393, 70 S. Ct. 674, 681, 94 L.Ed. 925 (1950)) (emphasis added). This inquiry ends when the practical effect of the government's actions has been determined; a court need not go on to evaluate whether people who withdrew from membership, for example, were right to do so.

Id.

The government further contends that associational rights are not infringed when there is no risk that the gathered information will be disclosed to the public. But, again, the authority the government cites states the opposite. In *Perry,* 591 F.3d at 1143, the Ninth Circuit explained that limits on dissemination of the associational information "will ameliorate but cannot eliminate these threatened harms."[21] *See also Garde*, 673 F. Supp. at 607 (holding that promises that identities of whistleblowers would not be disclosed to the public did little to address associational injuries when secrecy from the government was the chief concern).

Indeed the Privacy and Civil Liberties Oversight Board, after reviewing the declarations in this case as well as the amicus briefs filed in support, concluded:

> These accounts describe changes in behavior on the part of journalists, sources, whistleblowers, activists, dissidents, and others upon learning that the government maintains a comprehensive and daily updated repository of call detail records on their telephone calls. The Board believes that such a shift in behavior is entirely predictable and rational. Although we cannot quantify the full extent of the chilling effect, we believe that these results—among them greater hindrances to political activism and a less robust press—are real and will be detrimental to the nation.

PCLOB Report at p. 164.

Lastly, the government, in a footnote, implies that plaintiffs have not, as a matter of law, suffered any injury because, pursuant to the third-party doctrine, they had no reasonable expectation of privacy in the call detail records held by their telephone providers. But the third party doctrine does not apply to claims of associational harm when the third party is playing a crucial role in the associational activities. To the contrary, "First Amendment rights are implicated whenever government seeks from third parties records of actions that play an integral

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[21] The government relies on the following quote from *Perry*: "A protective order limiting the dissemination of disclosed associational information may mitigate the chilling effect and could weigh against a showing of infringement." 591 F.3d at 1140 n.6. However the next sentence, omitted by the government in its papers, is more revealing: "The mere assurance that private information will be narrowly rather than broadly disseminated, however, is not dispositive." *Id.*

part in facilitating an association's normal arrangements for obtaining members or contributions." *Local 1814*, 667 F.2d at 271. As a result, associations have secured First Amendment protections against governmental efforts to obtain bank records, a protection not currently provided by the Fourth Amendment. *Compare United States v. Miller*, 425 U.S. 435, 437 (1976) (no Fourth Amendment privacy interest in bank records), *with Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 56 n.26 (1974) (expressing no opinion on First Amendment protections), *Pollard*, 283 F. Supp. at 258 (First Amendment protects against disclosure of association's bank records), *Citizens Bank*, 612 F.2d at 1094 (same), and *U.S. Servicemen's Fund*, 488 F.2d at 1268 (same, citing *Roberts*).

The government's reliance on *United States v. Gering*, 716 F.2d 615, 619 (9th Cir. 1983), is misplaced. That case dealt not with the freedom of association, but with a different First Amendment right, the free exercise of religion, that involves entirely different interests. *Id.*[22] *See also Mayer*, 503 F.3d at 749 (holding that even in absence of Fourth Amendment violation, "First Amendment violations may be remedied through a civil lawsuit"); *Tabbaa v. Chertoff*, 509 F.3d 89, 102 n.4 (2d Cir. 2007) (explaining that "distinguishing between incidental and substantial burdens under the First Amendment requires a different analysis, applying different legal standards, than distinguishing what is and is not routine in the Fourth Amendment border context").

Plaintiffs have thus established a *prima facie* case of infringement of their associational freedoms. As the government has not attempted to satisfy its evidentiary burden to show that the mass collection program is the least restrictive means of fulfilling its compelling interests, partial summary judgment must be granted on Count One.

B. Plaintiffs Have Standing to Challenge the Remaining Statutory and Constitutional Violations.

Plaintiffs have standing to challenge the lawfulness of the mass collection of call detail records program with respect to their non-First Amendment claims as well. Again, the plaintiffs'

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[22] Also unhelpful is the associational rights case relied on in *Gering, United States v. Choate*, 576 F.2d 165, 181 (9th Cir. 1978). The *Choate* court declined to find that the associational rights of those sending Choate mail were violated by a mail cover because on the record before it there was no evidence that those sending mail to Choate "would, in fact, care that others knew of the fact of their 'association with Choate.'" *Id.* The record in the present case is obviously much different.

injury-in-fact is the mass collection of their phone records. That injury—collection alone—was sufficient to overcome the government's standing arguments in *Jewel*, even before the recent revelations and governmental admissions, and it is more than sufficient to overcome the same standing argument in this case. As the Ninth Circuit explained, "In a similar vein, with respect to her constitutional claim, Jewel alleges a concrete claim of invasion of a personal constitutional right—the First Amendment right of association and the Fourth Amendment right to be free from unreasonable searches and seizures." *Jewel,* 673 F.3d at 908-09.

Plaintiffs' call detail records are a legally protected interest sufficient to establish their standing. The Stored Communications Act ("SCA") provides that telephone companies will not divulge, and the government will not compel the production of, those records. 18 U.S.C. §§ 2702, 2703; *Warth*, 422 U.S. at 500 ("The actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." (internal quotation marks and ellipsis omitted)); *Jewel*, 673 F.3d at 908 (same); *see also Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.").

C. The Motion to Dismiss Should Be Denied as to Count Four: Sovereign Immunity Has Been Waived with Respect to Plaintiffs' Statutory Claims Under Both the Administrative Procedure Act and the Stored Communications Act.

1. The Government Has Waived Sovereign Immunity for a Damages Claims Under the Stored Communications Act Via Section 2712 of That Act.

Count Four of the First Amended Complaint, alleging that the mass collection program exceeds statutory authority, is a valid claim against the government for damages for violations of the Stored Communications Act's specific prohibitions in sections 2702 and 2703, because section 2712 of the SCA (18 U.S.C. § 2712) explicitly waives sovereign immunity for such claims. This waiver also permits the Court to address plaintiffs' motion for partial summary judgment on the merits and adjudicate the issue. [23]

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[23] Both *Klayman* and *ACLU v. Clapper,* ___ F. Supp. 2d ___, No. 13 Civ. 3994, 2013 WL 6819708 (S.D.N.Y. Dec. 27, 2013), misunderstood the interplay between these statutes and

As explained in plaintiffs' Opening Brief, the government's unauthorized and improper collection of call detail records violates the SCA for two reasons. First, any production of call detail records is governed exclusively by the specific provisions of the SCA, including sections 2702 and 2703, which prohibit disclosure in these circumstances. Section 215, by contrast, is a more general statute and so does not and cannot override these specific provisions. Thus, even if the mass collection program were to conform to the statutory limits of section 215, which it does not, the SCA's more specific privacy provisions still bar the collection and still provide a cause of actions for damages via section 2712. Second, the mass collection of phone records program falls outside of the statutory limits embodied in section 215 itself. Even if section 215 in some other circumstances creates an implied exception to the exclusivity provisions of the SCA, which it does not, this mass collection program falls well outside the statutory reach of section 215 and is properly governed instead by the SCA.

Under sections 2702 and 2703 of the SCA, plaintiffs' phone records are to be protected from disclosure to the government except under certain enumerated, exclusive exceptions. Section 2712 directly waives sovereign immunity and permits an action against the United States for damages for a violation of these provisions. It states:

> Any person who is aggrieved by any willful violation of this chapter or of chapter 119 of this title or of sections 106(a), 305(a), or 405(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. §§ 1801, *et seq*.) may commence an action in United States District Court against the United States to recover money damages.

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found that section 2712 acted as a bar to those courts' consideration of the merits of those plaintiffs' statutory claims. Regardless, however, this case is distinct in that those plaintiffs sought injunctive relief in the context of motions for preliminary injunction, while the plaintiffs in this case seeks adjudication of claims that will include damages. Plaintiffs have alleged injunctive relief and in the Joint Case Management Statement have stated their intention to amend the First Amended Complaint to state claims for damages as soon as the deadlines set by the Federal Tort Claims Act expire. The government's motion to dismiss is to the complaint generally. Because plaintiffs are making damages claims that are eligible to be added to the Complaint in approximately July, 2014, for the purposes of the government's motion to dismiss and judicial efficiency, plaintiffs' claims should be considered as seeking both injunctive relief and damages and not exclusively one or the other.

18 U.S.C. § 2712(a). The first reference to "this chapter" refers to the SCA, thus sovereign immunity is waived for claims that sections 2702 and 2703 have been violated by the mass collection.

The government has argued that section 2712 waiver does not reach telephone record collection under section 215, since section 2712 references only certain statutes within FISA and section 215 is not one of the listed FISA statutes. Yet this observation only demonstrates that, to the extent section 215 is being used to collect phone records, it runs afoul of the specific limitations on phone records collection contained in sections 2702 and 2703 and therefore falls within the waiver of sovereign immunity in section 2712.

2. The Government Has Waived Sovereign Immunity for Plaintiffs' Claims Under 215 Seeking Relief Other Than Money Damages Via the Administrative Procedures Act.

While plaintiffs' damages claims are allowed under section 2712, plaintiffs' claims for other kinds of relief, importantly including injunctive relief to enjoin the government from exceeding its authority under section 215, fall within the sovereign immunity waiver of the Administrative Procedure Act (5 U.S.C. §§ 701, *et seq*.) ("APA"). The APA generally waives the government's immunity from injunctive relief, i.e., any suit "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. § 702. That general waiver applies unless some "other statute that grants consent to suit expressly or impliedly forbids the relief which is sought" by the plaintiff. *Id*. No other statute grants consent to suit for section 215 claims while expressly or impliedly forbidding the relief sought here, and so the APA's general waiver applies.

The government claims that two statutes each both grant consent to suit and forbid relief: section 2712 of title 18 and section 215(f) of FISA. But neither of the two statutes the government puts forward satisfies the exception to the APA's sovereign immunity waiver.

First, the government claims that section 2712 expressly negates the APA's general waiver. But section 2712 is the "exclusive remedy" only for "claims within the purview of this section [2712]" that give rise to an "action against the United States under this subsection [2712]." 18 U.S.C. § 2712(d). Section 2712 simply does not include section 215 claims "within

its purview" because it creates no damages cause of action for them. To the contrary, section 2712 explicitly lists the statutes for which it provides the exclusive remedy and section 215 is not among them.

The government's argument that section 2712 somehow precludes section 215 claims for which it creates no remedy wrecks the "within the purview" statutory limitation on section 2712's scope. By the government's interpretation, section 215 is within the purview of section 2712 for purposes of barring equitable relief yet is outside the purview of section 2712 for purposes of a damages claim. But section 2712(d) is clear that Congress gave a damages remedy under section 2712 for certain claims as the flipside of barring those same claims from equitable relief; the damages remedy and the equitable relief bar are coextensive and cannot be split apart any more than the two sides of a coin can be separated. So section 2712 does nothing to preclude equitable relief for section 215 violations because it does not create a damages remedy for claims brought under section 215.[24]

Second, the government claims that section 215(f) impliedly negates the APA's general waiver, but this also lacks merit. Section 215(f) provides a procedure for a direct recipient of a section 215 order to challenge it. The government concedes that section 215(f) says nothing expressly about a challenge by any other person—including those subject to or aggrieved by a section 215 order (*i.e.*, a telephone company). The government also concedes that the APA creates a "presumption favoring judicial review of administrative action." Thus, to prevail, the government must demonstrate that the APA's presumption of judicial review is "overcome by inferences of intent drawn from the statutory scheme as a whole." *Sackett v. EPA*, 132 S. Ct. 1367, 1373 (2012) (citing *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984)).

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[24] Although the Court did not address section 215, or the import of section 2712's "within the purview" limitation in its ruling in *Jewel*, it did broadly state that "FISA, by allowing suits against the United States only for damages based on three provisions of that statute, impliedly bans suits against the United States that seek injunctive relief under any provision of FISA." *Jewel v. NSA*, No. 08-CV-4373-JSW, ECF No. 153 at 20. Plaintiffs here respectfully request that, before extending that *Jewel* ruling to section 215 and this lawsuit, the Court consider both whether section 2712's preclusive scope is limited by its "within the purview" condition and whether section 215 falls within section 2712's preclusive scope.

Subsection 215(f) establishes a procedure by which the recipient of a section 215 order may challenge the order *while that order is still secret*. Importantly, it allows a challenge not only to the legality of the order, but also to the non-disclosure aspect of the order. 18 U.S.C. § 1861(f)(2)(A)(i). When the section 215 order is secret, Congress logically could both ensure that a recipient (the only other party that knows about it) had an ability to challenge it and put a recipient's challenge within the ambit of the FISC.[25]

But this provision cannot be relied upon as an implied prohibition on others challenging section 215 orders that affect them and become known to them. Section 215(f) recognizes, and indeed provides an explicit process for section 215 orders to lose their secrecy and become known by those whose communications records are subject to collection. A section 215 order may be disclosed whenever the FISC "finds that there is no reason to believe that disclosure may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person." 18 U.S.C. § 1861(f)(2)(C)(i). Moreover, even outside section 215, the government can (and here has) declassified section 215 orders.

Subsection 215(f) includes no provision preventing or limiting judicial review of such non-secret orders even though the possibility of disclosure is expressly referenced within subsection 215(f). 18 U.S.C. § 1861(f)(2)(C)(i). If Congress intended section 215(f) to be exclusive after a section 215 order is disclosed, then it would have provided for that eventuality. The absence of such a provision suggests that a person aggrieved by a section 215 order may utilize any appropriate procedure to challenge it, be it the APA, the SCA, or FISA. *See Sackett*, 132 S. Ct. at 1373 ("But if the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome the APA's presumption of reviewability for all final agency action, it would not be much of a presumption at all.").

Cases that have held that a statutory review scheme is exclusive involved clear indicia of Congress' intent, most commonly through an administrative review mechanism that must be

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[25] Subsection (e) of section 215 gives the recipient of a section 215 order a qualified immunity from suit for complying with the order in good faith. This minimizes the incentive for the recipient to challenge such an order and indeed no telephone company has challenged the program.

exhausted. *See generally*, *Sackett*, 132 S. Ct. at 1373-74. For example, *Block* held that the Agricultural Marketing Agreement Act of 1937, which expressly allowed milk handlers to obtain judicial review of milk market orders but required them first to pursue administrative review, precluded review of milk market orders in suits brought by milk consumers who were not subject to the exhaustion-of-administrative-remedies requirement. 467 U.S. at 345-348. That act provided the exclusive means of judicial review: "Where a statute provides that particular agency action is reviewable at the instance of one party, *who must first exhaust administrative remedies,* the inference that it is not reviewable at the instance of other parties, who are not *subject* to the administrative process, is strong." *Sackett*, 132 S. Ct. at 1374 (first italics added, second italics original). There is no such administrative review scheme in section 215.

Unlike the acts and statutes in the foregoing cases, nothing in section 215 indicates that Congress impliedly prohibited a challenge by a party who learns—via a section 215(f) challenge or otherwise—of a section 215 order that subjects his communications to collection. The assertion that Congress did not intend a person aggrieved by a section 215 order to *ever* learn of its existence is simply false, and it was error by the government, the *Klayman* court and the *ACLU* court to assert otherwise. *ACLU*, 2013 WL 6819708, at *12; *Klayman*, 2013 WL 6571596, at *10.

D. Plaintiffs' Motion for Partial Summary Judgment on Count Four Should Be Granted: The Mass Collection of Phone Records is Not Lawfully Authorized Under Section 215 and Is Illegal Under the SCA.

1. The Mass Collection Program, by the Government's Own Admission, Gathers Far More Than "Relevant" Information.

(a) The Mass Collection Program Exceeds Any Notion of "Relevance".

By use of the familiar term "relevant," Congress cannot be said to have implicitly authorized a program that reaches so much farther than any program previously approved by it or by any court in any context. *See Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions– it does not . . . hide elephants in mouseholes."); *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 231 (1994) (explaining that conferral of authority to "modify" rates was not a cryptic conferral of authority to make filing of rates voluntary). Nothing in section 215 intimates that Congress intended that the government could

collect a mind-numbingly massive amount of irrelevant call record data under the guise of "relevance."

As explained in plaintiffs' Opening Brief, the government seeks to tie the breadth of "relevance" to the government's use of new and sophisticated analytical tools. The government has not cited to any precedent that would support such a significant change in the interpretation of "relevance." The most that the government can conjure is the occasional case in which a court approved the production of a large amount of documents under the special circumstances of each case. But nothing in the text of section 215 envisions such significant shift in the definition of the term, much less tying the definition to increasing technical collection capabilities. As the PCLOB observed: "The implication of this reasoning is that if the government develops an effective means of searching through *everything* in order to find *something*, then *everything* becomes relevant to its investigations." *See* PCLOB Report at 62 (emphases in original).

To the contrary, section 215 contains hard limits, allowing only the production of tangible things that could be obtained with a grand jury subpoena *duces tecum*. As even the government admits, (ECF No. 66 at 22) no court has ever approved of a grand jury subpoena for the ongoing production of all the phone records from a single telephone company, much less multiple carriers. Moreover, the potential reach of the government's new definition of "relevance" based on its own increasing surveillance capabilities is far beyond the phone records at issue here. The government denies this, asserting that its approach to relevance is not unlimited because of the unique, standardized nature of telephonic data and their ability to "chain." Yet other personal data, like financial transactional records and location records can similarly be chained when collected in mass.[26]

The government has also interpreted the phrase "to an authorized investigation" out of existence. Section 215 states as plainly as any statute can that the tangible things the FISC orders produced must be relevant to *an authorized investigation* at the time that the tangible things are to be produced. 50 U.S.C. § 1861(b)(2)(A) (an application must include "a statement of facts

[26] For instance, recent revelations show that the NSA is "chaining" location data as part of a program called COTRAVELER, allowing it to determine when travelers are together. *How the NSA is Tracking People Right Now*, Wash. Post, *available at* http://apps.washingtonpost.com/g/page/world/how-the-nsa-is-tracking-people-right-now/634.

showing that there are reasonable grounds to believe that the tangible things sought *are* relevant to an authorized investigation") (emphasis added). Section 215 thus contemplates a logical connection between the tangible things to be produced and a specific, current investigation—not to terrorist investigations generally and not to prospective investigations. But the government has not attempted to make a connection between the mass collection of all phone records and a specific investigation.[27] Indeed, the government does not ever appear to have attempted to make such a connection in its filings with the FISC. In the first brief to the FISC about the program, the government maintained that the program related not only to present FBI investigations (it claimed there were over a thousand) but also to the NSA's own determination of what needed to be investigated and to whether the "FBI can determine whether an investigation should be commenced[.]" (Cohn Decl., Ex. A [Memorandum of Law in Supp. of Appl. for Certain Tangible Things for Investigations to Protect Against International Terrorism at 13-17, *[Redacted]*, No. BR 06-05 (FISC May 23, 2006)). That does not comply with section 215.

The government added in that filing that from analysis of the data, "[T]he NSA may provide such information to the FBI, which can determine whether an investigation should be commenced to identify the users of the telephone numbers and to determine whether there are any links to international terrorist activities." *Id*. This statement confirms that the government has implemented the program in the reverse from what Congress intended. The government anticipates that its use of the phone records might cause the FBI to open an authorized investigation, instead of there already being an authorized investigation to which the mass collection of phone records is relevant. But section 215 requires that the data collected be relevant to an existing authorized investigation.[28]

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[27] The PCLOB Report states, "The government's approach … has been to declare that the calling records being sought are relevant to *all* of the investigations cited in its applications. This approach, at minimum, is in deep tension with the statutory requirement that items obtained through a Section 215 order be sought for 'an investigation,' not for the purpose of enhancing the government's counterterrorism capabilities generally." PCLOB Report at 59 (emphasis in original).

[28] The *ACLU* court, in finding that the program met the requirement of relevance, overlooked this requirement within section 215 that the "tangible things" had to be relevant to *an authorized investigation*. It held, in effect, that the program was relevant to the war on terror generally. *ACLU*, 2013 WL 6819708, at *17. That is not the standard Congress imposed.

Moreover, the statute is also violated by the role played by the NSA. As plaintiffs noted in their opening brief, (ECF No. 24, at 8 n. 3), section 215 does not authorize production of records to the NSA; records are to be "made available to," "obtained" by, and "received by" the FBI. *See* 50 U.S.C. § 1861(b)(2)(B), (d)(1), (d)(2)(B), (g)(1), (h). Similarly, the statutory minimization procedures are expressly "applicable to the retention and dissemination by the Federal Bureau of Investigation of any tangible things to be made available to the Federal Bureau of Investigation based on the order requested in such application." 50 U.S.C. § 1861(b)(2)(B). The PCLOB Report unsurprisingly found that:

> the bulk telephone records program violates the requirement that records produced in response to a section 215 order are to be obtained by the FBI, not the NSA, and that their retention and dissemination is to be governed by rules approved specifically for the FBI's handling of those items. Those requirements are integral to the overall design of the statute, under which records can be obtained only when they are relevant to a specific FBI investigation.

PCLOB Report at 90.

The government cannot seriously deny that the program is anything but a "fishing expedition[] into private papers on the possibility that they may disclose evidence of crime." *Federal Trade Commission. v. American Tobacco Co.*, 264 U.S. 298, 306 (1924) (Holmes, J.). By its own admission, "the metadata *may* reveal that a seed telephone number has been in contact with a previously unknown U.S. number" and "[e]xamining the chain of communications out to the second and in some cases a third hop *may* reveal a contact with other telephone numbers already known to be associated with a terrorist organization, thus establishing that the previously unknown telephone number is itself likely to be associated with terrorism." (ECF No. 66 at 7, emphasis added). Collecting all Americans' phone records on the theory that they "may" reveal a seed which "may" disclose some terrorist associations within them is the very essence of a fishing expedition. If a grand jury subpoena is the touchstone of the reach of section 215, and it is, then the government has gone too far: "Grand juries are not licensed to engage in arbitrary fishing expeditions." *United States v. R Enterprises, Inc.*, 498 U.S. 292, 299 (1991). The *Klayman* court described the mass collection program as almost "Orwellian." *Klayman*, 2013 WL 6571596, at *20. That description is apt.

(b) The FISC Rulings are Not Entitled to Deference on the Subject of Relevance.

It is for this Court to adjudicate a concrete, living contest between adversaries and to do so *de novo*. *See United States v. Cavanaugh*, 807 F.2d 787, 791 (9th Cir. 1987) ("[A]rticle III courts are not foreclosed from reviewing the decisions of the FISA court."). With respect to the jurists who have sat on the FISC, their rulings should be given no deference or weight. Although the FISC judges are Article III judges, they are not exercising the Article III power of deciding cases when they issue an *ex parte* section 215 order. A section 215 order, like an ordinary warrant or wiretap application, is not an Article III "case or controversy" because it is only a one-sided *ex parte* presentation, not an adversary proceeding. *Mistretta v. United State*s, 488 U.S. 361, 388-90 & n.16 (1989); *Morrison v. Olson*, 487 U.S. 654, 681 n.20 (1988). Indeed, for this reason the issuance of section 215 orders may be delegated to an Article I Magistrate Judge. 50 U.S.C. § 1861(b)(1)(B). The FISC proceedings lacked an adversary that had "a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Federal Election Comm'n v. Akins*, 524 U.S. 11, 20 (1998) (*quoting Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting)). No party was present to help "assure that courts will not 'pass upon . . . abstract, intellectual problems,' but adjudicate 'concrete, living contest[s] between adversaries." *Akins*, 524 U.S. at 20. No party was present to challenge the factual assertions made by the government. As a result, the FISC labored under the weight of the government's unchallenged admonishments that the mass collection of phone records was "vital" to the ability of the government to protect the nation from attack. (ECF No. 25-3 Moore Decl. Ex. C, p. 1-2) ("In making this finding, the Court relied on the assertion of the National Security Agency ('NSA') that having access to the call detail records 'is vital to NSA's counterterrorism mission' …")).

The government has abandoned that level of hyperbole in the present motions. At most, the government has here asserted that the mass collection program is "important." (ECF No. 67 Ex. A Declaration Teresa H. Shea ("Shea Decl.") ¶ 44). Moreover, the ongoing public disputes about the effectiveness of the program are a distraction in the context of plaintiffs' present motion for partial summary judgment. The program either meets statutory and constitutional standards for being legal under the claims raised in plaintiffs' motion or it does not. The

government's claims about its effectiveness are therefore irrelevant since effectiveness is not an element of those claims. Plaintiffs therefore move to strike under Federal R. Evid. 401 all references to the effectiveness of the program in the record, specifically paragraphs 6-8, 11-13, 44-63 of the Shea Declaration and paragraphs 8-9 18-3 of the Skule Declaration.[29]

The government used the secret and non-adversarial aspects of FISC practice to stretch the truth in other ways as well. In a decision dated October 3, 2011, the FISC noted: "The court is troubled that the government's revelations regarding NSA's acquisition of Internet transactions mark the third instance in less than three years in which the government has disclosed a substantial misrepresentation regarding the scope of a major collection program." (Moore Decl. (ECF No. 25.13) Ex. M, Mem. Op. at 16 n.14, *[Redacted]*, No. [Redacted] (FISC Oct. 3, 2011).

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[29] "Evidence must tend to prove a fact that is of consequence to the determination in order to be relevant. If the evidence is offered to prove a fact not in issue under substantive law then, while it might be probative of that fact, it is nonetheless not relevant under Rule 401." 2 Weinstein's Federal Evidence, § 401.04(3)(b), p.401-35 (1987).
Moreover, even if the claims were relevant, they are disputed, and indeed have been dramatically undermined. For instance, in *Klayman*, 2013 WL 6571596, at *24, the court noted: "The Government does not cite a single instance in which analysis of the NSA's bulk metadata collection actually stopped an imminent attack, or otherwise aided the Government in achieving any objective that was time sensitive in nature." The government was also forced in a Senate hearing in September to retract its previous claims of impact in "54 terror-related events," and admit that it had only provided useful intelligence in one or two instances. Hearing on FISA oversight before the S. Comm. on the Judiciary, 113th Cong. (Oct 2, 2013). And even as to those remaining instances Senators Heinrich, Udall, and Wyden (all members of the Senate Select Committee on Intelligence) have stated, "the government could have used its more targeted authorities to obtain the phone records it claims were valuable." Brief of Amici Curiae Senator Ron Wyden, Senator Mark Udall & Senator Martin Heinrich at 11-13. (ECF No. 63). The independent review group appointed by President Obama to review the NSA's surveillance programs and the PCLOB have agreed. (PCLOB Report at 146; Cohn Decl., Ex. B President's Review Grp. on Intelligence and Commc'ns Tech., Liberty and Security in a Changing World ("President's Review Group") at 104 (Dec. 12, 2013)). *See also* Justin Elliot, *Judge on NSA Case Cites 9/11 Report, But It Doesn't Actually Support His Ruling*, ProPublica (Dec. 28, 2013); Bergen, Sterman, Schneider and Cahill, "Do NSA's Bulk Surveillance Programs Stop Terrorists?" New America Foundation (January, 2014) *available at* http://www.lawfareblog.com/wp-content/uploads/2014/01/Bergen_NAF_NSA-Surveillance_1.pdf and Marshall Erwin, Resarch Fellow, Hoover Institution, *Connecting the Dots: Analysis of the Effectiveness of Bulk Phone Records Collection* (January 13, 2014) available at http://justsecurity.org/wp-content/uploads/2014/01/Connecting-the-Dots.pdf.

2. Section 2703 Is the Exclusive Basis for the Government to Compel the Production of Call Detail Records.

As set forth in plaintiffs' opening brief, section 2703 of the SCA sets out the exclusive means by which the government may compel the production of phone records. An order under the authority of section 215 is not one of the methods listed among the exclusive methods listed in section 2703. Because section 215 is a statute of general application to business records and sections 2702 and 2703 of the SCA specifically apply to phone records, sections 2702 and 2703 control. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007).

The government relies on section 215 as the sole legal authorization for the mass collection program. As such, the program runs afoul of the SCA's exclusivity provisions. The government argues in a circular fashion that because section 2703(d) references production of phone records via a court order and section 215(c)(2)(D) references "any other order issued by a court of the United States directing the production of records or tangible things" that a section 215 order either *is* an order that satisfies section 2703(d) or constitutes an implied exception to section 2703.

The argument does not stand up to close analysis. The quoted language in section 215 is one of limitation, not authorization. Under section 215, a judicial order of approval "may only require the production of a tangible thing if such thing can be obtained with a subpoena *duces tecum* issued by a court of the United States in aid of a grand jury investigation or with any other order issued by a court of the United States directing the production of records or tangible things." 50 U.S.C. § 1861(c)(2)(D). That language does not suggest that a section 215 order is the equivalent of any other court order, including a court order under section 2703(d). And that language certainly does not modify the limitations of section 2703.

The requirements of section 2703(d) for orders that can lawfully compel the production of phone records and a section 215 order are significantly different. Section 2703(d) requires that any order compelling the production of phone records be based on "specific and articulable facts" that the information is "relevant and material" to "an ongoing criminal investigation." Section 215 bulk collection orders, by contrast, are much broader. Section 215 limits relevance to "an authorized investigation (other than a threat assessment) . . . to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities."

Both the *ACLU* court and the FISC erred in holding that Congress made an implicit exception for section 215 from the requirements of the SCA. Both courts noted that another provision of the SCA, section 2709, provided that the government could issue a "national security letter" to a telephone service provider requesting telephone records of a customer without court approval. The courts opined that it would be "anomalous" for Congress to have created such an exception while prohibiting the production of the same records under the authority of a court order under section 215. *ACLU*, 2013 WL 6819708, at *14 (citing *In re Production of Tangible Things from [Redacted]*, No. BR 08-13 (FISC Dec. 12, 2008)).

There is no anomaly. First, unlike section 215 orders, section 2709 national security letters fall within the express exception of 18 U.S.C. § 2703(c)(2) authorizing disclosure of calling records in response to an administrative subpoena. Second, section 2709 national security letters are limited to the records of individually identified persons or entities, and cannot be used for mass collection. 18 U.S.C. § 2709(b)(1) (limiting national security letters to a request for phone records of "*a* person or entity" (emphasis added)). In other words, section 2709 does not permit the government to acquire the "same records" that it is acquiring with its mass collection program. Indeed, section 2709 reinforces the conclusion that Congress has permitted the government to lawfully acquire only records of identified persons or entities, and has not permitted the government to acquire records in bulk.

In fact, Congress amended section 215 and enacted the relevant portion of section 2703 as part of the 2006 extension of the PATRIOT Act. The two provisions were only three pages from each other in the bill. USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178, §§ 3, 4, 120 Stat. 280 (2006). If Congress intended to create any kind of exemption for section 215 orders in section 2703, it would have done so expressly.

3. The Present and Future Electronic Telephonic Data that the Government Collects Is Not a "Tangible Thing" Within the Meaning of Section 215.

Congress' limitation of section 215 to the production of "tangible things" was intentional. Section 215 uses that word-pair thirteen times. There was nothing in the PATRIOT Act to suggest that by "tangible things" Congress intended section 215 to embrace future-created electronic data or presently-existing, unseeable, untouchable electronic data. On the contrary, Congress expressly used words such as "electronic communication" in the PATRIOT Act when the collection of

electronic information was its intent. *See* 50 U.S.C. § 1841(3), (4). Presently existing electronic data also is not a "tangible thing." When stored in a computer's memory, electronic data is an invisible, incorporeal series of magnetic states. When communicated, electronic data is an invisible, incorporeal flow of electrons. Neither is a "tangible thing" within the plain meaning of those words.

Nevertheless, the government claims that "tangible things" should be read to include something indisputably not tangible, namely, electronic data. The government bases this claim on the potential for the words in the parenthetical ("books, records, papers, documents, and other items") to have a more expansive meaning that can include data. But statutory construction provides that the use of words in a parenthetical is meant to be illustrative of the general term that precedes the parenthetical; the words within a parenthetical do not expand the meaning of the general term. *Chickasaw Nation v. United States*, 534 U.S. 84, 89 (2001) (holding that the language outside a parenthetical governs the language inside the parenthetical and not the other way around). In this case, the use of the words "books, records, papers, documents" in the parenthetical after "tangible things" is meant to be illustrative and does not expand the plain meaning of "tangible things" to include intangible electronic data.

Moreover, any electronic data that has not yet been created is not a "tangible thing." The government cites to other situations in which an order can operate prospectively. However, none of those situations involved an authorizing statute that was limited to "tangible things."[30] Nor does Section 215 contain language "regarding the permissible scope or duration of" a prospective order. *See* PCLOB Report at 86.

4. Congress Did Not Ratify the Government's Interpretation of Section 215 When Congress Extended the PATRIOT Act.

The government persists in understating the amount of consensus required for a court to find implied Congressional ratification of a statutory interpretation. Implied Congressional

[30] The government principally relies on *In re Application of the United States*, 632 F. Supp. 2d 202, 207 (E.D.N.Y. 2008), which upheld an order pursuant to section 2703(d) seeking prospective cell site location information. Section 2703(d) refers to "contents of a wire or electronic communication, or the records or other information sought" from a telephone provider or similar entity. There is no requirement in section 2703 that the listed things be "tangible."

ratification can be found only where Congress reenacted a statute without change and where the specific interpretation of the statute was broad and unquestioned. *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 349 (2005); *United States v. Powell*, 379 U.S. 48, 55 n.13 (1964); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951); *Butterbaugh v. Dep't of Justice*, 336 F.3d 1332, 1342 (Fed. Cir. 2003). Alternatively, ratification may be established by a broad unanimity of judicial decisions. *Jama*, 543 U.S. at 349; *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975).

Forest Grove Sch. Dist. v. T.A., 557 U.S. 230 (2009), relied on by the government, does nothing more than establish a rebuttable presumption, which in that case was met by the existence of a public Supreme Court decision interpreting the statute. 557 U.S. at 239-40; *see also S.E.C. v. Sloan*, 436 U.S. 103, 121 (1978). In this case, any such presumption is easily overcome. The FISC approved the lawfulness of the secret program to engage in the mass collection of phone records by means of a series of secret orders after secret court proceedings. Congress as a whole appears not to have been given copies of the decisions themselves, but instead was only given access to a five-page memo. Even then, the memo was only made available to members of the Senate to read in a secure location for limited periods of time in both 2009 and 2011 and to the House of Representatives in 2009 only. There is no evidence of how many members of Congress, if any, availed themselves of the opportunity to review the memo.

The present case is distinct from *Forest Grove* and more closely analogous to *Sloan*. In *Sloan*, the Supreme Court addressed a statute that the S.E.C. had interpreted consistently for thirty years, that Congress had re-enacted without disapproving of the S.E.C.'s interpretation, and that, on at least one occasion, the S.E.C.'s interpretation of it had been disclosed to a Congressional committee which had approved of it. *Id*. at 120-21. The Supreme Court nevertheless found that Congress had not ratified the S.E.C.'s interpretation:

> We are extremely hesitant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents. That language in a Committee Report, without additional indication of more widespread congressional awareness, is simply not sufficient to invoke the presumption in a case such as this. For here its invocation would result in a construction of the statute which not only is at odds with the language of the section in question and the pattern of the statute taken as a whole, but also is extremely far reaching in terms of the

> virtually untrammeled and unreviewable power it would vest in a regulatory agency.

Id. at 121.[31]

Like the Committee Report in *Sloan*, the five-page memo is "simply not sufficient to invoke the presumption" of widespread Congressional awareness of the existence of the mass collection program or of the FISC review of those programs.

E. The Motion To Dismiss Count Two Must Be Denied: The First Amended Complaint States a Fourth Amendment Violation.

The allegations of the First Amended Complaint are more than sufficient to state a claim for violations of plaintiffs' Fourth Amendment rights. The third-party doctrine of *Smith v. Maryland*, 442 U.S. 735 (1979) does not foreclose Count Two. The scale, scope and type of information collected under the mass collection program are far greater than that at issue in *Smith.* As a result, plaintiffs have a reasonable expectation of privacy in their phone records even when they are held by their phone service providers. Moreover, *Smith* was a product of its times, both technically and legally. Since *Smith*, the legal protections of Americans' phone records have grown in conjunction with the proliferation of telephones and telephone technology. Also since *Smith*, the use of telephones and the scope of the information reflected in telephone records have increased.

The Fourth Amendment guarantees to the people of the United States the freedom from "unreasonable searches and seizures." U.S. Const. amend. IV. The meaning of this guarantee must be construed in light of its express purpose: to ensure "the right of the people to be *secure*

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[31] The other cases the government cites fail to establish Congressional ratification on the basis of a secret brief made available to members of Congress in a secure room. In *EEOC v. Shell Oil Co.*, 466 U.S. 54, 69 (1984), the Court noted that "[b]y 1972, Congress was aware that employment discrimination was a 'complex and pervasive' problem that could be extirpated only with thoroughgoing remedies." In *Haig v. Agee*, 453 U.S. 280, 297-98 (1981), the legislative history of the Passport Act of 1926 expressly indicated Congressional awareness of the longstanding practice of denying passports to persons on national security grounds. And, in *NLRB v. Gullett Gin Co.*, 340 U.S. at 365-6, the Court noted that "Congress considered in great detail the provisions of the earlier legislation as they had been applied by the Board." The secret notice of the mass collection program is not on a par with Congress' detailed consideration of the need for thoroughgoing enforcement of discrimination laws, the practice of denying passports to persons on national security grounds, or an NLRB interpretation.

in their persons, houses, papers, and effects." *Id*. (emphasis added). As the President's Review Group on Intelligence and Communications Technologies recently explained:

> This form of security is a central component of the right of privacy, which Supreme Court Justice Louis Brandeis famously described as 'the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.'
>
> * * *
>
> This protection is indispensable to the protection of security, properly conceived. In a free society, one that is genuinely committed to self-government, people are secure in the sense that they need not fear that their conversations and activities are being watched, monitored, questioned, interrogated, or scrutinized. Citizens are free from this kind of fear. In unfree societies, by contrast, there is no right to be let alone, and people struggle to organize their lives to avoid the government's probing eye. The resulting unfreedom jeopardizes, all at once, individual liberty, self-government, economic growth, and basic ideals of citizenship.

President's Review Group at 44.

1. Plaintiffs Have a Reasonable Expectation of Privacy Against the Government in Call Detail Records that Pervasively Detail Their Daily Lives and Activities.

The Fourth Amendment "requires a determination of whether the disputed search and seizure has infringed an interest of [plaintiffs] which the Fourth Amendment was designed to protect." *Rakas v. Illinois*, 439 U.S. 128, 140 (1978). That analysis, which includes the question of whether plaintiffs have a "legitimate" or "reasonable" expectation of privacy, is a fact-intensive inquiry that asks "whether the facts of a particular case give rise to a legitimate expectation of privacy." *Id*. at 143 & n.12, 144; *accord United States v. Davis*, 932 F.2d 752, 757 (9th Cir. 1991) (examining "the totality of the circumstances" to determine whether defendant had a legitimate expectation of privacy). That analysis requires a court to confront "all of the problems of line drawing which must be faced in any conscientious effort to apply the Fourth Amendment." *Rakas*, 439 U.S. at 147.

Plaintiffs have a reasonable expectation of privacy in the totality of their five years of their phone records that the government has collected and repeatedly searched. While even a single call to a "hotline" dedicated to helping people navigate medical privacy, drug laws, gun rights or report abuses of civil rights reveals sensitive information, phone records collected over time reveal more. Repeated calls to a church, activist group, or organization providing legal aid

reveal religious or political affiliations or legal concerns or issues. As the President's Review Group observed, "the record of every telephone call an individual makes or receives over the course of several years can reveal an enormous amount about that individual's private life." President's Review Group at 116-117.

Plaintiffs' reasonable expectation of privacy is buttressed by the numerous statutes passed since *Smith* restricting telecommunications carriers from voluntarily disclosing phone records to the government. At least three federal statutes now support a legitimate expectation of privacy either by prohibiting disclosure of phone records to the government except under legal process that is based on individualized suspicion of wrongdoing or restricting disclosure to private persons:

- The SCA, enacted in 1986, established among other things that telephone companies may not provide communication records to the government without legal process or consent of the customer. 18 U.S.C. § 2702(c)(3) ("shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service … to any governmental entity"); 18 U.S.C. § 2703(c) (setting forth legal process for compelling disclosure of communication records).

- The Telecommunications Act of 1996 provides statutory privacy protection for call records in the hands of telephone companies. 47 U.S.C. § 222 (protecting "customer proprietary network information" (CPNI)).[32] Under section 222, a telephone company may not use, disclose, or permit access to a customer's individually identifiable CPNI without that customer's consent except to provide service or to comply with the law. *See* 47 U.S.C. § 222(c)(1); 47 C.F.R Part 64, Subpart U (CPNI regulations). Thus, the primary effect of section 222 is to restrict what telephone companies can do with their customers' phone records and associated private

[32] *See* 47 U.S.C. § 222(h)(1) (defining CPNI as "(A) information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information.").

information. *U.S. West, Inc. v. F.C.C.*, 182 F.3d 1224, 1237 (10th Cir. 1999) ("Congress' primary purpose in enacting § 222 was concern for customer privacy.").

- The Telephone Records and Privacy Protection Act (TRPPA), 18 U.S.C. § 1039, enacted in 2007, generally makes it unlawful to sell or transfer or buy or receive "confidential phone records information"[33] of a telecommunications carrier or a provider of IP-enabled voice service, without prior authorization from the customer to whom such confidential phone records information relates." 18 U.S.C. §§ 1039(b)(1), (c)(1).[34] Moreover, Congress found in TRPPA that: "the information contained in call logs may include a wealth of personal data"; "call logs may reveal the names of telephone users' doctors, public and private relationships, business associates, and more"; "call logs are typically maintained for the exclusive use of phone companies, their authorized agents, and authorized consumers"; and "the unauthorized disclosure of telephone records not only assaults individual privacy but, in some instances, may further acts of domestic violence or stalking, compromise the personal safety of law enforcement officers, their families, victims of crime, witnesses, or confidential informants, and undermine the integrity of law enforcement investigations." *See* Pub. L. 109–476, § 2, Jan. 12, 2007, 120 Stat. 3568.

In light of these protections, the fact that telephone users necessarily convey their calling information to telephone companies for the purpose of making calls does not destroy the reasonableness of their expectation of privacy. *See Ferguson v City of Charleston*, 532 U.S. 67, 78 (2001) ("reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical

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[33] The definition of "confidential phone records information" in 18 U.S.C. § 1039 is similar to the definition of CPNI, and likewise includes the phone records collected under the Program. *See* 18 U.S.C. § 1039(h)(1) ("information that—(A) relates to the quantity, technical configuration, type, destination, location, or amount of use of a service offered by a covered entity, subscribed to by any customer of that covered entity, and kept by or on behalf of that covered entity solely by virtue of the relationship between that covered entity and the customer; (B) is made available to a covered entity by a customer solely by virtue of the relationship between that covered entity and the customer; or (C) is contained in any bill, itemization, or account statement provided to a customer by or on behalf of a covered entity solely by virtue of the relationship between that covered entity and the customer.").

[34] The prohibitions of both 47 U.S.C. § 222 and TRPPA are subject to the statutory exemptions in 47 U.S.C. § 222(d). *See* 18 U.S.C. §§ 1039(b)(2), (c)(2).

personnel without her consent"); *Stoner v. California*, 376 U.S. 483, 489-90 (1964) (hotel guest "gives 'implied or express permission' to such persons as maids, janitors or repairmen' to enter his room 'in the performance of their duties,'" but hotel rooms still protected against police entry); *Chapman v. United States*, 365 U.S. 610, 616 (1961) (though landlord may enter "to view waste," police intrusion even with landlord's permission still subject to Fourth Amendment).

2. *Smith v. Maryland* Is Not Determinative of the Constitutionality of the Mass Collection Program Under the Fourth Amendment.

Not only have the legal privacy protections for phone records changed since 1979, but the factual context is also significantly different than it was in *Smith v. Maryland*.

Like any other high court decision, *Smith* is controlling authority only for those issues that were actually presented and necessarily decided. Statements by the Supreme Court that go beyond the facts of the case and the issues presented, while deserving of respect and consideration for their persuasive value, are not controlling authority. *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) (en banc). This rule has special force in contexts like the Fourth Amendment that inherently require "fine lines to be drawn." *Rakas*, 439 U.S. at 147; *accord id*. at 156 (Powell, J., Burger, C.J., concurring) ("The range of variables in the fact situations of search and seizure is almost infinite. Rather than seek facile solutions, it is best to apply principles broadly faithful to Fourth Amendment purposes.").

The government would have this Court rely on *Smith* for matters far beyond the relatively narrow question decided in that case. *Smith* concerned the targeted and limited collection of two weeks' worth of telephone numbers dialed (not received) from a single telephone line of a person reasonably suspected of a crime. The electromechanical pen register at issue in *Smith* did not collect information about incoming calls, could not detect whether the call was completed or how long it lasted. Indeed, the *Smith* Court itself acknowledged the limited nature of what could be collected with that technology: "Indeed, a law enforcement official could not even determine from the use of a pen register whether a communication existed. . . . Neither the purport of any communication between the caller and the recipient of the call, their identities, nor whether the call was even completed is disclosed by pen registers." *Id*. at 741.

The differences between a pen register collecting the telephone numbers dialed from a single telephone and the government's mass collection program are stark and manifest:

● **Scale:** The mass collection program involves millions of phone numbers affecting millions of persons rather than calls dialed on one home telephone.

● **Duration:** The mass collection program provides the NSA with the capability to build a deeply invasive associational dossier of each of those persons through tracking their communications over a five-year period, rather than two weeks.

● **Changes in Telephone Use Since 1979:** Use of the telephone has changed dramatically since 1979, when telephones were largely stationary devices shared among a number of users, with one number per household or per entire organization. Today, as landline usage dwindles, mobile phones have become personal, not shared, devices that many people carry constantly with them and use dozens, if not hundreds, of times per day.

● **Information collected:** The phone records in this case include whether the call was completed, its duration, and other information rather than simply which numbers were being dialed as in *Smith*.

● **Individualized suspicion:** The program does not collect information based on individualized suspicion of any sort, much less individualized suspicion of a crime.

These differences are material. Indeed, the government's own defense of the program is largely predicated on how the broad scope, massive scale, and lack of any individualized showing of suspicion prior to collection of these records assists them in discovering relationships between people or among groups of people. (Gov't Opp., ECF No. 66 at 7, 23-24). As one district court recently put it, the question before the Supreme Court in *Smith*—"whether the installation and use of a pen register constitutes a 'search' within the meaning of the Fourth Amendment," 442 U.S. at 736—"is a far cry from the issue in this case." *Klayman*, 2013 WL 6571596, at *18.

The mechanical application of Fourth Amendment precedent was rejected by five Supreme Court justices in *United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945 (2012), which addressed whether the installation and use of a GPS tracking device for 28 days constituted a search. While the majority opinion relied upon the physical intrusion of the device itself, two concurring opinions joined by five justices agreed that police collection of detailed movement data over a month constituted a search for a different reason: because it "impinge[d] on expectations of privacy." *Id.* at 964 (Alito, J., concurring); *id.* at 956 (Sotomayor, J., concurring)

(individuals have "a reasonable societal expectation of privacy in the sum of [their] public movements"). These five justices did not reject prior caselaw that held that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *United States v. Knotts*, 460 U.S. 276, 281 (1983). Instead, consistent with the close factual analysis and careful line-drawing inherent in Fourth Amendment cases, they explained how the tracking in *Knotts* was materially different from the tracking in *Jones*, and explicitly distinguished that case based on the longer time of collection in *Jones*. *Jones*, 132 S. Ct. at 956 n.* (Sotomayor, J., concurring); *id*. at 964 (Alito, J., concurring).

3. No "Special Needs" Justify the Government's Violation of Basic Fourth Amendment Principles.

Nor is the government correct that the "special needs" doctrine renders plaintiffs' complaint insufficient under Federal Rules of Civil Procedure 12(b)(1) or (6). This exception applies only when the primary purpose of the government's acts is "beyond the need for normal law enforcement," and special needs "make the warrant and probable-cause requirement impracticable." *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). But the government must do more than invoke even "an extremely high" national security interest for the special needs exception to apply. *Al Haramain Islamic Foundation, Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 993 (9th Cir. 2011) (citation omitted); *id*. ("[T]he dispositive question here is whether it is impracticable for [the government] to achieve its undeniably important aims without securing a warrant."); *Chandler v. Miller*, 520 U.S. 305, 318-19 (1997) ("Notably lacking in respondents' presentation is any indication of a concrete danger demanding departure from the Fourth Amendment's main rule."). Thus the Ninth Circuit declined to apply the special needs exception when "there is no limited scope or scale to the effect of" the order; the order's "potential reach is extensive" and could be used "against *any person* within the United States or elsewhere"; and the technique could be used "without warning," with "no 'long history of judicial and public acceptance.'" *Al Haramain*, 686 F.3d at 992-93 (emphasis in original) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967)).

The mass collection program closely resembles the program to which the Ninth Circuit found the special needs exception did not apply in *Al Haramain*. The program has an enormous impact on plaintiffs (as well as the general public); it has unlimited scope or scale; it can reach

any person in the United States who makes phone calls, and did so without warning or notice to plaintiffs or the general public until recently. Nor can the government show that the program has significant value in the context of a motion to dismiss.

Moreover, the value of the program is sharply disputed. Amici Senators Wyden, Udall and Heinrich note:

> As members of the committee charged with overseeing the National Security Agency's surveillance, Amici have reviewed this surveillance extensively and have seen no evidence that the bulk collection of Americans' phone records has provided any intelligence of value that could not have been gathered through less intrusive means.

Amici brief of Wyden, Udall and Heinrich, ECF No. 63 at 2.[35] The government has simply not demonstrated that a warrant and probable cause requirement would be so "impracticable" as to render plaintiffs' complaint vulnerable to a motion to dismiss.

Significantly, the government has not shown that "special needs," as a matter of law, make the warrant and probable-cause requirement impracticable. FISA requires warrants based on probable cause for "electronic surveillance." This shows that the interest in collecting foreign intelligence within the United States alone does not in itself trigger "special needs." Congress has also provided the government with multiple statutory tools for particularized, targeted collection of domestic phone records, which avoid the constitutional issues of mass untargeted collection.[36]

Accordingly, the government's motion to dismiss must be denied.

F. The Government's Motion to Dismiss Count Three Must Be Denied: Plaintiffs Have Stated a Claim for a Violation of Their Fifth Amendment Rights.

Plaintiffs have stated a due process claim under two independent theories. The mass collection program deprives plaintiffs and their members of their substantive due process right to informational privacy without any pre- or post-deprivation process. Separately, if section 215

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[35] As noted supra at note 29, the President's Review Group and many other independent reviewers agree.

[36] The court in *Klayman* concluded that the government's stated value of the Program was speed, *e.g.*, "rapid analysis in emergent situations." *Klayman*, 2013 WL 6571596, at *23; Shea Decl. ¶ 59. Yet, the court noted that the government never asserted as a matter of fact that the Program was immediately useful or prevented an impending attack. *Klayman*, 2013 WL 6571596, at *24 n.65. The same is true here.

were to authorize the mass collection program as the government says it does, then it would be unconstitutionally vague "secret law."

1. Plaintiffs Have a Liberty Interest in the Privacy of Their Phone Records That Is Deprived Without Due Process by the Bulk Collection Program.

"A liberty interest protected by the Fifth Amendment may arise from two sources: the Constitution . . . or a federal statute." *United States v. Johnson*, 703 F.3d 464, 469 (8th Cir. 2013) (citations omitted); *see also Marsh v. County of San Diego*, 680 F.3d 1148, 1157 (9th Cir. 2012) ("statutory laws of general applicability can create a liberty interest that is constitutionally protected"). Here plaintiffs and their members have a liberty interest arising from both.[37]

The Fifth Amendment right to information privacy includes "the individual interest in avoiding disclosure of personal matters." *See, e.g., Whalen v. Roe,* 429 U.S. 589, 591-93 (1977) (recognizing constitutional "interest in avoiding disclosure of personal matters"); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 458 (1977) (information in which one has a "legitimate expectation of privacy"); *Nelson v. NASA*, 530 F.3d 865, 877 (9th Cir. 2008) ("[t]his interest covers a wide range of personal matters," including sexual activity, medical information, and financial matters) (citations omitted), *rev'd on other grounds*, 131 S. Ct. 746, 751 (2011) ("We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*."). The information privacy right is important and well-established in this Circuit. *See, e.g., In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999) (public disclosure of Social Security numbers implicates the right to informational privacy); *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1269 (9th Cir. 1998) (unauthorized employer testing for sensitive medical information violates employees' right to informational privacy); *Doe v. Attorney General*, 941 F.2d 780, 796 (9th Cir. 1991) (individual's HIV-status afforded informational privacy protection; government may seek and use such information only if its actions are narrowly tailored to meet legitimate interests); *Thorne v. City of El Segundo*, 726 F.2d 459, 469

[37] Plaintiffs have standing to raise the liberty interests of their members under the doctrine of associational standing. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

(9th Cir. 1983) (potential state employee may not be required to disclose personal sexual matters to gain benefits of state employment).

The program's aggregation of phone records inevitably discloses such personal matters. Such protection is especially important today, when technological advances have created an unparalleled power to harness and use aggregated data for a variety of purposes. But it is not novel. *Whalen*, 429 U.S. at 605 (noting "the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files").

The government argues that there can be no Fifth Amendment information privacy claim because plaintiffs have no reasonable expectation of privacy in their phone records. This is wrong as a matter of law, because the right to information privacy protects personal information even if that information is known to third parties. *Nixon*, 433 U.S. at 458; *Nelson*, 530 F.3d at 880 n.5.[38]

The government also argues that no Fifth Amendment claim can be stated because only the Fourth Amendment protects plaintiffs' alleged interests. The Ninth Circuit has squarely rejected this:

> If the constitutional right to informational privacy were limited to cases that involved a Fourth Amendment 'search,' the two rights would be entirely redundant. Indeed, although the two doctrines often overlap, we have repeatedly found the right to informational privacy implicated in contexts that did not involve a Fourth Amendment 'search.'

Nelson, 530 F.3d at 880 n.5 (internal citations omitted). There is no general principle of "constitutional rights preemption." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49 (1993) ("We have rejected the view that the applicability of one constitutional amendment preempts the guarantees of another"); *Soldal v. Cook County*, 506 U.S. 56, 70 (1992) ("Certain

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[38] More generally, that others know plaintiffs' phone records should never remove their legitimate expectations of privacy. "In an organized society, there are few facts that are not at one time or another divulged to another." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989); *id*. at 770-71 ("that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information.") (internal quotation marks and citation omitted); *id.* at 763 ("privacy encompass[es] the individual's control of information").

wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands.").[39]

Independently, the SCA and the other federal statutes described above also create a liberty interest protecting the privacy of the phone records of plaintiffs and their members. Thus, for purposes of a motion to dismiss, plaintiffs have adequately alleged the existence of a protected liberty interest.

When the government compels the production of the phone records of plaintiffs and their members, it deprives them of their protected liberty interest in the information contained in those phone records. Substantive due process requires that the government's interest in disclosure be substantial enough to outweigh the privacy interests. *In re Crawford*, 194 F.3d at 959 (right to informational privacy "is a conditional right which may be infringed upon a showing of proper governmental interest;" "the government has the burden of showing that 'its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest.'") Plaintiffs allege that the government has no legitimate interest in the bulk collection of information that is concededly irrelevant to the government's stated purpose of preventing terrorism and that the government's bulk collection is not narrowly tailored, thereby stating a substantive due process claim. (ECF No. 9, ¶ 92).

Procedural due process requires that the government provide plaintiffs and their members with some form of pre- or post-deprivation notice and process before depriving them of their liberty. "[T]he right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." *Hamdi v. Rumsfeld*, 542 U.S. 507, 596 (2004) (plurality opinion). Plaintiffs allege that that they are provided with no pre- or post-deprivation notice or process at all, thereby stating a procedural due process claim. (ECF No. 9, ¶ 91). Moreover, resolving this claim will require the Court to "carefully assess the precise 'procedures used' by the government, 'the value of additional safeguards,' and 'the burdens of additional procedural

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[39] The plurality opinion in *Albright v. Oliver*, 510 U.S. 266, 274 (1994), which the government relies on, is off point. The question in *Albright* was whether there was a substantive due process right under the facts alleged, not whether an overlapping Fourth Amendment claim precluded the plaintiff from asserting an established substantive due process right, which is what the government contends here.

requirements.'" *Al Haramain*, 686 F.3d at 980. "Striking a balance . . . cannot be done in the abstract," *id.*; instead, the analysis requires consideration of facts not before the Court on a motion to dismiss.

2. Section 215 is Unconstitutionally Vague "Secret Law."

Alternatively, the government's position that the textual limitations of "relevance to an authorized investigation," and "tangible things" in section 215 have no effect on its ability to collect millions of innocent people's phone records renders the statute unconstitutionally vague for due process purposes. Under the government's construction, the statute both lacks guidelines to prevent arbitrary and discriminatory surveillance and fails to apprise ordinary persons that it authorizes the government to acquire all of their phone records in bulk without any showing of suspicion or relevance. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) (gang-loitering statute facially unconstitutional because it lacked guidelines to prevent arbitrary and discriminatory enforcement and conferred "vast discretion" on the police); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (statute criminalizing failure to provide "credible and reliable identification" vague because its lack of standards "vest[ed] virtually complete discretion in the hands of the police") (internal quotation marks omitted); *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) (statute aimed at "annoying" conduct vague "in the sense that no standard of conduct is specified at all").

Additionally, arbitrary and discretionary enforcement are especially problematic when, as here, the government's interpretation of a law is both secret and inconsistent with the law's plain language. "Secret law is an abomination," *Cox v. United States Dep't of Justice*, 576 F.2d 1302, 1309 (8th Cir. 1978) (quoting K. Davis, *Administrative Law*, 137 (1978)). Plaintiffs have stated a claim; the government's Motion to Dismiss must be denied.

G. The Government's Motion to Dismiss Count Five Must Be Denied: Plaintiffs State a Claim for Relief Under Fed. R. Crim. Pro. 41(g).

The government makes two erroneous arguments in seeking dismissal of plaintiffs' Fed. R. Crim. Pro. 41(g) claim. (ECF No. 66 at 45 n.38). The Ninth Circuit, in its en banc opinion in *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162 (9th Cir. 2010) (en banc), has conclusively rejected both of the government's arguments.

First, the government argues that Rule 41(g) applies only in criminal cases and cannot be used in a civil case. Not so: "Though styled as a motion under a Federal Rule of Criminal Procedure, when the motion is made by a party against whom no criminal charges have been brought, such a motion is in fact a petition that the district court invoke its civil equitable jurisdiction." *Comprehensive Drug Testing*, 621 F.3d at 1172; *see* FAC ¶ 110 (invoking this Court's civil equitable jurisdiction).

Second, the government argues that plaintiffs lack a property interest in their phone records and cannot state a Rule 41(g) claim for that reason. But *Comprehensive Drug Testing* rejected this argument, too: "The rule nowhere speaks of an ownership interest; rather, by its plain terms, it authorizes anyone aggrieved by a deprivation of property to seek its return. Here, the Players Association is aggrieved by the seizure as the removal of the specimens and documents breaches its negotiated agreement for confidentiality, violates its members' privacy interests and interferes with the operation of its business. *Cf. NAACP v. Alabama,* 357 U.S. at 458–60. *Comprehensive Drug Testing*, 621 F.3d at 1173-74.

III. CONCLUSION

The 911 Commission stated:

> We must find ways of reconciling security with liberty, since the success of one helps protect the other. The choice between security and liberty is a false choice, as nothing is more likely to endanger America's liberties than the success of a terrorist attack at home. Our history has shown us that insecurity threatens liberty. Yet, if our liberties are curtailed, we lose the values that we are struggling to defend.

The 9-11 Comm'n, Report 395 (Jul. 22, 2004). The choice between security and liberty is a false choice in this case for a further reason: If the government can define for itself that a massive amount of irrelevant data is "relevant," that a statute listing exclusive methods of securing phone records is "non-exclusive," that inherently intangible things are "tangible," and, most importantly, that its Associational Tracking Program simply does not burden free speech and association, then the only thing that binds the government to the law is its ability to engage in legal sophistry. Law, as manifested in the principles set forth in the Bill of Rights and the plain meaning of statutes, is sacrificed at the altar of claims of national security.

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The government's motion to dismiss should be denied in its entirety, the referenced sections of the government's declarations should be striken, and plaintiffs' motion for partial summary judgment should be granted.

DATED: January 25, 2014

Respectfully submitted,

/s/ Cindy Cohn
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

FIRST UNITARIAN CHURCH OF LOS ANGELES, *et al*.

Plaintiffs,

v.

NATIONAL SECURITY AGENCY, *et al*.,

Defendants.

Case No: 3:13-cv-03287 JSW

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION TO DISMISS

Date: April 25, 2014
Time: 9:00 a.m.
Courtroom 11, 19th Floor
The Honorable Jeffrey S. White

This matter came for hearing before the Court on Plaintiffs' Motion for Partial Summary Judgement and Defendants' Motion to Dismiss. Having given full consideration to the parties' papers and evidence, the relevant authorities, and oral presentations of counsel, and good cause appearing, it is **HEREBY ORDERED**:

Plaintiffs' Motion for Partial Summary Judgment is **GRANTED**.

Defendants' Motion to Dismiss is **DENIED**.

IT IS SO ORDERED.

DATED: _____

_____
HONORABLE JEFFREY S. WHITE
UNITED STATES DISTRICT COURT JUDGE