CINDY COHN (SBN 145997)
cindy@eff.org
LEE TIEN (SBN 148216)
KURT OPSAHL (SBN 191303)
DAVID GREENE (SBN 160107)
JAMES S. TYRE (SBN 083117)
MARK RUMOLD (SBN 279060)
ANDREW CROCKER (SBN 291596)
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Telephone: (415) 436-9333
Fax: (415) 436-9993

RICHARD R. WIEBE (SBN 121156)
wiebe@pacbell.net
LAW OFFICE OF RICHARD R. WIEBE
One California Street, Suite 900
San Francisco, CA 94111
Telephone: (415) 433-3200
Fax: (415) 433-6382

RACHAEL E. MENY (SBN 178514)
rmeny@kvn.com
PAULA L. BLIZZARD (SBN 207920)
MICHAEL S. KWUN (SBN 198945)
AUDREY WALTON-HADLOCK (SBN 250574)
BENJAMIN W. BERKOWITZ (SBN 244441)
JUSTINA K. SESSIONS (SBN 270914)
KEKER & VAN NEST, LLP
633 Battery Street
San Francisco, CA 94111
Telephone: (415) 391-5400
Fax: (415) 397-7188

THOMAS E. MOORE III (SBN 115107)
tmoore@rroyselaw.com
ROYSE LAW FIRM, PC
1717 Embarcadero Road
Palo Alto, CA 94303
Telephone: (650) 813-9700
Fax: (650) 813-9777

ARAM ANTARAMIAN (SBN 239070)
aram@eff.org
LAW OFFICE OF ARAM ANTARAMIAN
1714 Blake Street
Berkeley, CA 94703
Telephone: (510) 289-1626

Counsel for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CAROLYN JEWEL, TASH HEPTING, *et al.*,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY, *et al.*,

Defendants.

FIRST UNITARIAN CHURCH OF LOS ANGELES, et al.,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY, *et al.*,

Defendants.

Case No. 08-cv-4373-JSW
Case No. 13-cv-3287-JSW

PLAINTIFFS' REPLY BRIEF RE EVIDENCE PRESERVATION

Date: March 19, 2014
Time: 2:00 p.m.
Courtroom 11, 19th Floor
The Honorable Jeffrey S. White

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Rules

INTRODUCTION

Since 2006, Plaintiffs have been diligently and consistently pursuing litigation aimed at stopping the Government's mass spying. This includes both mass collection of telephone records and Internet metadata, and the mass collection of communications content and records of ordinary Americans, including Plaintiffs. Plaintiffs' claims have always been based on the NSA's conduct and its technological methods of collection, not on the often shifting and secret legal authority upon which the Government has relied to justify its surveillance.

The Court need only resolve two issues in this proceeding.

First, what should be the ongoing preservation requirements placed on the Government regarding the mass collection programs? The parties both agree that the collected call detail records are relevant to *First Unitarian Church v. NSA*.[1] The Government suggests only two possible approaches to satisfy its evidentiary duties: either keep *all* call records of millions of innocent Americans, which is what it originally suggested to the FISC, or conduct ongoing searches through its database for the records of Plaintiffs. But there is a third, and much simpler, path: the Government can simply admit or deny collecting Plaintiffs' information in *First Unitarian* and *Jewel*. This path is the one that the Government has already acceded to another case challenging the bulk telephone records collection, *ACLU v. Clapper*. It would permit the destruction of the collected information while still preserving, in a form usable in the litigation, the information that Plaintiffs need.

Second, the court must decide whether the Government has failed in its duties to preserve evidence in *Jewel v. NSA*. There, the Government's duties include preservation of telephone records, Internet metadata, and telephone content. While the Government never directly addresses the question, based on public disclosures and their Response, it appears the Government has failed to preserve evidence from many of these programs once they were brought within FISC oversight. It should be ordered to immediately provide the Court and Plaintiffs with information concerning

[1]Plaintiffs disagree with the Government's argument that the same records are not relevant to *Jewel v. NSA*. However, because there need be only one basis for preservation, if the Court decides to preserve all the records it need not resolve that dispute in this proceeding.

the Internet metadata collection and the content collections, as it has offered. Gov't Opp. at 5:17-20. Only with this information can the Court fashion an appropriate, comprehensive remedy.

The Government's dramatic and unexpected failure to preserve evidence is based on an attempt to secretly reconstrue the *Jewel* complaint as limited to challenging pre-FISC authorized surveillance. Yet as Plaintiffs have emphasized repeatedly over years of briefing, FISC authorization does not alter *Jewel*: not only does the complaint reach the Government's mass surveillance (regardless of the legal authority the Government claims at any point in time), but even more importantly, FISC sign-off cannot not make unconstitutional surveillance constitutional.

ARGUMENT

A. Ongoing Evidence Preservation Orders

The parties agree that a preservation order should be put in place in *First Unitarian Church v. NSA*. With respect to *Jewel*, Plaintiffs believe that the existing Preservation Order reaches the Government's current mass collection activities. But to the extent that this Court determines that it does not, an updated order should issue in *Jewel* as well.

1. This Preservation Dispute Can be Avoided if The Government Admits its Collection of Plaintiffs' Communications and Communications Records

Plaintiffs need this evidence preserved so that they can oppose the Government's assertion that Plaintiffs lack standing because they merely speculate that their information has been collected and, to a lesser extent, to prove the size of their monetary damages. This evidence preservation dispute can be avoided by a simple stipulation: an admission that Plaintiffs' telephone records– including *First Unitarian* and the *Jewel* class– have been collected and for how long.[2] The Government essentially admitted as much with respect to Verizon Business Network customers in *ACLU v. Clapper*, another case challenging the call detail records collection.[3] Once the fact of

[2] The parties can continue to argue about whether the mere fact of collection confers standing. That issue is currently once again before this Court in the Government's response to the Court's questions following denial of its most recent motion to dismiss. *See, e.g., Jewel* ECF No. 185 at 3:1-4.

[3] Brief for Plaintiff-Appellants at 10-11, filed in *ACLU v. Clapper*, 14-42 (2d Cir. 2014) (ECF No. 42) (noting it is "undisputed that Plaintiff's phone records have been collected by the NSA").

collection and the relevant time periods are settled in a way that Plaintiffs can rely on moving forward, the actual records themselves need not be preserved.

In any event, this Court is certainly not limited to the two preservation options presented by the Government. Of the two, however, the one it proposed to the FISC (which the FISC accepted as a temporary order), by which it simply keeps the records it has collected and renders them operationally unavailable except for use as needed in the litigation, is preferable and plainly more practicable. March 14, 2014 FISC Order at 6-7.[4] But while making the terms of the FISC order apply for the life of both *First Unitarian* and *Jewel* would be sufficient, Plaintiffs are cognizant of the concerns that information that they believe should not have been collected in the first place should not be kept any longer than necessary. After all, Plaintiffs brought these cases because they believed that both the law and the Constitution prevent their communication records and content from being collected on a mass scale and kept for years at a time. They are also extremely sensitive to the fact that as long as the records exist, there remains a potential for misuse. Thus Plaintiffs' proposed third option is the most reasonable, and practicable, given the need to balance the privacy interests and the litigation needs.

2. The Preservation Orders in *First Unitarian v. NSA* and *Jewel v. NSA* Are Tied to the Activity of Bulk Collection, Not the Government's Claimed Legal Authority.

Whichever Preservation Order is entered, the Government's requirement to preserve evidence in both cases should apply regardless of the legal defenses the government may raise to justify the bulk collection. Given that the Government's claimed legal basis for the authority has shifted over time, the preservation order should be drafted so that the Government's obligations to preserve relevant evidence continue even if the legal basis for their claimed authority changes again. It would unleash untold mischief if defendants could avoid their evidence obligations each time they imagined a new legal defense to Plaintiffs' claims.

[4] The FISC also provided that it be notified of any further accesses to the records, a requirement that the Plaintiffs do not object to but that need not be part of this Court's order. If the FISC wishes an ongoing notification of access, it can so order.

Thus, a preservation order in *First Unitarian* should apply to the *conduct* Plaintiffs challenge, regardless of the claimed legal authority under which the Government engages in the conduct. The *First Unitarian* Complaint plainly is not limited solely to challenging the Government's actions under Section 215:

> 4. The Associational Tracking Program is vast. It collects telephone communications information for all telephone calls transiting the networks of all major American telecommunication companies, including Verizon, AT&T, and Sprint, *ostensibly* under the authority of section 215 of the USA PATRIOT Act, codified at 50 U.S.C. § 1861 (emphasis added).
>
> 66. Defendants' bulk seizure, collection, acquisition, and retention of the telephone communications information of Plaintiffs, their members, and their staffs is done without lawful authorization, probable cause, and/or individualized suspicion. It is done in violation of statutory and constitutional limitations and in excess of statutory and constitutional authority. Any judicial, administrative, or executive authorization (*including* any order issued pursuant to the business records provision of 50 U.S.C. § 1861) of the Associational Tracking Program or of the acquisition and retention of the communications information of Plaintiffs, their members, and their staffs is unlawful and invalid (emphasis added).
>
> 73. Defendants' searching of the telephone communications information of Plaintiffs is done without lawful authorization, probable cause, and/or individualized suspicion. It is done in violation of statutory and constitutional limitations and in excess of statutory and constitutional authority. Any judicial, administrative, or executive authorization (*including* any business records order issued pursuant 50 U.S.C. § 1861) of the Associational Tracking Program or of the searching of the communications information of Plaintiffs is unlawful and invalid (emphasis added).

Moreover, as demonstrated in Plaintiffs' opening brief and further below, the *Jewel* complaint is not so limited either. Thus, to the extent this Court finds that the existing *Jewel* order is somehow limited to pre-FISC collection, that Order should be modified as well.

Plaintiffs believe that the proposed Order they provided (ECF No. 191-1) meets this requirement. But should more clarity be needed with regard to *First Unitarian*, that Order could be modified to provide, as Plaintiffs suggested with regard to *Jewel* (ECF No. 191-1 at 1:10-15) that: "This order extends to telephone records without regard to when the government obtained them or the legal authority under which the government obtained them, whether under orders of the Foreign Intelligence Surveillance Court or otherwise. The order extends specifically to the telephone

records the government proposed to destroy in March, 2014 (*see*, *e.g.*, ECF No. 95 in 13-cv-3287-JSW) and all similar records."

3. The Government's Preservation Proposal to the FISC is Practicable and Should Apply to All of the Claims in Jewel.

In examining the language of the Preservation Order, the Government clings to the thin reed of the limitation "to the extent practicable." Gov't Opp. at 17-18. This does not help the Government for two reasons. First, the claim that preservation is not practicable because of conflicting obligations by the FISC is belied by the Government's motion earlier this year. When faced with the same problem—even without admitting that any other court's order applied—the Government was able to seek relief. Ultimately, after the full record was clarified, the FISC deferred to this Court. For this same reason, the Government's claim that it is under conflicting orders about preservation between this court and the FISC is simply untrue.

Second, the Government's declarations in support of its Response filed yesterday illustrate that the preservation of evidence was practicable. Indeed, the declarations describe how the Government had taken steps to preserve call records for more than five years, by migrating the data to back-up tapes. If it was practicable for information gathered for the first six years, there is no reason why it is impracticable now. And there is no reason why it is not similarly practicable for the other evidence relevant to the *Jewel* Complaint going forward.

B. Plaintiffs Are Entitled to Clear Answers, and Ultimately to Relief, Because the Government Has Not Complied With Its Preservation Obligations.

It now seems apparent that the Government, as a result of its secret unwarranted and extremely narrow reading of the *Jewel* Complaint, has not adequately preserved evidence regarding the claims in *Jewel*. As revealed to Plaintiffs for the first time at 1:00 PM yesterday, as part of an 89 page filing containing a 38 page brief, the Government decided, in secret, that Plaintiffs' complaint does not reach the government's collection activities other than those done solely under "presidential authority." This assertion is both absurd and outrageous, flying in the face of the eight years that Plaintiffs have been seeking to stop the Government's mass surveillance programs, six years of which (and a trip to the Ninth Circuit and back) occurred under the *Jewel* complaint. It is

no less outrageous for the fact that the Government has apparently been maintaining this position – secretly – since at least 2007.[5]

While the Government has only provided some information about the telephone records, it seems clear that the Government has destroyed evidence about the Internet metadata and content collections for some significant timeframe as well. As a result, the Government should be ordered to immediately provide Plaintiffs and the Court with information concerning the Internet metadata and content collections, as it has offered. Gov't Opp at 5:17-20.

Moreover, there appears to be a serious question about whether the Government has been complying with its preservation obligations in *First Unitarian*. The Complaint was filed in September 2013, and, as Plaintiffs noted in their opening brief, on October 31, 2013, the Government told the Court that it was complying with its preservation obligations. *First Unitarian* Joint Case Management Conference Statement, ECF No. 20 in No. 13-cv-3287- JSW. Yet the Government has now admitted that it has been destroying evidence continuously through March 10, 2014. Declaration of Teresa Shea (*Jewel* ECF No. 193-3) at ¶ 20. It did not bring this to the attention of any court before, or even shortly after, the October Joint CMC Statement, but rather only in February 2014, six months after it was on unequivocal notice of Plaintiffs' claims. The Government fails to address this directly in its Opposition and the Court should require the Government to state, clearly and unequivocally, what it has been doing with telephone records it has collected after the *First Unitarian* Complaint was filed.

[5] The failure to disclose this declaration previously was in violation of this Court's September 27, 2013, order, in which it ordered the Government to re-file its prior secret declarations by December 20, 2013: "I'm going to require that *all* the previous declarations be declassified and presented to the Court. All of them, without exception, because I want a full record in this Court." Transcript of Proceedings held on 9-27-2013 (ECF No. 164) at 24:15-18 (emphasis added). Plaintiffs note that the Government failed to do so with the declaration attached to its Response. If the Government had obeyed this Court's order in December, Plaintiffs may have been able to identify the issues earlier, before two months more destruction occurred. *See* Plaintiffs' Response to Defendants' Public Declarations at 11-13 (ECF No. 173) (noting classified filings remained in case, contrary to Court's order).

1. Plaintiffs Have Always Alleged Ongoing Mass Collection and Have Never Limited Their Claims to Merely the Collection Occurring Under "Presidential Authority."

The Government's narrow, and heretofore secret reading of the *Jewel* Complaint must be rejected, especially given the liberal pleadings standards in the Ninth Circuit.[6]

As demonstrated in its opening brief, Plaintiffs' complaint in *Jewel* more than meets this standard of giving fair notice that they challenge the Government's *ongoing conduct* of mass collection of telephone records, Internet metadata, and Internet and telephone communications content, whatever the purported authority under which the government engages in that conduct. While it is certainly true that Plaintiffs seek relief for the timeframe where the mass collection occurred only with executive authority, Plaintiffs also plainly alleged *ongoing* mass collection and in no way limited their claims to the timeframe prior to FISC orders. Indeed, the *Jewel* Complaint, filed two years after the first FISC order, is unambiguous in its scope as including ongoing collection and seeking an injunction. The following are just a small sample of such allegations:

> 9. . . . Defendants have acquired and *continue to acquire* the content of a significant portion of the phone calls, emails, instant messages . . ..
>
> 10. . . . Defendants have unlawfully solicited and obtained from telecommunications companies such as AT&T the complete *and ongoing disclosure* of the private telephone and Internet transactional records of those companies millions of customers . . .
>
> 13. Communications of Plaintiffs and class members have been *and continue to be* illegally acquired by Defendants . . .
>
> 14. Plaintiffs are suing Defendants *to enjoin* their unlawful acquisition of the communications and records of Plaintiffs and class members . . .

Jewel Complaint, most recently filed in *Jewel v. NSA* as an exhibit to the Cohn Declaration in support of the request for TRO, ECF No. 86-1. Indeed, the injunctive relief request would have been especially nonsensical had Plaintiffs merely been suing about collections under an authority

[6] The standards for pleading in the Ninth Circuit are merely to give the other side notice of a claim: "[U]nder the federal rules a complaint is required only to give the notice of the claim such that the opposing party may defend himself or herself effectively". *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (en banc). To comply with the pleading requirements of Fed. R. Civ. P. 8(a)(2), "[s]pecific facts are not necessary; the statement need only give the defendant fair notice of what the ... claim is and the grounds upon which it rests. " *Grabinski v. National Union Fire Ins. Co. of Pittsburgh*, 265 Fed.Appx. 633, 635 (9th Cir. 2008) (quoting *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 2200 (2007)).

that had ceased to exist two years prior to filing their action. *See Jewel* Complaint, Prayer for Relief, paragraph B, ECF No. 86-1.

Ignoring these allegations, the Government instead cherry-picks portions of the *Jewel* complaint that reference lack of judicial authority. The Government points to paragraphs 110, 120, 129, and 138, of the *Jewel* complaint, which allege defendants have acted "without judicial or other lawful authorization, probable cause, and/or individualized suspicion, in violation of statutory and constitutional limitations, and in excess of statutory and constitutional authority." Govt. Br. at 19. Even if the Government's reading were correct, the allegation would be merely an alternate, not exclusive, claim. Rule 8(d) permits a plaintiff to plead alternative or inconsistent claims.

But this allegation merely states that the Government's conduct was illegal. It does not limit the scope of the claim.

The first clause alleges defendants have acted "without judicial or other lawful authorization, probable cause, and/or individualized suspicion." That is, Plaintiffs allege defendants have acted *either* without judicial or other lawful authorization, *or* without probable cause, *or* without individualized suspicion. Any one of the three conditions suffices to satisfy the allegation, and it is undisputed that none of the FISC orders upon which the Government relies for bulk collection of telephone records and Internet and telephone content are based on probable cause or individualized suspicion. And, fairly read, only *lawful* judicial authorization is within the scope of the allegation; *unlawful* judicial authorization, like the FISC orders purporting to authorize bulk collection of telephone records under Section 215, is not.

The second and third clauses—"in violation of statutory and constitutional limitations," and "in excess of statutory and constitutional authority"—allege in the alternative that *even if* defendants are acting under color of judicial authorization, their conduct is nonetheless in violation of statutory and constitutional limitations, and in excess of statutory and constitutional authority. Thus, Plaintiffs' allegations are about the illegal and unconstitutional facts of mass spying, which encompass surveillance whether or not under color of a FISC order.

But more importantly, the Government points to nothing in the *Jewel* complaint that limits Plaintiffs' claims to collection done solely under presidential authority. And for good reason: the Government did not formally admit until the summer of 2013 that its mass collection activity (as opposed to its targeted collection activity under traditional FISA orders directed at specific persons) was conducted pursuant to FISC orders under Patriot Act Section 215 and FISA Amendments Act Section 702.

But to the extent the Government wishes to base its failure to preserve evidence on a reading of the Complaint that *excludes* collections done after the FISC orders, one would think they could find such a limitation directly referenced in the Complaint itself. They cannot, because Plaintiffs simply did not limit their allegations based upon the purported authority under which the mass surveillance occurred, executive or otherwise.

2. The Government's *Ex Parte*, *In Camera* Filings in Opposition to the Plaintiffs' Motion for a Preservation Order in 2007 Cannot Reduce the Scope of Relevant Evidence for Purposes of Evidence Preservation.

Nor can the Government narrow its preservation duties based on its own *ex parte, in camera* filings made *prior* to the 2007 MDL preservation order that Plaintiffs never saw before yesterday. Notwithstanding the Government's secret assertions about the scope of the Complaint, both the 2007 MDL preservation order issued on November 15, 2007, and the subsequent *Jewel* preservation order based upon it, impose extremely broad preservation obligations on the Government.

In its Response, the Government presents two documents filed on October 25, 2007, as part of its efforts to prevent entirely the issuance of a preservation order. Exhibits A and B. When it originally filed the documents, the Government asked that this Court agree that its preservation effort of only TSP evidence was "ample and appropriate." Ex. B at 1. But this Court did not agree: just over two weeks later, on November 15, 2007, this Court issued the preservation order over the Government's objections. Instead, the Court imposed a preservation obligation on the Government with operative language—"reasonably anticipated to be" and "may be" relevant—almost identical to the Plaintiffs' proposed order (*In Re NSA*, ECF No. 375). If this Court had agreed that what the

Government was already (secretly) doing was adequate, it would not have entered the preservation order that matched the one Plaintiffs sought and would not have turned down the Government's request that no preservation order issue.

Moreover, the Government's Response plainly fails to provide an adequate accounting of the evidence it has destroyed so far. The newly declassified version of its 2007 declarations (Ex. A) not only fails to put the matter to rest, it raises more questions than it answers. Indeed, the 2007 declaration raises the alarming concern that the Government also failed to preserve evidence for the content acquisition that is relevant to the Complaint.

As an initial matter, the 2007 declaration references activity "under the TSP," meaning the so-called Terrorist Surveillance Program. *See* Gov't Opp. at 7-8 (summarizing various paragraphs). But there never was an actual program called the "TSP," it was a label made up by the Bush Administration for aspects of a broader program, the President's Surveillance Program (PSP). Department of Defense, *et al*., Offices of Inspector Gen., *Unclassified Report on the President's Surveillance Program* (July 10, 2009) at 1 ("OIG PSP Report") [Summary of Evidence (*Jewel* ECF No. 113) Vol. III, Ex. 33, p. 1197]. "[B]efore December 2005, the term 'Terrorist Surveillance Program' was not used to refer to these activities, collectively or otherwise. It was only in early 2006, as part of the public debate that followed the unauthorized disclosure and the President's acknowledgement of *one aspect* of the NSA activities, that the term Terrorist Surveillance Program was first used." *Letter from Att'y Gen. Alberto Gonzalez to Sen. Patrick Leahy* (Aug. 1, 2007) [Summary of Evidence Vol. V, Ex. 102, p. 3481] (emphasis added).

Furthermore, the aspects of the overall surveillance marketed to the public as the TSP were carefully limited – "interception of the content of communications into and out of the United States where there was a reasonable basis to conclude that one party to the communication was a member of al-Qa'ida or related terrorist organizations." OIG PSP Report at 1.

As far as Plaintiffs are aware, the Government never returned to the Court to seek any clarification of its preservation obligations, either in the MDL or in *Jewel*. It certainly never raised the scope of Plaintiffs' complaint with Plaintiffs. The Government's self-serving declarations in

support of its efforts to avoid a preservation order, which were not adopted by the Court, simply cannot narrow the scope of the Government's preservation obligations.

3. The Government Cannot Now Recast Its Declarations as Limited to Pre-FISC Surveillance

The Government's approach to the scope of the *Jewel* claims is overly fixated on the notion that all facts alleged, and all evidence at issue, must be cabined by some Government-designated program label. The Government's response to the Plaintiffs' Rule 56(f) Declaration illustrates this well. In the Declaration, Plaintiffs wrote:

> Plaintiffs would seek discovery regarding the fact of the carriers' interception and disclosure of the communications and communications records of the telecommunications companies' customers.

Pls.' Br. at 7, citing *Jewel* ECF No. 30. The statement included no limitations to one program or another. Nevertheless, the Government wishes to append "under the president's authority" to the end (*see* Gov't Opp. at 20), and implicitly limit the scope of evidence preservation to the program at that time. There is no basis for the Government, or any party, to unilaterally add limitations to the opposing party's FRCP 56(f) declaration.

Similarly, in several declarations through 2012, the Government asserted the state secrets privilege for evidence regarding the surveillance program after the Government sought FISC orders. In its Response, the Government does not deny this, but attempts to discount these concessions, pointing to other statements in those declarations regarding the Plaintiffs' claims against the Program. Gov't Opp. at 22.

But the Government can't have it both ways. It makes no sense for the Government to have one understanding of the scope of the claims – a very broad one – when asserting the state secret privilege, while having a different and much narrower understanding when it is destroying potential evidence. And of course there is no point, and no authority, for the Government to assert the privilege over material that it did not believe was relevant to the case.

Moreover, the claims have always been about the facts alleged. As DNI Clapper admitted, "the sources and methods used by NSA at that time continue to be used under subsequent authorizations." Gov't Opp. at 22 (quoting 2012 NSA Decl. ¶ 52.). The activity – the facts of mass

surveillance – over which Plaintiffs originally sued has remained. Plaintiffs' claims are that the "sources and methods used by the NSA," referenced by DNI Clapper are and always have been illegal and unconstitutional, whether authorized solely by the President, by strained readings of statutes or by the FISC.

To be sure, it would not be surprising if the Government were to raise as a defense its contention that Section 215 of the Patriot Act authorized the program after some point in time, but this does not make evidence after that point irrelevant. Were that the case, a litigant could claim a defense it may raise will prevail, and destroy evidence according to that presumption, thus eliminating the other parties' opportunity to litigate the issue.

4. The Government Could Have Raised this Preservation Issue Long Ago

The Government now claims that it received FISC orders for bulk telephone record collection in May 2006, and presumably began to devise its scheme to secretly limit Plaintiffs' claims around that time. Yet this is no excuse. Even when the Government first publically admitted on January 17, 2007 that it had received FISC authority for the aspects of its activities labeled as the TSP, Plaintiffs affirmatively told the court that they did not believe that this authority reached (or legally could reach) the bulk collection they alleged:

> Earlier today, the government announced that it will seek authorization from the FISA court for any future electronic surveillance of international communications involving al Qaeda suspects as part of the "Terrorist Surveillance Program." *See* Letter from Attorney General Gonzales to Chairman Leahy and Senator Specter (January 17, 2007) (MDL-1791 Dkt. 127, Ex. 1). *This announcement is irrelevant to Plaintiff"'s claim that the carriers are assisting the government in the interception and electronic surveillance of all or most of the communications, both domestic and international, that transit the carriers' networks. Nor does the FISA court have the statutory or constitutional authority to issue a general warrant authorizing such dragnet surveillance of million of innocent Americans.* Rather, under FISA, a FISA court judge must find probable cause to believe that the particular target of electronic surveillance is a foreign power or agent thereof before authorizing that surveillance. *See* 50 U.S.C. § 1805(a)(3).

Opp. to Stay, MDL (ECF No. 128) (January 17, 2007) (emphasis added).

In the face of this statement about the claims, the Government could have raised the issue with the Plaintiffs or the Court. Yet instead it choose to ignore the statement and unilaterally adopt

a different understanding of the claims in its secret filing in opposition to the preservation motion in October 2007. Nor has it raised this issue since, except for one note in its appellate brief in 2010, which the Plaintiffs strongly debunked. Opening brief (ECF No. 191) at 9:22-10-5.

In fact, the Government could have asked Plaintiffs or the Court questions anytime about the scope of Plaintiffs' claims and whether those encompassed surveillance under color of a FISC order and whether preservation should occur. They could have probed the scope of Plaintiffs' claims without limit because nothing they could have asked about whether Plaintiffs' claims extended to surveillance after the "Presidential authority" ended, would have revealed anything about whether any FISC orders existed, the scope of any FISC orders, or the nature of the surveillance the Government was conducting. They did not.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request, as set forth more particularly in the accompanying proposed order:

1. That the Court reaffirm that the Court's November 13, 2009 evidence preservation order in *Jewel v. NSA* (ECF No. 51 in No. 08-cv-4373-JSW), as well as the obligation under the common law and the Federal Rules of Civil Procedure to preserve potentially relevant or discoverable evidence, requires the Government defendants to preserve the telephone metadata records ("call detail records") they possess, and that the Court enforce the *Jewel* preservation order as stated in the accompanying proposed order.

2. That the Court enter a preservation order in *First Unitarian Church of Los Angeles, et al. v. National Security Agency, et al.*, Case No. 13-cv-3287-JSW (N.D. Cal.) similar to the Preservation Order in *Jewel* (ECF No. 51).

3. That the Court order the Government defendants within 15 days to disclose to the Court and to Plaintiffs what they have done to comply with the existing preservation orders, and to disclose whether they have destroyed telephone metadata records ("call detail records"), Internet metadata records, Internet or telephone content data, or any other evidence potentially relevant to

or discoverable in these lawsuits since the commencement of the related *Hepting* litigation in January 2006.

DATE: March 18, 2014

Respectfully submitted,

s/ Cindy Cohn

CINDY COHN
LEE TIEN
KURT OPSAHL
DAVID GREENE
JAMES S. TYRE
MARK RUMOLD
ANDREW CROCKER
ELECTRONIC FRONTIER FOUNDATION

RICHARD R. WIEBE
LAW OFFICE OF RICHARD R. WIEBE

THOMAS E. MOORE III
ROYSE LAW FIRM, PC

RACHAEL E. MENY
PAULA L. BLIZZARD
MICHAEL S. KWUN
AUDREY WALTON-HADLOCK
BENJAMIN W. BERKOWITZ
KEKER & VAN NEST LLP

ARAM ANTARAMIAN
LAW OFFICE OF ARAM ANTARAMIAN

Counsel for Plaintiffs