MARK RUMOLD (SBN 279060)
mark@eff.org
DAVID GREENE (SBN 160107)
NATHAN D. CARDOZO (SBN 259097)
LEE TIEN (SBN 148216)
KURT OPSAHL (SBN 191303)
HANNI FAKHOURY (SBN 252629)
JAMIE L. WILLIAMS (SBN 279046)
ANDREW CROCKER (SBN 291596)
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Telephone: (415) 436-9333
Facsimile: (415) 436-9993

Counsel for Plaintiff
Human Rights Watch

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

HUMAN RIGHTS WATCH, Plaintiff, v. DRUG ENFORCEMENT ADMINISTRATION, *et al.*, Defendants.	Case No: 2:15-cv-2573-PSG-JPR **OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** Date: August 17, 2015 Time: 1:30 p.m. Courtroom 880 – Roybal Hon. Philip S. Gutierrez

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INTRODUCTION

For over two decades, the DEA and other government agencies, in secret, collected billions of international call records; retained those records indefinitely; searched them (almost without limitation); disseminated them throughout the federal government and beyond; and used the records in a variety of law enforcement investigations.

The government now seeks to avoid judicial review of its actions, arguing that Plaintiff Human Rights Watch ("HRW") lacks standing. However, because HRW's records were swept up in Defendants' Mass Surveillance Program ("the Program"), HRW has standing to challenge the Program, to ensure that the government does not restart the Program, and to ensure that HRW's records are accounted for and purged from the government's files. The government's voluntary decision to abruptly halt the collection of call records does not alter that conclusion. Nor does the DEA's decision to purge *its* "database" of records. This case seeks to ensure HRW's call records are purged from all government files, wherever those records now reside.

The government's motion should be denied and the Program given the judicial review HRW and millions of Americans deserve.

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I. Background

HRW and its staff regularly place calls between the United States and the countries targeted through the Program, and they have a strong interest in keeping the calls, and the fact of these calls, confidential. Compl. ¶¶ 44-45 (ECF No. 1).

HRW is one of the world's leading international human rights organizations, dedicated to defending and promoting human rights around the world. *Id*. ¶ 4. HRW's global advocacy work involves exposing human rights abuses and pressuring those in power to respect human rights and secure justice. *Id.* ¶ 39.

As part of this work, HRW's staff conducts fact-finding missions and investigates allegations of human rights violations. *Id.* ¶ 40. This often requires communicating by phone with individuals overseas. *Id.* ¶ 44. HRW's communications with these individuals are often extraordinarily sensitive, as when HRW communicates with a victim of, or witness to, human rights abuses. *Id.* ¶¶ 44-45. "These individuals often fear for their physical safety or their life, and the mere fact of contacting an international human rights organization, like HRW, can put them in harm's way." *Id.* ¶ 45.

Records of HRW's calls to its contacts overseas were swept up in Defendants' Mass Surveillance Program. *Id*. ¶ 47. The Program involves the collection of "information about millions," if not billions, "of calls made by Americans, including Plaintiff HRW." *Id*. ¶ 23. Defendants obtained records for

the Program by issuing "subpoenas to American telecommunications service providers, requiring the providers to turn over information in bulk about Americans' calls" to certain specified foreign countries (the "Designated Countries"). *Id.* ¶ 25. Relying on these subpoenas, the "Program indiscriminately swe[pt] in records of calls between the United States and the Designated Countries—countries that [were] determined to have a 'demonstrated nexus to international drug trafficking and related criminal activities.'" *Id.* ¶ 29 (quoting Compl. Ex. A (Declaration of Robert Patterson ¶ 4) ("First Patterson Decl.")). One of those countries is Iran. *Id.* ¶ 30.

The records collected through the Program were initially "retained and stored by Defendants in one or more databases." *Id*. ¶ 34. These databases were then searched by officers and employees of various federal agencies, including DEA, DHS, and FBI. *Id.* ¶ 35. Program records continue to be used in a variety of federal law enforcement investigations, and their use is not limited to investigations of illegal drug trafficking or production. *Id*. ¶ 36. Call records obtained from the Program databases have been and continue to be used and disseminated throughout the federal government. *Id.* All this is done without any judicial oversight or authorization. *Id*. ¶ 25.

According to the government, use of the *DEA's* Program database was "suspended in September 2013" and "information is no longer being collected in

bulk." *See* First Patterson Decl. ¶ 6.

HRW filed this suit seeking a declaration that the Program violates its First and Fourth Amendment rights; an injunction preventing the government from continuing or restarting the Program; an order requiring the government to produce an inventory of all HRW's call records; an injunction prohibiting further "search, use, or dissemination" of any of HRW's call records; and an order requiring the government to purge all of HRW's call records from its files. Compl. at 16-17.

ARGUMENT

This Court has jurisdiction to hear the case. HRW's standing is established by credible, well-pled allegations on the face of the Complaint. The government's attempt to introduce new evidence does not alter the sufficiency of the Complaint's allegations at this stage. The government's motion to dismiss should thus be denied.

I. Defendants' Motion to Dismiss Must Be Denied Because HRW's Complaint, On Its Face, Establishes Its Standing to Sue.

In resolving a motion to dismiss that challenges the complaint on its face, the district court must accept "the plaintiff's allegations as true and draw[] all reasonable inferences in the plaintiff's favor." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). A complaint must only contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is *plausible* on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citation omitted, emphasis added).

Jurisdictional dismissals in cases based on federal-question jurisdiction, like the dismissal sought here, are "exceptional" and warranted only where the alleged claim is "wholly insubstantial and frivolous.'" *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (internal citations omitted).

To establish the Court's jurisdiction, the complaint must allege plausible facts sufficient to meet the familiar requirements of standing: (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision. *Susan B. Anthony List v. Driehaus*, 573 U.S. __, 134 S. Ct. 2334, 2341 (2014).

HRW's Complaint, on its face, establishes each of these required elements.

A. The Invasion of HRW's Privacy and the Burden on HRW's Associations Caused by the Mass Surveillance Program Constitute an Injury in Fact.

An injury in fact is the "invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

As the Complaint establishes, the injury HRW suffers is concrete, particularized, and *remains ongoing*. Critically, the alleged Program is neither conjectural nor hypothetical: the government has already admitted its existence. *See generally* First Patterson Decl. As described in the Complaint, the Program involves "Defendants' bulk collection, retention, search, use, and dissemination of

call records for all, or substantially all, telephone calls originating in the United States and terminating in the Designated Countries," including the calls of HRW as it engages in its global human rights advocacy. Compl. ¶ 23; *see also id.* ¶¶ 22, 24-25. The Program swept in records of HRW's communications with its network of affiliates and contacts overseas. *Id*. ¶¶ 5, 47-49, 53-54. As a result, the Program has caused and continues to cause concrete harm to HRW's privacy and associational rights. *Id*. ¶¶ 44-53, 58-60, 64-65.

These allegations, grounded in the government's own admissions, establish an injury in fact under directly analgous precedent. *Jewel v. NSA* is controlling here. 673 F.3d 902, 910 (9th Cir. 2011). *Jewel* considered plaintiffs' standing to challenge the "'dragnet collection' of communications records" by government defendants—including the collection of "all or most" of the plaintiffs' call records. *Id*. at 906, 910; *accord* Compl. ¶ 23 (alleging collection of "all, or substantially all, telephone calls originating in the United States and terminating in the Designated Countries," including calls made by HRW). The Ninth Circuit determined that the *Jewel* plaintiffs had alleged a "sufficiently concrete and particularized injury" because the Complaint alleged, as here, that the dragnet surveillance program caused "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." 673 F.3d at 908-09; *accord* Compl. ¶¶ 49-54,

56-66 (alleging invasion of First and Fourth Amendment rights).

The government's arguments to the contrary are unpersuasive.

First, Defendants label HRW's allegations as "conclusory" and "bare assertions" because the defendants, themselves, have failed to publicly disclose some aspects of the Mass Surveillance Program. *See* Def. Mot. at 8-9. The government apparently seeks a rule requiring HRW to prove its entire case at the outset. But, as *Jewel* makes clear, there is no heightened pleading requirement simply because a case involves government surveillance—even in the national security context. 673 F.3d at 912 (rejecting government invitation to impose heightened standing requirement in national security surveillance cases).[1] Indeed, in *Jewel*, the government had confirmed far less about the challenged surveillance programs than the government has here. *Compare id*. at 906 (describing government invocation of state secrets privilege), *with* First Patterson Decl. ¶¶ 4-6 (describing bulk collection program).

Second, the government incorrectly suggests that, because its bulk collection of metadata may have (temporarily and voluntarily) ceased, HRW cannot identify an ongoing or future injury for standing purposes.

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[1] And, under any circumstances, there is an easy solution to the purported defects identified by the government: discovery. Although HRW's allegations are sufficient at the motion to dismiss stage, the discovery HRW seeks will definitively establish each of the facts the government complains is absent. *See generally* Request for Evidentiary Hearing and Discovery (filed herewith).

But the alleged cessation of *collection* is beside the point: HRW challenges the entire *program* of surveillance, including Defendants' ongoing "retention, search, use and dissemination" of HRW's call records. Compl. ¶¶ 22-25. Thus, in a "case such as this one" where HRW "challenge[s] the telephone metadata program as a whole," HRW "surely ha[s] standing to allege injury from the collection, and maintenance" in government files "of records relating to them." *ACLU v. Clapper*, 785 F.3d 787, 801 (2d Cir. 2015) (finding standing for plaintiff challenging legality of NSA call record collection program).

As the Ninth Circuit has observed, the "government's continued retention" of material obtained or derived from surveillance constitutes "a present, ongoing injury." *Mayfield v. United States*, 599 F.3d 964, 971 (9th Cir. 2010). In *Mayfield,* the plaintiff challenged the constitutionality of past surveillance and physical searches conducted by the government against him and his family. *Id.* at 968. At the district court, Mayfield partially settled his case against the government, and the government agreed to return or destroy any material directly obtained as a result of past surveillance. *Id.* at 968 n.5. The government refused, however, to identify and destroy materials in its possession that were merely *derived* from the fruits of its surveillance. *Id.* On appeal, the Ninth Circuit determined that the

government's possession of material merely derived from surveillance was a sufficiently concrete and ongoing injury in fact.[2] *Id.* at 971.

Here, HRW alleges the government continues to "retain[], search, and use" the results of its surveillance itself—HRW's call records. Compl. ¶ 54. It is therefore irrelevant, at this stage, whether a particular HRW number was ever queried in the database or whether DEA reviewed an aggregated collection of HRW's call records. *See* Def. Mot. at 10-13.[3] Continued government retention of HRW's records, alone, suffices.

Finally, the government places great emphasis on the Supreme Court's decision in *Clapper v. Amnesty Int'l*, 568 U.S. __, 133 S. Ct. 1138 (2013). That reliance is misplaced. First, *Amnesty* was a pre-enforcement challenge to a newly enacted surveillance law. *Id*. at 1146. Because the lawsuit was filed the day the law went into effect, the plaintiffs could only allege that there was an "objectively reasonable likelihood" that their communications would be intercepted in the

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[2] The Court ultimately found Mayfield did not have standing because the only relief available after his settlement was declaratory, which would not require the government to do anything to redress Mayfield's injuries. 599 F.3d at 972-73; *see also* Section I(C), *infra* at 14-15.

[3] The government misleads the Court when it suggest that HRW's records would not have been searched unless it was the target of an investigation. Def. Mot. at 10. As the government admitted in *ACLU v. Clapper*, the query of a "seed" number in its telephone records database "necessarily searches appellants' records electronically, even if such a search does not return appellants' records for close review by a human agent." 785 F.3d at 802. The same is true here; HRW's records were searched every time the database was queried.

future. *Id*. The *Amnesty* Court's holding is thus far more limited than the government lets on. The Court held only that plaintiffs had not established an injury in fact for possible injuries that might arise from *future* government surveillance conducted under the new law. *Id*. at 1150-51. Here, in contrast, the injury has *already occurred* and *remains ongoing*. As the Ninth Circuit observed in *Jewel*: "Whereas [in *Amnesty*, plaintiffs] 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." 673 F.3d at 911 (emphasis in original). HRW, like the *Jewel* plaintiffs, plausibly and specifically alleges the past collection, retention, search, use, and dissemination of HRW's call records—based in part on the government's own admissions. There is nothing speculative about that injury.

B. HRW's Injuries Are Fairly Traceable to Defendants' Admitted Mass Surveillance Program.

The injuries HRW alleges—the invasion of HRW's protected First and Fourth Amendment rights—are "fairly traceable" to Defendants' Mass Surveillance Program. This requirement of standing ensures that a "federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

The government does not contest that collection of HRW's sensitive and private call records, and the attendant Fourth Amendment injury, is directly traceable to the Program. *See* Def. Mot. at 14-15; *see also Jewel*, 673 F.3d at 912 (finding "harms Jewel alleges," including "invasion of privacy," can be "directly linked to" the challenged surveillance program).

Rather, the government incorrectly suggests HRW's *First* Amendment associational injuries are not traceable to the Program. As the Complaint sets forth, however, the Program substantially burdens HRW's "associations and human rights advocacy efforts" through the creation of a "permanent government record of all Plaintiff's telephone communications" with HRW's contacts in countries around the world." Compl. ¶ 51. It "is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy"—such as that ocurring here—can constitute "a restraint on freedom of association." *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). Indeed, the Ninth Circuit rejected a similar government argument made by the government in *Jewel*. *See* 673 F.3d at 902, 906, 908-09.

More recently, the Second Circuit in *ACLU v. Clapper* rejected the same government arguments, under circumstances functionally identical to those present here. In that case, the ACLU challenged the bulk collection of its call records by the NSA on First and Fourth Amendment grounds. The Second Circuit had little difficulty determining ACLU had standing to bring its First Amendment claim:

> When the government collects appellants' metadata, appellants' members' interest in keeeping their associations and contacts private are implicated, and any potential "chilling effect" is created at that point. Appellants have therfore alleged a concrete, fairly traceable, and redressable injury sufficient to confer standing to assert their First Amendment claims as well.

ACLU v. Clapper, 785 F.3d at 802-03.

Other Ninth Circuit precedent further supports HRW's standing. In *Presbyterian Church (USA) v. United States*, churches that had been subject to government surveillance had standing to challenge that surveillance as a violation of the churches' First Amendment rights:

> The churches have alleged that the INS has confronted their congregants with the threat that their prayers and other religious expressions will be . . . recorded by the watchful . . . ears of government and perhaps be kept on file in government records. According to the churches' allegations, knowledge of this threat has deterred congregants from participating fully in religious observances, and has thereby impaired the churches' ability to carry out their religious missions. Clearly, this injury to the churches can "fairly be traced" to the INS' conduct.

870 F.2d 518, 523 (9th Cir. 1989).

The same is true here: Defendants have "confronted" HRW and its contacts overseas "with the threat" that their communications will be "kept on file in government records"; this, in turn, has "impaired" HRW's "ability to carry out" its critical human rights mission. *Compare id., with* Compl. ¶ 51 (noting the substantial burden upon HRW's "associations and human rights advocacy efforts" caused by the Program's creation of a "permanent government record of all

Plaintiff's telephone communications"). Accordingly, the injury "can 'fairly be traced'" to the government's conduct. *See Presbyterian Church*, 870 F.2d at 523 (internal citations omitted).

In contrast, the cases relied on by the government—*ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), and *Laird v. Tatum*, 408 U.S. 1 (1972)—are easily distinguished: neither case involved plaintiffs who alleged the government had *actually surveilled them*. In *ACLU v. NSA*, the ACLU and other plaintiffs alleged a "well founded belief" that their contacts overseas were the type of people the NSA was "*likely*" to target. 493 F.3d at 664. Similarly, in *Laird*, the Supreme Court declined to extend standing to "a complainant who alleges that the exercise of his First Amendment rights is being chilled by the *mere existence, without more*, of a governmental investigative and data-gathering activity[.]" 408 U.S. at 10 (reciting Court of Appeals conclusion that plaintiffs "complain of no specific action" of the government and that there "is no evidence of illegal or unlawful surveillance activies") (emphasis added).

Here, there is much more: HRW, along with millions of other Americans, has *actually* been subject to surveillence under Defendants' Program. *See* Compl. ¶¶ 47-55; *Laird*, 408 U.S. at 11 (distinguishing facts of *Laird* from those cases where "the complainant was either presently or prospectively subject to" the challenged government action). HRW's injuries are thus fairly traceable to that

Program.

C. The Relief Sought Will Redress HRW's Injuries.

The third element of standing focuses on whether there is "a likel[ihood] that the injury will be redressed by a favorable decision." *Susan B. Anthony List*, 134 S. Ct. at 2341 (internal citations and quotations omitted).

Here, just as in *Jewel*, "[t]here is no real question about redressability." *See* 673 F.3d at 912. HRW seeks both injunctive and declaratory relief, and both will redress its injuries.

HRW seeks a declaration that Defendants' conduct violates its constitutional rights; an accounting of HRW's records collected by Defendants; the destruction of those records; and a prohibition on the ongoing and future operation of the Mass Surveillance Program. *See* Compl. at 16. This relief will "unquestionably" redress both the invasion of HRW's privacy and the burden on HRW's associations caused by Program. *Mayfield*, 599 F.3d at 972; *see also Jewel*, 673 F.3d at 912 ("Jewel easily meets the third prong of the standing requirement. . . . Jewel seeks an injunction . . . which is an available remedy should Jewel prevail on the merits.").

Indeed, even if the ongoing collection and search of HRW's call records has stopped—as the government insists—an order requiring the destruction of HRW's call records will still redress HRW's injuries. *Mayfield*, 599 F.3d at 972 (noting Mayfield's standing to seek an injunction requring the destruction of information

in the government's possession); *accord Church of Scientology v. United States*, 506 U.S. 9, 13 (1992) (holding that, where government retained records causing an "affront to" a citizen's privacy, "a court does have power to effectuate a partial remedy by ordering the Government to destroy or return any and all copies it may have in its possession").

The cases relied on by the government do not hold otherwise. In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 108 (1998) the Supreme Court found injunctive relief was inappropriate because the plaintiff had made no allegation of ongoing or future injury. 523 U.S. 83, 108 (1998). Had the plaintiff "alleged a continuing violation"— like the violation alleged here—"the injunctive relief requested would remedy that alleged harm." *Id*.

Even less availing is Defendants' reliance on *Mayfield*. As noted above, the Ninth Circuit determined that Mayfield, "*unquestionably* had standing to seek . . . injunctive relief when he filed the original complaint." 599 F.3d at 972 (emphasis added). However, because Mayfield negotiated away his ability to seek an injunction through settlement, a declaration that the government's conduct was unconstitutional, *on its own*, would not remedy his injuries—*i.e.*, it would not require the government to destroy the illegally collected material. *See id*. at 972-73. As described above, HRW seeks declaratory *and* injunctive relief; the obstacles presented in *Mayfield* thus have no application here.

II. The Government Has Not Introduced Evidence That It Has Destroyed All of HRW's Illegally Collected Records.

HRW's standing in this case derives from its credible, well-pled allegations that the government collected, retained, searched, used, and disseminated its telephone records, and nothing in the extrinsic evidence the government now submits contradicts these allegations.

A. The Second Patterson Declaration Does Not Establish that HRW's Records Have Been Purged From the Government's Files.

The government's motion to dismiss was accompanied by a new declaration from Robert Patterson—the DEA agent whose initial declaration in *United States v. Hassanshahi* first disclosed the Program's existence. *Compare* Declaration of Robert Patterson (ECF No. 24-2) ("Second Patterson Decl."), *with* First Patterson Decl. As the government acknowledges, the Second Patterson Declaration largely parrots the language of the First Patterson Declaration, with one notable addition: the Second Patterson Declaration asserts that call records collected through the Program were "quarantined"; that "the database ha[s] been purged of the collected data"; and the "database no longer exists." *Compare* Second Patterson Decl. ¶ 3, *with* First Patterson Decl. ¶¶ 1-6.

But this case is not about the existence or nonexistence of a particular database: it is about the government's illegal collection, retention, and use of *HRW's records*. Specifically, Agent Patterson does not state that HRW's records

were never collected, nor does he assert that the government no longer retains these records. *See generally* Second Patterson Decl. The Court should thus not infer from this new evidence that *all* illegally collected records, including those of HRW, have been destroyed.

Indeed, the declaration is entirely silent on a number of key issues concerning the government's handling and use of HRW's records. Among the key facts the declaration fails to address are:

(1) Whether the DEA's copy of telephone records was the sole copy.

In the Second Declaration, Agent Patterson states that the "metadata" described in the First Declaration "was stored in a separate database in the sole possession and control of the DEA." Second Patterson Decl. ¶ 2. However, he does *not* state that the government maintained only one copy of each record or that these copies resided solely in the DEA's database. It is probable, for example, that other agencies received copies of the records at the time of collection, or as a result of database queries, and then created separate databases to store those records.

(2) What happened to information generated by database queries.

The result of a query to any computerized database is a new set of data responsive to that query. Agent Patterson states that the DEA's database contained the illegally collected telephone records themselves, but he is silent as to the

storage of the *results* of database queries[4]—queries which occurred hundreds of times per day for two decades. At minimum, this new data must have been retained during the course of investigations and prosecutions and then shared with other interested agencies—all of which occurred in *Hassanshahi*.

(3) The extent of other government agencies' access to the records.

Agent Patterson's statements that the DEA's database was "in the sole possession and control of the DEA" and that the query at issue in *Hassanshahi* was "conducted by DEA . . . at the request of the Department of Homeland Security" do not establish that other government agencies did not have regular access to the records collected through the Program. *See* Second Patterson Decl. ¶ 2. First, as discussed above, these agencies may have maintained their own databases of the same call records. Second, the phrase "sole possession and control" does not establish that other agencies could not directly query the database, even if the specific query by the Department of Homeland Security at issue in *Hassanshahi*

[4] For example, in an analogous but separate bulk collection program, the NSA retained the results of queries of its bulk call records database in a separate database, known as the "corporate store." *See* Privacy and Civil Liberties Oversight Board, *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* 30 (January 23, 2014), *available at* https://www.pclob.gov/library/215-Report_on_the_Telephone_Records_Program.pdf. The Privacy and Civil Liberties Oversight Board described the "corporate store" as "ever-growing," and estimated that it contained millions of call records. *Id*. at 171, 165. Notably, the Board recognized the need to purge both the "corporate store" as well as the initial database of bulk call records. *Id*. at 169.

was made indirectly. Indeed, Agent Patterson's description of the database as a "federal law enforcement" database strongly suggests regular access to Program records by other law enforcement agencies, beyond just DEA. *See* Second Patterson Decl. ¶ 2. Finally, even if other agencies could only access this database indirectly, these agencies almost certainly retained copies of the information the queries produced, as occurred in *Hassanshahi*.

B. The Government's Statements in this Case and in *Hassanshahi* are Inconsistent and Contradictory.

Beyond the gaps in the Second Patterson Declaration, the government's own statements contradict the inferences it now asks the Court to draw.

For example, the government's apparent contention that all illegally collected telephone records have been destroyed is undermined by its statement—in response to Plaintiff's previous discovery motion—that identifying whether DEA employees have ongoing access to Program records would be "burdensome" and "time-consuming." *See* Defs.' Mem. in Opp'n to Pl.'s Mot. for Expedited Disc. at 13:20; 14:4 (ECF No. 25). If all illegally collected records have, in fact, been thoroughly "quarantined" and "purged," it should be no burden to admit that DEA agents lack ongoing access to Program records.

The same holds true for the government's claim that it would be burdensome to identify all agencies that accessed Program call records. *See id*. If the DEA maintained tight control over the records, as the government would have the Court

believe, identifying those agencies with which the records were shared in specific instances should pose no difficulty.

Indeed, the government's position on whether agencies outside of DEA had direct access to Program call records has not been consistent. For instance, in his first declaration, Agent Patterson described the database as one "*used by* Homeland Security Investigations to discover Hassanshahi's phone number"—not a database that DEA searched at the request of DHS. *See* First Patterson Decl. ¶ 2 (emphasis added). This inconsistency is further reflected in several declarations filed in *Hassanshahi* by Homeland Security Investigations (HSI) Special Agent Joshua Akronowitz. In his first declaration, Agent Akronowitz stated: "*I* searched HSI-accessible law enforcement databases" in order to identify Hassanshahi's number. Declaration of Joshua J. Akronowitz ¶ 15 (further stating disclosure of the number occurred "as a result of *my* search") (emphasis added), *U.S. v. Hassanshahi*, No. 13-cr-00274, ECF No. 1-1 (Jan. 9, 2013 D.D.C.) (attached as Ex. 1).[5] But, in a subsequent declaration, Agent Akronowitz stated he "sent a research request for [a] phone number" to an "HSI-accessible database" and then received "research in response" to this query. Declaration of Joshua J. Akronowitz ¶¶ 3, 4, *U.S. v. Hassanshahi*, No. 13-cr-00274, ECF No. 37-1 (July 14, 2014 D.D.C.) (attached as Ex. 2).

[5] All exhibits referenced in this brief are attached to the Declaration of Mark Rumold, filed herewith.

Finally, the government is not even consistent about what it has actually purged. The Second Patterson Declaration suggests records were stored in a single, "separate database" that was ultimately purged. *See* Second Patterson Decl. ¶¶ 2-3. Yet, in *Hassanshahi*, the government described storage of Program records in a "now-defunct database *component*." The United States' Reply to Defendant's Response to the United States' February 25, 2015 Memorandum at 6 (emphasis added), *U.S. v. Hassanshahi*, No. 13-cr-00274, ECF No. 58 (April 29, 2015 D.D.C.) (attached as Ex. 3).

C. Public Reports Contradict the Government's Description of the Program.

The inferences the government asks this Court to draw from the Second Patterson Declaration are further contradicted by public reports on the Program. According to these reports, the government searched its collection of phone records hundreds of times each day and enabled sharing of information between numerous government agencies, including foreign entities.

For example, an April 2015 article from *USA Today* provides a detailed picture of the government's development and use of the Mass Surveillance Program. *See* Brad Heath, *U.S. secretly tracked billions of calls for decades*, USA Today (Apr. 8, 2015) (attached as Ex. 4 to Rumold Decl.).[6] According to the

[6] *Available at* http://www.usatoday.com/story/news/2015/04/07/dea-bulk-telephone-surveillance-operation/70808616.

article, which quotes current and former government officials, beginning in 1992 the DOJ and DEA "amassed logs of virtually all telephone calls from the USA to as many as 116 countries[.]" *Id*. The article describes how the Program operated on a vast scale with few internal constraints: "Agents gathered the records without court approval [and] searched them more often in a day" than the NSA searches its own bulk collection of telephone records in an entire year. *Id.* DEA analysts then "automatically linked the numbers the agency gathered to large electronic collections of investigative reports, domestic call records accumulated by its agents and intelligence data from overseas." *Id*. The report also noted that DEA sometimes even shared phone records obtained through the Program with law enforcement agencies in foreign countries. *Id.*

Public reports also suggest that the records collected by the DEA were shared widely across the government and held in multiple databases. An article in the *Intercept*, based on leaked government documents, describes a joint DEA and CIA collaboration in the early 1990s to build a system to house collected telephone records. Ryan Gallagher, *The Surveillance Engine: How the NSA Built Its Own Secret Google*, The Intercept (Aug. 24, 2014) (attached as Ex. 5).[7] According to the report, "[t]he program rapidly grew in size and scope" and, by 1999, a number of

[7] *Available at* https://firstlook.org/theintercept/2014/08/25/icreach-nsa-cia-secret-google-crisscross-proton.

agencies including the DEA, CIA, FBI, and the Defense Intelligence Agency were each contributing records to and accessing the system. *Id*.

Based on the facts contained in these accounts, "quarantining" or "purging" a single database is unlikely to account for the great majority of illegally collected records, including those of HRW.

III. HRW Should Be Allowed Discovery Concerning Jurisdictional Facts.

The Second Patterson Declaration constitutes extrinsic evidence (although disputed and incomplete) concerning jurisdiction. The introduction of this evidence at the motion to dismiss stage converts the motion into a factual motion to dismiss, which entitles HRW to discovery and an evidentiary hearing on the matter.

The government's attack constitutes a "factual" one, despite the government's efforts to characterize it as "primarily . . . a facial attack." *See St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989); *Courthouse News Service v. Planet*, 750 F.3d 776, 780 n. 3 (9th Cir. 2014). *See* Defs.' Resp. to Pl.'s Opp'n to Defs.' Request to Continue Hearing at 2 (ECF No. 29). The Second Patterson Declaration undeniably includes facts not contained in either the First Patterson Declaration or the Complaint: specifically, information concerning the purported "quarantine" and "purge" of illegally collected records.

In light of the introduction of this disputed factual issue, HRW is entitled to discovery because it is "possible"—indeed, it is probable—that discovery will

yield the "requisite jurisdictional facts." *St. Clair*, 880 F.2d at 201; *see also Twentieth Century Fox Int'l Corp. v. Scriba*, 385 F. App'x. 651, 652 (9th Cir. 2010) (holding that the district court abused its discretion in denying discovery on jurisdictional facts: "the court below erred by ruling on an incomplete record, rather than allowing the parties to conduct limited jurisdictional discovery."). "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence," the party opposing the motion is allowed the opportunity to provide evidence supporting subject matter jurisdiction. *Savage v. Glendale Union High Sch., Dist. No. 205, Maricopa Cnty.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003) (citation omitted). Under these circumstances, "where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary," discovery and evidentiary hearings are warranted. *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008) (internal citation omitted); *see also Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001).

As outlined in the accompanying Request for Discovery and Evidentiary Hearing, the discovery HRW seeks is tailored to establishing certain jurisdictional facts, including whether the government retains HRW's telephone records—the very fact the Second Patterson Declaration purports to call into doubt. *See* Request for Discovery and Evidentiary Hearing ¶ 4.

Finally, if an evidentiary hearing is denied, the court must accept the factual allegations in the complaint as true. *McLachlan v. Bell*, 261 F.3d 908, 909 (9th Cir. 2001) ("Because no evidentiary hearing was held, we accept as true the factual allegations in the complaint.").

Accordingly, the Court should decline to consider any extrinsic evidence and assume the credible and well-pled allegations in the Complaint to be true. *See McLachlan*, 261 F.3d at 909. As described above, that requires the denial of the government's motion and allowing this case to move forward as it normally would.

CONCLUSION

For the all these reasons, the government's motion should be denied.

Dated: July 27, 2015

Respectfully submitted,

s/ Mark Rumold
MARK RUMOLD
DAVID GREENE
NATHAN D. CARDOZO
LEE TIEN
KURT OPSAHL
HANNI FAKHOURY
JAMIE L. WILLIAMS
ANDREW CROCKER

ELECTRONIC FRONTIER FOUNDATION

Counsel for Plaintiff Human Rights Watch

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Central District of California by using the Court's CM/ECF system on July 27, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

Dated: July 27, 2015

s/ Mark Rumold
MARK RUMOLD

MARK RUMOLD (SBN 279060)
mark@eff.org
DAVID GREENE (SBN 160107)
NATHAN D. CARDOZO (SBN 259097)
LEE TIEN (SBN 148216)
KURT OPSAHL (SBN 191303)
HANNI FAKHOURY (SBN 252629)
JAMIE L. WILLIAMS (SBN 279046)
ANDREW CROCKER (SBN 291596)
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Telephone: (415) 436-9333
Facsimile: (415) 436-9993

Counsel for Plaintiff
Human Rights Watch

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

HUMAN RIGHTS WATCH, Plaintiff, v. DRUG ENFORCEMENT ADMINISTRATION, *et al*., Defendants.	Case No: 2:15-cv-2573-PSG-JPR **[PROPOSED] ORDER DENYING DEFENDANTS' MOTION TO DISMISS** Date: August 17, 2015 Time: 1:30 p.m. Courtroom 880 – Roybal Hon. Philip S. Gutierrez

Having considered Defendants' Motion to Dismiss, the opposition thereto, the entire record herein, and upon argument of counsel and for good cause shown, IT IS HEREBY ORDERED that Defendant's Motion to Dismiss is **DENIED**.

IT IS SO ORDERED.

Dated: _____

_____
HON. PHILIP S. GUTIERREZ
UNITED STATES DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Central District of California by using the Court's CM/ECF system on July 27, 2015.

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s/ Mark Rumold
MARK RUMOLD