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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,

Plaintiff,

v.

UNITED STATES DEPARTMENT
OF JUSTICE,

Defendant.

CASE NO. C16-0538JLR

ORDER ON MOTION TO
DISMISS

I. INTRODUCTION

Before the court is Defendant United States Department of Justice’s (“the Government”) motion to dismiss Plaintiff Microsoft Corporation’s first amended complaint. (Mot. (Dkt. # 38).) Microsoft opposes the Government’s motion. (Resp. (Dkt. # 44).) The court has considered the Government’s motion, Microsoft’s opposition to the Government’s motion (Resp. (Dkt. # 44)), the Government’s reply (Reply (Dkt. # 92)), the filings of amici (Amici Br. (Dkt. ## 43, 48, 49, 56, 57, 58, 61, 66, 71)), the

1 relevant portions of the record, and the applicable law. In addition, the court heard
2 argument from the parties on January 23, 2017. (1/23/17 Min. Entry (Dkt. # 105).)
3 Being fully advised, the court GRANTS IN PART and DENIES IN PART the
4 Government’s motion for the reasons set forth below.

5 **II. BACKGROUND**

6 **A. Statutory Background**

7 The Electronic Communications Privacy Act of 1986 (“ECPA”), 18 U.S.C.
8 § 2510, *et seq.*, “addresses various areas of electronic surveillance, including wiretaps,
9 tracking devices, stored wire and electronic communications, pen registers, and trap and
10 trace devices.” *See United States v. Anderson*, No. 2:15-cr-00200-KJD-PAL, 2016 WL
11 4191045, at *7 (D. Nev. Apr. 27, 2016). ECPA addresses “electronic communications
12 services (e.g., the transfer of electronic messages, such as email, between computer users)
13 and remote computing services (e.g., the provision of offsite computer storage or
14 processing of data and files).” *In re Zynga Privacy Litig.*, 750 F.3d 1098, 1103 (9th Cir.
15 2014). Under ECPA, an electronic communications service provider (“ECS provider”) is
16 an entity that offers “any service which provides to users thereof the ability to send or
17 receive wire or electronic communications,” 18 U.S.C. § 2510(15), and a remote
18 computing service provider (“RCS provider”) is an entity that provides “to the
19 public . . . computer storage or processing services by means of an electronic
20 communications system,” 18 U.S.C. § 2711(2). A subscriber is a person who uses one or
21 more of those services. *See, e.g., In re Application of the U.S. for an Order Pursuant to*
22 *18 U.S.C. § 2705(b)*, 131 F. Supp. 3d 1266, 1268 (D. Utah 2015).

1 Title II of ECPA—the Stored Communications Act (“the SCA”), 18 U.S.C.
2 § 2701, *et seq.*—governs the government’s access to “electronic information stored in
3 third party computers.” *In re Zynga*, 750 F.3d at 1104; *see also* Stephen Wm. Smith,
4 *Gagged, Sealed & Delivered: Reforming ECPA’s Secret Docket*, 6 HARV. L. & POL’Y
5 REV. 313, 324 (2012) [hereinafter “*Reforming ECPA’s Secret Docket*”] (“Title II of the
6 ECPA . . . prescribes requirements and procedures under which the government can
7 obtain court orders (known as § 2703(d) orders) compelling access to stored wire and
8 electronic communications, as well as related subscriber and customer account
9 information.”). Two sections of the SCA, 18 U.S.C. § 2703 and 18 U.S.C. § 2705,
10 “regulate relations between a government entity which seeks information; a service
11 provider which holds information; and the subscriber of the service who owns the
12 information and is therefore a target of investigation.” *In re Application of the U.S.*, 131
13 F. Supp. 3d at 1268. The information sought from ECS and RCS providers may contain
14 “content” or “non-content” data. *Id.* Content includes items such as emails and
15 documents, while non-content data includes things like email addresses and IP addresses.
16 *See, e.g., Req. for Int’l Judicial Assistance from the Turkish Ministry of Justice*, No.
17 16-mc-80108-JSC, 2016 WL 2957032, at *1 (N.D. Cal. May 23, 2016); *Integral Dev.*
18 *Corp. v. Tolat*, No. C 12-06575 JSW (LB), 2013 WL 1389691, at *1 (N.D. Cal. May 30,
19 2013).

20 Section 2703 of the SCA authorizes the government to acquire a subscriber’s
21 information from a service provider when the subscriber is a “target” of the government’s
22 information request. *See* 18 U.S.C. § 2703. The provision “establishes a complex

1 scheme pursuant to which a governmental entity can, after fulfilling certain procedural
2 and notice requirements, obtain information from [a service provider] via administrative
3 subpoena or grand jury or trial subpoena.” *Crispin v. Christian Audigier, Inc.*, 717 F.
4 Supp. 2d 965, 974-75 (C.D. Cal. 2010) (citing 18 U.S.C. § 2703(b)). Section 2703
5 requires the government to give notice to subscribers that it has obtained their
6 information from a service provider in some but not all circumstances. *See* 18 U.S.C.
7 § 2703(a)-(c) (describing various notice requirements for communication contents and
8 records in electronic storage and remote computing services).

9 Section 2705 of the SCA addresses when the government may withhold notice that
10 is otherwise required under Section 2703. *See* 18 U.S.C. § 2705(a)-(b); *In re Application*
11 *of the U.S.*, 131 F. Supp. 3d at 1268. Under Section 2705(a), the government may delay
12 giving notice to the subscriber that the government has collected the subscriber’s
13 information if certain requirements are met. *Id.* at 1267. Under Section 2705(b), the
14 government may apply for “a preclusion-of-notice order.” *Id.* Such an order
15 “command[s] a provider of electronic communications service or remote computing
16 service not to notify any person of the existence of a grand jury subpoena [or other
17 acceptable court order under the SCA] which the Government has served on the
18 provider.” *Id.*; *see also Reforming ECPA’s Secret Docket* at 325 (“The SCA does
19 authorize the court to issue a gag order (called ‘preclusion of notice’) to service
20 providers, commanding them not to notify any other person of the existence of the court
21 order.”). A court may issue such a “preclusion-of-notice order” if the court

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1 determines that there is reason to believe that notification of the existence of
2 the warrant, subpoena, or court order will result in (1) endangering the life
3 or physical safety of an individual; (2) flight from prosecution; (3)
4 destruction of or tampering with evidence; (4) intimidation of potential
5 witnesses; or (5) otherwise seriously jeopardizing an investigation or unduly
6 delaying a trial.

7 18 U.S.C. § 2705(b). “The combined effect of [Sections 2703] and 2705(b) is that the
8 subscriber may never receive notice of a warrant to obtain content information from a
9 remote computing service and the government may seek an order under § 2705(b) that
10 restrains the provider indefinitely from notifying the subscriber.” *In re Application of the*
11 *U.S.*, 131 F. Supp. 3d at 1271.

12 Since Congress passed the SCA in 1986, the technological landscape has
13 changed considerably. *See* Orin Kerr, *The Next Generation Communications Privacy*
14 *Act*, 162 U. PA. L. REV. 373, 375 (2014) (“In recent years, ECPA has become widely
15 perceived as outdated.”); *see also id.* at 376 (noting that at the time Congress passed
16 ECPA, “[a]ccess to stored communications was a lesser concern,” but “[s]ervice
17 providers now routinely store everything, and they can turn over everything to law
18 enforcement”). As technology changes, the public has vigorously debated the
19 appropriate reach of the government’s electronic surveillance of its citizens. *See, e.g.,*
20 *Reforming ECPA’s Secret Docket* at 313-14; Jonathan Manes, *Online Service Providers*
21 *& Surveillance Law Technology*, 125 Yale L.J. F. 343, 346 (Mar. 3, 2016) (“Over the
22 past two-and-a-half years, we have had the most robust public discussion about
surveillance in a generation.”). As former Magistrate Judge Paul S. Grewal noted,
“[w]arrants for location data, cell phone records[,] and especially email rule the day.” *In*

1 *Matter of Search Warrant for [Redacted]@hotmail.com*, 74 F. Supp. 3d 1184, 1185
2 (N.D. Cal. 2014). And according to Magistrate Judge Stephen Wm. Smith, the “ECPA
3 docket . . . handles tens of thousands of secret cases every year.” *Reforming ECPA’s*
4 *Secret Docket* at 313.

5 The public debate has intensified as people increasingly store their information in
6 the cloud¹ and on devices with significant storage capacity. *See In re Grand Jury*
7 *Subpoena, JK-15-029*, 828 F.3d 1083, 1090 (9th Cir. 2016) (quoting *United States v.*
8 *Cotterman*, 709 F.3d 952, 964 (9th Cir. 2013)) (noting that “electronic storage devices
9 such as laptops ‘contain the most intimate details of our lives: financial records,
10 confidential business documents, medical records[,] and private emails,’” which “‘are
11 expected to be kept private’”). Government surveillance aided by service providers
12 creates unique considerations because of the vast amount of data service providers have
13 about their customers. For example, “[i]nternet service providers know the websites we
14 have viewed. Google keeps records of our searches. Facebook keeps records of our
15 ‘friends,’ our communications, and what we ‘like.’” *Online Service Providers &*
16 *Surveillance Law Technology* at 349. These developments have led several courts to
17 conclude that certain material stored with providers deserves constitutional protection.
18 *See, e.g., In re Grand Jury Subpoena*, 828 F.3d at 1090 (“[E]mails are to be treated as

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¹ The “cloud” is “a metaphor for the ethereal internet.” *In re U.S.’s Application for a Search Warrant to Seize & Search Elec. Devices from Edward Cunniss*, 770 F. Supp. 2d 1138, 1144 n.5 (W.D. Wash. 2011) (internal quotations omitted) (quoting David A. Couillard, *Defogging the Cloud: Applying Fourth Amendment Principles to Evolving Privacy Expectations in Cloud Computing*, 93 MINN. L. REV. 2205, 2216 (2009)).

1 closed, addressed packages for expectation-of-privacy purposes.”); *Search of Info.*
2 *Associated with Email Addresses Stored at Premises Controlled by Microsoft Corp.*,
3 --- F. Supp. 3d ---, 2016 WL 5410401, at *8 (D. Kan. Sept. 28, 2016) (“In considering the
4 email context specifically, courts have held an individual enjoys a right to privacy in his
5 or her emails.”); *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010) (holding
6 that “a subscriber enjoys a reasonable expectation of privacy in the contents of emails”).

7 **B. This Lawsuit**

8 Against this statutory and technological backdrop, Microsoft² filed this suit on
9 April 14, 2016 (Compl. (Dkt. # 1)), and later amended its complaint on June 17, 2016
10 (FAC (Dkt. # 28)). Microsoft seeks declaratory relief. (*See id.* ¶¶ 33, 41.) The gravamen
11 of Microsoft’s complaint is that Section 2705(b) is unconstitutional under the First and
12 Fourth Amendments and that Section 2703 is unconstitutional under the Fourth
13 Amendment “to the extent it absolves the government of the obligation to give notice to a
14 customer whose content it obtains by warrant, without regard to the circumstances of the
15 particular case.” (*Id.* ¶ 35.) In Microsoft’s view, “the government has increasingly
16 adopted the tactic of obtaining the private digital documents of cloud customers not from
17 the customers themselves, but through legal process directed at online cloud providers
18 like Microsoft.” (*Id.* ¶ 4.) The government then “seeks secrecy orders under 18 U.S.C.
19 § 2705(b) to prevent Microsoft from telling its customers (or anyone else) of the
20 government’s demands” for that information. (*Id.*) According to Microsoft, “[t]he vast

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22 ² Microsoft is both an ECS provider and an RCS provider. *See Crispin*, 717 F. Supp. 2d
at 978 (citing *United States v. Weaver*, 636 F. Supp. 2d 769, 770 (C.D. Ill. 2009)).

1 majority of these secrecy orders relate[] to consumer accounts and prevent Microsoft
2 from telling affected individuals about the government’s intrusion into their personal
3 affairs; others prevent Microsoft from telling business customers that the government has
4 searched and seized the emails of individual employees of the customer.” (*Id.* ¶ 16.)
5 Microsoft alleges that federal courts have issued “more than 3,250 secrecy orders” over a
6 20-month period ending in May 2016, and that nearly two-thirds of those orders are for
7 an indefinite length of time. (*Id.* ¶ 5.)

8 Microsoft contends that Section 2705(b) is unconstitutional facially and as applied
9 because it violates the First Amendment right of a business to “talk to [the business’s]
10 customers and to discuss how the government conducts its investigations.” (*Id.* ¶ 1.)

11 Specifically, Microsoft contends that Section 2705(b) is overbroad, imposes
12 impermissible prior restraints on speech, imposes impermissible content-based
13 restrictions on speech, and improperly inhibits the public’s right to access search
14 warrants. (*Id.* ¶¶ 23-26.)

15 Microsoft also alleges that Sections 2705(b) and 2703 are unconstitutional facially
16 and as applied because they violate the Fourth Amendment right of “people and
17 businesses . . . to know if the government searches or seizes their property.” (*Id.* ¶ 33.)

18 Microsoft contends that the statutes are facially invalid because they allow the
19 government to (1) forgo notifying individuals of searches and seizures, and (2) obtain
20 secrecy orders that “prohibit providers from telling customers when the government has
21 accessed their private information” without constitutionally sufficient proof and without
22 sufficient tailoring. (*Id.* ¶ 35.) Microsoft further alleges that Sections 2703 and 2705(b)

1 are unconstitutional as applied because “[t]he absence of a government notice obligation,
2 combined with the imposition of secrecy orders on Microsoft, has resulted, and will
3 continue to result, in unconstitutional delay of notice to Microsoft’s customers, in
4 violation of their Fourth Amendment rights.” (*Id.* ¶ 40.) Microsoft asserts that it has
5 third-party standing to vindicate its customers’ rights to notice of search and seizure
6 under the Fourth Amendment. (*Id.* ¶¶ 38-39.)

7 The Government moves to dismiss Microsoft’s first amended complaint for lack
8 of standing and failure to state a claim. (*See Mot.*)

9 III. ANALYSIS

10 A. Legal Standards

11 1. Motion to Dismiss Under Rule 12(b)(1)

12 “Article III of the Constitution limits federal courts’ jurisdiction to certain ‘Cases’
13 and ‘Controversies.’” *Clapper v. Amnesty Int’l USA*, --- U.S. ---, 133 S. Ct. 1138, 1146
14 (2013). The case or controversy requirement demands that a plaintiff have standing. *See*
15 *id.*; *see also Spokeo, Inc. v. Robins*, --- U.S. ---, 136 S. Ct. 1540, 1547 (2016) (“Standing
16 to sue is a doctrine rooted in the traditional understanding of a case or controversy.”). To
17 establish standing, a plaintiff must demonstrate three elements: (1) a “concrete,
18 particularized, and actual or imminent” injury that is (2) “fairly traceable to the
19 challenged action” and (3) “redressable by a favorable ruling.” *Monsanto Co. v.*
20 *Geertson Seed Farms*, 561 U.S. 139, 149 (2010). These requirements are more
21 succinctly referred to as injury, causation, and redressability. *Nw. Immigrant Rights*

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1 *Project v. United States Citizenship & Immigration Servs.*, --- F.R.D. ---, 2016 WL
2 5817078, at *6 (W.D. Wash. Oct. 5, 2016).

3 Special standing considerations apply to a declaratory judgment action.

4 “Declaratory judgment is not a corrective remedy and should not be used to remedy past
5 wrongs.” *Williams v. Bank of Am.*, No. 2:12-cv-2513 JAM AC PS, 2013 WL 1907529, at
6 *5-6 (E.D. Cal. May 7, 2013). Accordingly, when a “plaintiff[] seeks declaratory and
7 injunctive relief only,” “there is a further requirement that [the plaintiff] show a very
8 significant possibility of future harm” in addition to the three Article III standing
9 elements. *See San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir.
10 1996); *see also Canatella v. California*, 304 F.3d 843, 852 (9th Cir. 2002) (“In the
11 particular context of injunctive and declaratory relief, a plaintiff must show that he has
12 suffered or is threatened with a concrete and particularized legal harm . . . coupled with a
13 sufficient likelihood that he will again be wronged in a similar way.” (citations and
14 internal quotation marks omitted)); *Sample v. Johnson*, 771 F.2d 1335, 1340 (9th Cir.
15 1985) (“[P]laintiffs must demonstrate a credible threat exists that they will again be
16 subject to the specific injury for which they seek injunctive or declaratory relief.”
17 (internal quotations omitted)). In other words, a plaintiff may not “demonstrate only a
18 past injury.” *San Diego Cty. Gun Rights*, 98 F.3d at 1126.

19 “The plaintiff, as the party invoking federal jurisdiction, bears the burden of
20 establishing these elements.” *Spokeo*, 136 S. Ct. at 1547. “Where . . . a case is at the
21 pleading stage, the plaintiff must ‘clearly . . . allege facts demonstrating’ each element,”
22 *id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)), and “[t]he court analyzes

1 standing claim by claim,” *Antman v. Uber Techs., Inc.*, No. 15-cr-01175-LB, 2015 WL
2 6123054, at *9 (N.D. Cal. Oct. 19, 2015). “When a motion to dismiss attacks
3 subject-matter jurisdiction under Rule 12(b)(1) on the face of the complaint, the court
4 assumes the factual allegations in the complaint are true and draws all reasonable
5 inferences in the plaintiff’s favor.” *City of L.A. v. JPMorgan Chase & Co.*, 22 F. Supp.
6 3d 1047, 1052 (C.D. Cal. 2014). “The jurisdictional question of standing precedes, and
7 does not require, analysis of the merits” of the plaintiff’s claims. *Equity Lifestyle Props.,*
8 *Inc. v. Cty. of San Luis Obispo*, 548 F.3d 1184, 1189 n.10 (9th Cir. 2007).

9 2. Motion to Dismiss Under Rule 12(b)(6)

10 When considering a motion to dismiss under Federal Rule of Civil Procedure
11 12(b)(6), the court construes the complaint in the light most favorable to the nonmoving
12 party. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir.
13 2005). The court must accept all well-pleaded allegations of material fact as true and
14 draw all reasonable inferences in favor of the plaintiff. *See Wyler Summit P’ship v.*
15 *Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). “To survive a motion to
16 dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a
17 claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
18 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Telesaurus*
19 *VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010). “A claim has facial plausibility
20 when the plaintiff pleads factual content that allows the court to draw the reasonable
21 inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678.

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1 **B. First Amendment Claim**

2 The Government contends that Microsoft's First Amendment challenge fails on
3 several grounds. The court addresses each of the Government's arguments in turn.

4 1. Standing

5 The Government first argues that Microsoft lacks standing to challenge Section
6 2705(b) under the First Amendment because Microsoft fails to identify a concrete and
7 particularized injury or a favorable judgment that would redress Microsoft's alleged
8 injury. (Mot. at 10-13.) Specifically, the Government argues that Microsoft has not
9 identified a concrete and particularized injury and contends that a favorable judgment
10 would not redress Microsoft's alleged injury. (*See id.* at 10-12.)

11 *a. Injury in Fact and Likelihood of Future Injury*

12 "To establish injury in fact, a plaintiff must show that he or she suffered 'an
13 invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or
14 imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan v.*
15 *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). An injury is particularized when it
16 "affect[s] the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. An
17 injury is concrete when it actually exists. *See Spokeo*, 136 S. Ct. at 1548 ("A 'concrete'
18 injury must be 'de facto'; that is, it must actually exist."). In addition, because it seeks
19 declaratory relief, Microsoft must allege a likelihood of future injury. *See Canatella*, 304
20 F.3d at 852.

21 Microsoft alleges that Section 2705(b) impinges on its First Amendment rights
22 because the statute allows court orders that imposes prior restraints and content-based

1 restrictions on speech. (See FAC ¶¶ 24 (“The statute authorizes secrecy orders that
2 prohibit, *ex ante*, providers such as Microsoft from engaging in core protected speech
3 under the First Amendment, i.e., speech about the government’s access to customers’
4 sensitive communications and documents and its increased surveillance on the Internet.”),
5 25 (“Secrecy orders issued under Section 2705(b) also function as content-based
6 restrictions on speech”).) Microsoft also asserts that orders issued under Section
7 2705(b) “improperly inhibit the public’s right of access to search warrants under both the
8 common law and the First Amendment.” (*Id.* ¶ 26.) In its response to the Government’s
9 motion, Microsoft contends that it has suffered “thousands of concrete, particularized
10 injuries” in the form of “the secrecy orders to which Microsoft has been subject since
11 2014.” (Resp. at 12 (emphasis omitted) (citing FAC ¶ 16).) Microsoft further argues that
12 “Section 2705(b) also inflicts economic injury on Microsoft by eroding customer
13 confidence in its cloud services.” (*Id.* at 13 (citing FAC ¶¶ 5, 39)); *see also San Diego*
14 *Cty. Gun Rights*, 98 F.3d at 1130 (“Economic injury is clearly a sufficient basis for
15 standing.”). Microsoft contends that the Government’s arguments regarding the injury
16 element are misplaced because the arguments “preview the Government’s flawed merits
17 argument that Section 2705(b) passes constitutional muster, just because some 2705(b)
18 orders must be constitutional.” (Resp. at 13.)

19 The court finds that Microsoft has sufficiently alleged an injury-in-fact and a
20 likelihood of future injury. Microsoft alleges “an invasion of” its “legally protected
21 interest” in speaking about government investigations due to indefinite nondisclosure
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1 orders issued pursuant to Section 2705(b).³ (FAC ¶¶ 1 (“[Section 2705(b)]
2 violates . . . the First Amendment, which enshrines Microsoft’s rights to talk to its
3 customers and to discuss how the government conducts its investigations”); 5
4 (alleging that non-disclosure orders “have impaired Microsoft’s right to be transparent
5 with its customers, a right guaranteed by the First Amendment”); 24; 32-33.) The court
6 concludes that Section 2705(b) orders that indefinitely prevent Microsoft from speaking
7 about government investigations implicate Microsoft’s First Amendment rights.

8 First Amendment rights must be balanced against “the substantial burden openness
9 [may] impose on government investigations.” *Times Mirror Co. v. United States*, 873
10 F.2d 1210, 1217 (9th Cir. 1989) (holding that the First Amendment did not guarantee
11 public access to warrant applications while a pre-indictment investigation was ongoing,
12 but declining to decide whether there was such a right post-indictment); *see also In re*
13 *§ 2703(d)*, 787 F. Supp. 2d 430, 438 (E.D. Va. 2011) (noting that First Amendment
14 interests may have to “yield to the investigatory process” under certain circumstances).
15 In at least some circumstances, however, the Government’s interest in keeping
16 investigations secret dissipates after an investigation concludes and at that point, First
17 Amendment rights may outweigh the Government interest in secrecy. *See In re Sealing*
18 *& Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876 (S.D. Tex. 2008); *In*
19 *Matter of Search Warrant*, 74 F. Supp. 3d at 1186 (“If the court were dealing with a

21 ³ In arguing that Microsoft has failed to state a First Amendment claim, the Government
22 argues that Microsoft does not have an “absolute right” to speak about the Government’s
investigations. The court addresses that argument *infra* § III.C.3.a.

1 grand jury subpoena, with its historical presumption of secrecy, perhaps an infinite period
2 of Microsoft silence would be appropriate. But in the absence of such a historical
3 presumption, the First Amendment rights of both Microsoft and the public, to say nothing
4 of the rights of the target, must be given at least some consideration.”). When the
5 government’s concern dissipates, the First Amendment’s protection of speech about
6 governmental activity—including criminal investigations—warrants consideration. *See*
7 *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991) (“There is no question that
8 speech critical of the exercise of the State’s power lies at the very center of the First
9 Amendment.”); *Landmark Commc’ns., Inc. v. Virginia*, 435 U.S. 829, 838 (1978)
10 (“[T]here is practically universal agreement that a major purpose of [the First]
11 Amendment was to protect the free discussion of governmental affairs.”).

12 Accordingly, the court concludes that Microsoft has adequately alleged an injury
13 to a “legally protected interest.” For example, the Southern District of Texas considered
14 whether “electronic surveillance court orders may properly be kept secret, by sealing and
15 non-disclosure provisions, for an indefinite period beyond the underlying criminal
16 investigation.” *Id.* at 877. The court concluded that “setting a fixed expiration date on
17 sealing and non-disclosure of electronic surveillance orders is not merely better practice,
18 but required by . . . the First Amendment prohibition against prior restraint of speech.”
19 *Id.* at 878. In a case involving grand jury proceedings, the Supreme Court similarly held
20 that a “Florida law [that] prohibit[ed] a grand jury witness from disclosing his own
21 testimony after the term of the grand jury has ended . . . violates the First Amendment to
22 the United States Constitution.” *Butterworth v. Smith*, 494 U.S. 624, 626 (1990). And,

1 finally, the Ninth Circuit Court of Appeals decided that there is no First Amendment right
2 to access warrant application materials during an ongoing investigation pre-indictment,
3 but expressly left open the question of whether the public has such a right after an
4 indictment issues. *Times Mirror Co.*, 873 F.2d at 1217; *see also United States v. Bus. of*
5 *Custer Battlefield Museum & Store*, 658 F.3d 1188, 1194-95 (9th Cir. 2011) (stating that
6 the Ninth Circuit had “expressly reserved whether the public has a constitutional right of
7 access after an investigation has been terminated”). These cases either necessarily imply
8 or suggest that indefinite non-disclosure orders that extend beyond the life of an ongoing
9 investigation implicate First Amendment rights.

10 In addition to alleging an injury to a legally protected interest, Microsoft
11 adequately alleges that this “invasion” is “particularized” because the injury Microsoft
12 complains of “affect[s] [Microsoft] in a personal and individual way.” *Lujan*, 504 U.S. at
13 560 n.1. Microsoft’s alleged injury is also concrete because Microsoft alleges that it has
14 personally been subjected to thousands of indefinite non-disclosure orders that implicate
15 its First Amendment Rights. (*See, e.g.*, FAC ¶ 5); *see also Spokeo*, 136 S. Ct. at 1548
16 (“A ‘concrete’ injury must be ‘de facto’; that is, it must actually exist.”) For these
17 reasons, the court concludes that Microsoft has adequately alleged an injury-in-fact.

18 The Government makes several arguments to demonstrate that Microsoft has not
19 alleged a First Amendment injury, but those arguments flow from the same premises:
20 that the nondisclosure orders to which Microsoft is subject under Section 2705(b) contain
21 different terms, were issued according to the specific context in which they arose, and
22 require individualized consideration of the context in which each order was issued. (*See*

1 Mot. at 11.) Essentially, the Government argues that Microsoft alleges a generalized
2 grievance that cannot confer standing. (*See* Reply at 2-3.)

3 The court is unpersuaded. A generalized grievance is an “asserted harm” that is
4 “shared in substantially equal measure by all or a large class of citizens.” *Warth*, 422
5 U.S. at 499. Accordingly, a generalized grievance presents “abstract questions of wide
6 public significance.” *Valley Forge*, 454 U.S. at 474-75. Here, however, Microsoft
7 alleges that it has been subjected to thousands of nondisclosure orders that Microsoft
8 asserts violate its First Amendment rights. (*See* Compl. ¶ 5.) Microsoft reasonably
9 believes that it is likely to be subject to similar orders in the future. (*Id.* ¶ 33.) Although
10 the privacy issues underpinning these nondisclosure orders may be of widespread public
11 interest, Microsoft seeks to vindicate its own First Amendment rights. Whether or not the
12 orders were issued under varying circumstances or the ultimate issues in this case may
13 have to be resolved “using legal tests that are context[-] and fact-specific” (Mot. at 11),
14 Microsoft has alleged a concrete and particularized First Amendment injury.

15 In addition, the Government’s arguments assail the merits of Microsoft’s First
16 Amendment claim, not Microsoft’s standing. (*See* Mot. at 10-11.) For example, the
17 Government argues that Microsoft has not “identif[ied] any particular order that this
18 [c]ourt could analyze to determine the existence, nature, and extent of injury.” (*Id.* at 10.)
19 The Government further argues that the Government obtains the nondisclosure orders via
20 different procedures, which means the court can “derive[] . . . no common legal
21 principle” by which to analyze the orders under the First Amendment. (*Id.* at 10-11.) At
22 this stage, however, Microsoft is not required to provide evidence to support its claims. It

1 must only allege that it has suffered an injury in fact, *City of L.A.*, 22 F. Supp. 3d at 1052,
2 and the court finds that Microsoft has adequately done so.

3 Microsoft also sufficiently alleges a likelihood of similar harm in the future. *See*
4 *Canatella*, 304 F.3d at 854. Specifically, Microsoft asserts that without a declaration that
5 Section 2705(b) is unconstitutional insofar as it permits indefinite nondisclosure orders,
6 “the government will continue to seek, and courts will continue to issue, secrecy orders
7 that impermissibly restrict the First Amendment rights of Microsoft and similarly situated
8 providers.” (FAC ¶ 33.) Microsoft bolsters its prediction by alleging that over a
9 20-month period preceding this lawsuit, the Government sought and obtained 3,250
10 orders—at least 450⁴ of which accompanied search warrants—that contained indefinite
11 nondisclosure provisions. (*Id.* ¶¶ 5, 32.) In addition, Microsoft alleges that in this
12 District alone, it has received at least 63 such orders since September 2014. (*Id.* ¶ 16.)
13 Because these orders have been frequent and issued recently, the Government will likely
14 continue to seek and obtain them. Accordingly, Microsoft’s “fears” of similar injuries in
15 the future are not “merely speculative.”⁵ *Mendia v. Garcia*, 165 F. Supp. 3d 861, 895
16 (N.D. Cal. 2016).

17
18 ⁴ In different places in its first amended complaint, Microsoft alleges that either 450 or
19 650 nondisclosure orders accompanied search warrants. (*Compare* FAC ¶ 5, *with id.* ¶ 32.)

20 ⁵ At oral argument, Microsoft styled its challenge to the constitutionality of Section
21 2705(b) as a kind of pre-enforcement challenge. A pre-enforcement challenge raises ripeness
22 questions. *See ProtectMarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 839 (9th Cir. 2014).
Ripeness is a jurisdictional consideration because it implicates Article III’s case or controversy
requirement. *See Guatay Christian Fellowship v. Cty. of San Diego*, 670 F.3d 957, 980 (9th Cir.
2011). However, due to the overwhelming importance of the rights protected by the First
Amendment, courts relax the usual standing principles and apply a three-part test to determine
whether a plaintiff has established standing to pursue a First Amendment claim when the

1 For the foregoing reasons, the court concludes that Microsoft has adequately
2 alleged an injury and a likelihood of similar future injury for the purposes of establishing
3 standing to pursue its First Amendment claim.

4 *b. Causation*

5 “To show causation, the plaintiff must demonstrate a causal connection between
6 the injury and the conduct complained of—the injury has to be fairly traceable to the
7 challenged action of the defendant, and not the result of the independent action of some
8 third party not before the court.” *Salmon Spawning & Recovery All. v. Gutierrez*, 545
9 F.3d 1220, 1227 (9th Cir. 2008). “Although the traceability of a plaintiff’s harm to the
10 defendant’s actions need not rise to the level of proximate causation, Article III does
11 require proof of a substantial likelihood that the defendant’s conduct caused plaintiff’s
12 injury in fact.” *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863,
13 877 (N.D. Cal. 2009) (internal quotation marks omitted).

14 Neither party substantively addresses the causation element of the standing
15 inquiry. (*See Mot.; Resp.*) However, the court has an independent duty to ensure that it
16 has subject matter jurisdiction over this action. *See Arbaugh v. Y&H Corp.*, 546 U.S.
17 500, 514 (2006). Microsoft alleges that indefinite nondisclosure orders issued pursuant to
18

19 _____
20 plaintiff has not yet suffered an actual injury. *See Alaska Right to Life Political Action Comm. v.*
21 *Feldman*, 504 F.3d 840, 851 (9th Cir. 2007); *see also Wolfson v. Brammer*, 616 F.3d 1045, 1058
22 (9th Cir. 2010). Despite this characterization, however, the court finds for the reasons noted
above that Microsoft need not allege facts regarding the three elements necessary to mount a
pre-enforcement challenge. *See Brammer*, 616 F.3d at 1058. Because Microsoft has alleged a
past injury, it need only allege a likelihood of similar injury in the future in this action for
declaratory relief. *See, e.g., Canatella*, 304 F.3d at 852.

1 Section 2705(b) prevent Microsoft from engaging in protected speech. (*See generally*
2 FAC.) This alleged injury—the curtailing of Microsoft’s speech—is fairly traceable to
3 the conduct complained of—indefinite nondisclosure orders issued pursuant to Section
4 2705(b). Accordingly, the court finds that Microsoft has sufficiently alleged causation.

5 *c. Redressability*

6 A plaintiff establishes redressability by demonstrating “a ‘substantial likelihood’
7 that the requested relief will remedy the alleged injury in fact.” *Vermont Agency of Nat.*
8 *Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000). “[A] plaintiff satisfies the
9 redressability requirement when he shows that a favorable decision will relieve a discrete
10 injury[, but he] need not show that a favorable decision will relieve his *every* injury.”
11 *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (plurality opinion). “In the context of
12 declaratory relief, a plaintiff demonstrates redressability if the court’s statement would
13 require the defendant to act in any way that would redress past injuries or prevent future
14 harm.” *Viet. Veterans of Am. v. C.I.A.*, 288 F.R.D. 192, 205 (N.D. Cal. 2012) (internal
15 quotation marks omitted); *accord Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83,
16 108 (1998) (“If respondent had alleged a continuing violation or the imminence of a
17 future violation, the injunctive relief requested would remedy that alleged harm.”). A
18 plaintiff is entitled to a presumption of redressability where he “seeks declaratory relief
19 against the type of government action that indisputably caused him injury.” *Mayfield v.*
20 *United States*, 599 F.3d 964, 971 (9th Cir. 2010) (determining whether redressability
21 requirement was met in a declaratory judgment action involving the constitutionality of
22 the Foreign Intelligence Surveillance Act (“FISA”)).

1 The Government argues that even if the court declared Section 2705(b)
2 unconstitutional, that declaration would not redress Microsoft's injury. (*See* Mot. at
3 12-13.) The Government contends that "[a] favorable judgment in this case would not
4 release Microsoft from those individual [nondisclosure] orders, so its alleged injury
5 would not be remedied and redressability is therefore lacking." (*Id.* at 12.) Microsoft
6 responds that it "is not asking this [c]ourt to 'release' it from secrecy orders." (Resp. at
7 15.) Rather, Microsoft "seeks a declaration that Section 2705(b) violates the First
8 Amendment, relief that would prevent the Government from continuing to rely on the
9 statute to restrain Microsoft's speech in the future." (*Id.*) The Government views
10 Microsoft's response as an attempt to "time-shift" the basis for its standing by seeking
11 redress that would prevent future injuries rather than remedy past injuries. (Mot. at 3.)

12 The declaratory relief Microsoft seeks would not remedy its past injuries, but it
13 would "prevent likely future injuries" in the form of additional indefinite nondisclosure
14 orders. *Mayfield*, 599 F.3d at 972. Although Microsoft alleges a past injury—being
15 subjected to thousands of indefinite nondisclosure orders since 2014—that past injury
16 strengthens Microsoft's allegation that it faces a substantial likelihood of the same kind
17 of harm in the future. (FAC ¶ 33.) Microsoft alleges that without a declaration from the
18 court regarding Section 2705(b)'s constitutionality, "the [G]overnment will continue to
19 seek, and courts will continue to issue, secrecy orders that impermissibly restrict the First
20 Amendment rights of Microsoft." (*Id.*) Thus, a declaration that Section 2705(b) is
21 unconstitutional because it permits courts to issue indefinite nondisclosure orders would

22 //

1 redress Microsoft's future injuries. In the context of declaratory relief, such allegations
2 suffice. *See Viet. Veterans of Am.*, 288 F.R.D. at 205.

3 2. Prudential Considerations

4 The Government next argues that "comity grounds" support dismissing
5 Microsoft's First Amendment claims because "[i]t is a settled principle that a challenge to
6 an order of a coordinate court may not be heard by a different court."⁶ (Mot. at 16 (citing
7 *Lapin v. Shulton*, 333 F.2d 169, 172 (9th Cir. 1964); *Treadaway v. Acad. of Motion*
8 *Picture Arts & Scis.*, 783 F.2d 1418, 1422 (9th Cir. 1986)).) Microsoft responds that this
9 argument fails because "Microsoft is not bringing a collateral attack on other courts'
10 orders; rather, it seeks a judgment that will be binding on the Government when it seeks
11 secrecy orders in other courts." (Resp. at 15 n.2.)

12 The cases the Government cites establish that when a party seeks to modify or
13 revoke an injunction or final order, the party must seek relief from the court that issued
14 the order. *See Lapin*, 333 F.2d at 170 ("[T]he present proceedings to secure dissolution
15 of an injunction on the grounds here asserted should have been brought in the issuing
16 court, the District Court of Minnesota."); *Treadaway*, 783 F.2d at 1422 ("When a court
17 entertains an independent action for relief from the final order of another court, it
18 interferes with and usurps the power of the rendering court just as much as it would if it

19
20 ⁶ The Government also argues that Microsoft's Fourth Amendment claims should be
21 dismissed on prudential grounds because those claims do not fall within the Fourth
22 Amendment's zone of interests. However, the court does not address this argument or the
Government's arguments that Microsoft has failed to state a Fourth Amendment claim because
the court concludes that Microsoft may not pursue such claims due to Supreme Court and Ninth
Circuit precedent. *See infra* § III.C.

1 | were reviewing that court’s equitable decree.”). “[F]or a nonissuing court to entertain an
2 | action for such relief would be seriously to interfere with, and substantially to usurp, the
3 | inherent power of the issuing court.” *Lapin*, 333 F.2d at 172. Accordingly,
4 | “considerations of comity and orderly administration of justice demand that the
5 | nonrendering court . . . decline jurisdiction.” *Id.*

6 | Here, however, Microsoft does not seek to have this court invalidate other courts’
7 | orders. Rather, Microsoft asks the court to determine whether Section 2705(b) is
8 | constitutional insofar as it permits future courts to indefinitely prevent disclosure of the
9 | circumstances of government investigations. For this reason, the comity concerns that
10 | the Ninth Circuit addressed in *Lapin* and *Treadaway* do not apply, and the court declines
11 | to dismiss Microsoft’s First Amendment claim on this basis.

12 | 3. Stating a First Amendment Claim

13 | The Government also argues that Microsoft fails to state a First Amendment claim
14 | for which relief may be granted. The court now analyzes the Government’s arguments in
15 | favor of dismissal.

16 | a. *Prior Restraints and Content-Based Regulations*

17 | The Government first contends that Microsoft has no absolute right to discuss the
18 | Government’s requests for information or the substance of any nondisclosure orders to
19 | which Microsoft is bound. (*See* Mot. at 19; Reply at 8-9.) As Microsoft acknowledges
20 | (FAC ¶ 28), First Amendment rights are not absolute, *see Neb. Press Ass’n v. Stuart*, 427
21 | U.S. 539, 570 (1976). However, as the court explained above, Microsoft alleges that
22 | indefinite nondisclosure orders implicate its First Amendment rights because the orders

1 impinge on its right to speak about governmental affairs and the public’s right to access
2 search warrants. *See supra* § III.B.1.a; (FAC ¶¶ 24-26.) Microsoft also alleges that the
3 orders **categorically bar Microsoft from speaking about the existence of the orders and**
4 **therefore constitute content-based prior restraints.** (FAC ¶¶ 25, 28-30.)

5 “The First Amendment reflects ‘a profound national commitment to the principle
6 that debate on public issues should be uninhibited, robust, and wide-open.’” *Snyder v.*
7 *Phelps*, 562 U.S. 443, 452 (2011) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270
8 (1964)). “[S]peech on public issues occupies the highest rung of the hierarchy of First
9 Amendment values, and is entitled to special protection.” *Connick v. Myers*, 461 U.S.
10 138, 145 (1983). For these reasons, prior restraints of and content-based restrictions on
11 speech regarding matters of public concern are often impermissible.

12 “The term prior restraint is used to describe administrative and judicial orders
13 forbidding certain communications when issued in advance of the time that such
14 communications are to occur.” *Alexander v. United States*, 509 U.S. 544, 550 (1993)
15 (internal quotation marks and emphasis omitted). Prior restraints are “the most serious
16 and the least tolerable infringement on First Amendment rights.” *Neb. Press Ass’n*, 427
17 U.S. at 559. Although prior restraints are not unconstitutional per se, there is a heavy
18 presumption against their constitutionality. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215,
19 225 (1990). Accordingly, the Government bears the burden of “showing justification for
20 the imposition of such a restraint.” *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303,
21 1305 (1983).

22 //

1 Similarly, “[c]ontent-based laws—those that target speech based on its
2 communicative content—are presumptively unconstitutional and may be justified only if
3 the government proves that they are narrowly tailored to serve compelling state
4 interests.” *Reed v. Town of Gilbert, Ariz.*, --- U.S. ---, 135 S. Ct. 2218, 2226 (2015).
5 Content-based restrictions are subject to strict scrutiny, *id.*, and are presumptively invalid,
6 *United States v. Alvarez*, --- U.S. ---, 132 S. Ct. 2537, 2544 (2012). A regulation of
7 speech “is content-based if either the underlying purpose of the regulation is to suppress
8 particular ideas or if the regulation, by its very terms, singles out particular content for
9 differential treatment.” *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009) (en
10 banc) (internal citation omitted).

11 The Government argues that even if the nondisclosure orders constitute a prior
12 restraint, “the substantive basis and procedural safeguards provided by [S]ection 2705(b)
13 are sufficient to satisfy even the most searching First Amendment inquiry imposed in the
14 prior restraint context.” (Mot. at 21 (citing *Freedman v. Maryland*, 380 U.S. 51 (1965)).)

15 The Government also argues that Microsoft has not “demonstrated any likelihood that the
16 judicially-approved 2705(b) orders to which it is subject would fail the substantive First
17 Amendment requirements for content-based restrictions on speech.” (*Id.*) Microsoft
18 counters that it has adequately alleged that the indefinite orders are both prior restraints
19 and content-based regulations and that the statute fails to satisfy strict scrutiny. (Resp. at
20 20; *see also* FAC ¶¶ 24-25.)

21 The court begins its analysis by determining whether Microsoft has adequately
22 stated a claim that the Section 2705(b) orders at issue violate the First Amendment as

1 impermissible prior restraints. Section 2705(b) allows for indefinite nondisclosure
2 orders, which restrain Microsoft from speaking about government investigations without
3 any time limit on that restraint. For this reason, at least two other district courts have
4 concluded that indefinite nondisclosure orders pursuant to Section 2705(b) constitute
5 prior restraints on speech. *See Matter of Grand Jury Subpoena for:*
6 *[Redacted]@yahoo.com*, 79 F. Supp. 3d 1091, 1091 (N.D. Cal. 2015) (“[A]n indefinite
7 order would amount to an undue prior restraint of Yahoo!’s First Amendment right to
8 inform the public of its role in searching and seizing its information.”); *In re Sealing*, 562
9 F. Supp. 2d at 878, 881 (holding that an indefinite nondisclosure order would violate “the
10 First Amendment prohibition against prior restraint of speech” and stating that
11 “indefinitely sealed means permanently sealed”); *see also In re Application of the U.S.*,
12 131 F. Supp. 3d at 1270-71 (concluding that under Section 2705(b), “notice by the
13 provider to the subscriber may be *indefinitely* restrained,” and “[g]overnment restraint of
14 an innocent provider from fulfilling contractual notice and privacy obligations raises
15 concerns different than direct government notice to an investigation target”).

16 Nonetheless, the Government contends that even if certain Section 2705(b) orders
17 impose prior restraints on speech, Section 2705(b) contains sufficient procedural
18 safeguards. (Mot. at 21.) “Where expression is conditioned on governmental permission,
19 such as a licensing system for movies, the First Amendment generally requires
20 procedural protections to guard against impermissible censorship.” *John Doe, Inc. v.*
21 *Mukasey*, 549 F.3d 861, 871 (2d Cir. 2008) (citing *Freedman*, 380 U.S. at 58). The
22 required procedural protections are: (1) “any restraint prior to judicial review can be

1 imposed only for a specified brief period during which the status quo must be
2 maintained”; (2) “expeditious judicial review of that decision must be available”; and (3)
3 “the censor must bear the burden of going to court to suppress the speech and must bear
4 the burden of proof once in court.” *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 321 (2002)
5 (quoting *FW/PBS*, 493 U.S. at 227). However, the indefinite nondisclosure orders that
6 Section 2705(b) allows are not administrative prior restraints imposed by a licensing
7 scheme because Section 2705(b) itself does not impose the prior restraint; rather, the
8 statute allows a court to issue an order imposing a prior restraint on speech. *See* 18
9 U.S.C. § 2705(b). Accordingly, the orders at issue here are more analogous to permanent
10 injunctions preventing speech from taking place before it occurs. *See, e.g., Alexander*,
11 509 U.S. at 550 (1993) (“Temporary restraining orders and permanent injunctions—*i.e.*,
12 court orders that actually forbid speech activities—are classic examples of prior
13 restraints.”); *Oakley, Inc. v. McWilliams*, 879 F. Supp. 2d 1087, 1089-90 (C.D. Cal.
14 2012). For this reason, the *Freedman* procedural safeguards do not appear to apply in
15 this context.

16 In any event, even if the procedural safeguards outlined in *Freedman* are met, the
17 Government must show that the statute in question meets strict scrutiny.⁷ *See In re Nat’l*
18

19 ⁷ At oral argument, the Government argued for the first time that the speech at issue here
20 is subject to lesser scrutiny because the speech does not address matters of public concern. Even
21 if the Government had properly presented this theory, the court disagrees with the Government’s
22 characterization. *See Snyder*, 562 U.S. at 452 (describing matters of public concern as matters
related to political, social, or other concerns to the community); *First Nat’l Bank of Boston v.*
Bellotti, 432 U.S. 765, 777 (1978) (“The inherent worth of the speech in terms of its capacity for
informing the public does not depend upon the identity of its source, whether corporation,
association, union, or individual.”).

1 | *Sec. Letter*, 930 F. Supp. 2d 1064, 1071 (N.D. Cal. 2013) (holding that the Government
2 | must “meet the heightened justifications for sustaining prior-restraints announced in
3 | *Freedman v. Maryland*” and that the restraint “must be narrowly tailored to serve a
4 | compelling government interest”), 1074 (“Simply because the government chose to meet
5 | the *Freedman* safeguards in issuing and seeking to compel the [National Security Letter]
6 | at issue here, does not foreclose Petitioner’s ability to challenge the constitutionality of
7 | the statute’s provisions.”); *Admiral Theatre v. City of Chi.*, 832 F. Supp. 1195, 1203
8 | (N.D. Ill. 1993) (noting that even if procedural safeguards are met “the system is still
9 | subject to ‘least restrictive means’ scrutiny to determine its constitutionality”). Microsoft
10 | alleges that the indefinite nondisclosure orders are prior restraints because they prohibit
11 | Microsoft from engaging in protected speech before Microsoft actually engages in that
12 | speech. (FAC ¶ 24.) Microsoft further alleges that the orders are not narrowly tailored to
13 | serve the government’s interest in conducting sensitive investigations because Microsoft
14 | continues to be restrained from speaking even after “secrecy is no longer required to
15 | satisfy” the government’s interest. (*Id.* ¶ 28; *see also id.* ¶ 6.) Specifically, Microsoft

17 | As the Government points out (MTD at 21; Reply at 10), the Second Circuit has held in
18 | the National Security Letter context that “the nondisclosure requirement of subsection 2709(c) is
19 | not a typical prior restraint or a typical content-based restriction warranting the most rigorous
20 | First Amendment scrutiny.” *John Doe*, 549 F.3d at 877. However, the court is not persuaded to
21 | apply the same logic here. First, the Second Circuit based its conclusion in large part on the
22 | national security context in which Section 2709(c) operated. *See generally id.* Although Section
2705(b) made be utilized in national security investigations, nothing indicates that national
security investigations are the sole use or purpose of nondisclosure orders under Section 2705(b).
Second, the statutory provision at issue in *John Doe* imposed temporal limits on the
nondisclosure orders. *Id.* at 877. Such temporal limitations are not required under Section
2705(b), and according to Microsoft’s amended complaint, are frequently absent from orders
issued pursuant to that statute. (*See* FAC ¶ 33).

1 contends that for purposes of issuing an indefinite nondisclosure order under Section
2 2705(b), “the assessment of adverse consequences need not be based on the specific facts
3 of the investigation” and “the assessment is made only at the time the government applies
4 for the secrecy order.” (*Id.* ¶ 6 (emphasis omitted).) For these reasons, Microsoft’s
5 complaint contains sufficient facts that—taken as true and viewed in the light most
6 favorable to Microsoft—state a claim to relief that is plausible on its face. *See Iqbal*, 556
7 U.S. at 678.

8 In addition, Microsoft alleges that Section 2705(b) orders preclude Microsoft from
9 speaking about an entire topic—government surveillance and investigations. (*See* FAC
10 ¶¶ 16, 25.) Microsoft states that of the more than 6,000 demands for customer
11 information that it has received, a majority of the demands are coupled with orders
12 “forbidding Microsoft from telling the affected customers that the government was
13 looking at their information.” (*Id.* ¶ 16.) This prohibition amounts to a content-based
14 restriction on speech, which, like a prior restraint, is subject to strict scrutiny. *See Reed*,
15 135 S. Ct. at 2226.

16 Microsoft further alleges that three parts of Section 2705(b) fail strict scrutiny
17 review: (1) that Section 2705(b) “allows a court to issue secrecy orders of a prolonged
18 duration (FAC ¶ 28), (2) that “reason to believe standard” in Section 2705(b) “fails to
19 require that a secrecy order be the least restrictive means available” in a particular case
20 (*id.* ¶ 29), and (3) that Section 2705(b) allows an indefinite nondisclosure order “in the
21 absence of any case-specific compelling interest,” is “substantially broader than
22 necessary,” and “provides no meaningful constraints, (*id.* ¶ 30). The court concludes that

1 Microsoft has alleged sufficient facts that when taken as true state a claim that certain
2 provisions of Section 2705(b) fail strict scrutiny review and violate the First Amendment.

3 However, even if a lesser standard of review applies to Microsoft's First
4 Amendment claim, Microsoft's allegations support the reasonable inference that
5 indefinite nondisclosure orders impermissibly burden Microsoft's First Amendment
6 rights. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757
7 (1985) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and describing the
8 balancing test that is applied in First Amendment cases involving matters of private
9 concern); *In re § 2703(d)*, 787 F. Supp. 2d at 438 (describing a balancing approach for
10 evaluating First Amendment rights in the context of government investigations). For
11 example, Microsoft alleges that indefinite nondisclosure orders continue to burden its
12 First Amendment rights after the government's interest in keeping investigations secret
13 dissipates. (FAC ¶¶ 28, 32.) In addition, Microsoft alleges that courts do not have
14 occasion to revisit the indefinite orders unless Microsoft challenges the individual orders
15 in court. (*Id.* ¶ 19). Accepting these allegations as true, Microsoft's First Amendment
16 rights may outweigh the state's interest such that indefinite disclosure orders
17 impermissibly burden Microsoft's rights. Accordingly, Microsoft's complaint contains
18 sufficient factual allegations to support a First Amendment claim.

19 For these reasons, the court concludes Microsoft has adequately alleged a facially
20 plausible First Amendment claim. *See Iqbal*, 556 U.S. at 678.

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22 //

1 ***b. Overbreadth Doctrine***

2 The Government also argues that Microsoft fails to state a First Amendment
3 overbreadth claim because “as a party subject to numerous [S]ection 2705(b) orders,
4 Microsoft is wrong to suggest that it may seek invalidation of that section pursuant to the
5 ‘overbreadth doctrine.’”⁸ (Mot. at 18.) In addition, the Government contends that the
6 overbreadth challenge should be dismissed because “the only fact alleged by Microsoft to
7 support its facial challenge is the number of purportedly ‘indefinite’ orders, . . . which
8 says nothing about whether the application has been applied constitutionally in those
9 instances.” (*Id.* at 19.) Microsoft responds that it can assert an overbreadth challenge
10 even though “it bases its allegations on the thousands of unconstitutional secrecy orders
11 that stifle its own speech.” (Resp. at 17 (emphasis omitted).) Microsoft contends that it
12 challenges three aspects of Section 2705(b) on First Amendment grounds, that “[i]f any
13 one of these provisions is invalid, the statute is unconstitutional on its face,” and that it
14 has thus adequately stated an overbreadth claim. (*Id.*)

15 “The First Amendment doctrine of overbreadth is an exception to [the] normal rule
16 regarding standards for facial challenges.” *Virginia v. Hicks*, 539 U.S. 113, 118 (2003).

17
18 ⁸ The Government’s briefing contests Microsoft’s overbreadth challenge on Rule 12(b)(6)
19 grounds. (*See* Mot. at 18-19.) At oral argument, however, counsel for the Government framed
20 its challenge to this claim as an attack on subject matter jurisdiction under Rule 12(b)(1).
21 Although courts typically view the overbreadth doctrine as relaxing prudential limits on
22 standing, *see United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1132 (N.D. Cal. 2002), that
view of the doctrine is inapplicable where, as here, the plaintiff asserts an overbreadth challenge
to a statute that has also been applied to the plaintiff, *see, e.g., Fox*, 492 U.S. at 484. In addition,
courts generally evaluate a challenge to prudential standing under Rule 12(b)(6). *See Cetacean*
Cmty. v. Bush, 386 F.3d 1169, 1175 (9th Cir. 2004); *Elizabeth Retail Props., LLC v. KeyBank*
Nat’l Ass’n, 83 F. Supp. 3d 972, 985-86 (D. Or. 2015) (“While constitutional standing is
evaluated under Rule 12(b)(1), prudential standing is evaluated under 12(b)(6).”).

1 Generally, “[i]n a facial challenge on overbreadth grounds, the challenger contends that
2 the statute at issue is invalid because it is so broadly written that it infringes unacceptably
3 on the First Amendment rights of third parties.” *Elcom*, 203 F. Supp. 2d at 1132.
4 However, the overbreadth doctrine may “be invoked in the unusual situation . . . where
5 the plaintiff has standing to challenge all the applications of the statute he contends are
6 unlawful, but his challenge to some of them . . . will fail unless the doctrine of
7 overbreadth is invoked.”⁹ *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484
8 (1989) (emphasis omitted). As the Ninth Circuit has pointed out, “[t]echnically, the
9 overbreadth doctrine does not apply if the parties challenging the statute engage in the
10 allegedly protected expression[, but this technicality] does not mean that plaintiffs cannot
11 challenge an ordinance on its face . . . if the ordinance restricts their own constitutionally
12 protected conduct.” *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 949 (9th Cir.
13 1997). “[T]hus, whether the ‘overbreadth doctrine’ applies to [a plaintiff’s] First
14 Amendment challenge is more of a technical academic point than a practical concern.”
15 *Id.* In any event, “[i]t is not the usual judicial practice . . . to proceed to an overbreadth
16 issue unnecessarily—that is, before it is determined that the statute would be valid as
17
18

19 ⁹ Microsoft states in its response to the Government’s motion to dismiss that it “has third-
20 party standing to assert the First Amendment rights of its customers, who receive no notice and
21 therefore cannot exercise their own First Amendment rights to speak out about government
22 scrutiny.” (Resp. at 19 n.7.) However, besides asserting an overbreadth challenge and the
public’s right to access warrant information, Microsoft does not allege that it has third-party
standing to assert its customers’ First Amendment rights and makes no substantive argument on
these points. (*See* FAC; Resp.)

1 applied.” *Fox*, 492 U.S. at 484-85. Accordingly, “the lawfulness of the particular
2 application of the law should ordinarily be decided first.”¹⁰ *Id.* at 485.

3 “For a statute to be facially invalid on overbreadth grounds, it must be
4 substantially overbroad.” *Acosta v. City of Costa Mesa*, 694 F.3d 960, 970 (9th Cir.
5 2012). “A statute is substantially overbroad if a substantial number of its applications are
6 unconstitutional, judged in relation to the statute’s legitimate sweep.” *United States v.*
7 *Perelman*, 695 F.3d 866, 870 (9th Cir. 2012) (internal quotation marks omitted). “The
8 first step in overbreadth analysis is to construe the challenged statute; it is impossible to
9 determine whether a statute reaches too far without first knowing what the statute
10 covers.” *United States v. Williams*, 553 U.S. 285, 293 (2008).

11 The court rejects the Government’s argument that Microsoft may not proceed with
12 an overbreadth challenge. Although a plaintiff generally brings an overbreadth challenge
13 to assert that a law violates the First Amendment rights of parties that are not before the
14 court, a plaintiff may nevertheless assert an overbreadth challenge to a law that the
15 plaintiff contends also violates its own First Amendment rights.¹¹ *See Fox*, 492 U.S. at

16
17 ¹⁰ An as-applied challenge “contends that the law is unconstitutional as applied to the
18 litigant’s particular speech activity, even though the law may be capable of valid application to
19 others.” *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998). “A paradigmatic
20 as-applied attack . . . challenges only one of the rules in a statute, a subset of the statute’s
21 applications, or the application of the statute to a specific factual circumstance, under the
22 assumption that a court can ‘separate valid from invalid subrules or applications.’” *Hoye v. City*
of Oakland, 653 F.3d 835, 857 (9th Cir. 2011) (quoting Richard H. Fallon, Jr., *As-Applied and*
Facial Challenges and Third-Party Standing, 113 HARV. L. REV. 1321, 1334 (2000)). “[T]he
substantive legal tests used in the two challenges are invariant.” *Id.* (internal quotation marks
omitted).

¹¹ Further, Microsoft contends that indefinite nondisclosure orders under Section 2705(b)
impinge on the public’s right of access to court documents. (*See* FAC ¶ 26 (stating that orders

1 484; *Nunez*, 114 F.3d at 949. In addition, Microsoft alleges that “a substantial number”
 2 of Section 2705(b)’s applications are unconstitutional compared to Section 2705(b)’s
 3 “legitimate sweep.” *See Perelman*, 696 F.3d at 870; (FAC ¶¶ 23, 27-31.) Specifically,
 4 Microsoft alleges that Section 2705(b)’s “overbreadth manifests itself in at least three
 5 ways”: (1) by permitting nondisclosure orders “for such period as the court deems
 6 appropriate”; (2) by permitting a court to issue a nondisclosure order when the court has
 7 “reason to believe” notification would result in one of five outcomes listed in Section
 8 2705(b); and (3) by allowing a court to issue a nondisclosure order when notification to
 9 the target would “otherwise seriously jeopardiz[e] an investigation or unduly delay[] a
 10 trial.” (FAC ¶¶ 27-31.) Contrary to the Government’s characterization, these allegations
 11 adequately support Microsoft’s claim that Section 2705(b) is unconstitutionally
 12 overbroad.¹²

14 issued under 2705(b) “improperly inhibit the public’s right of access to search warrants under
 15 both the common law and the First Amendment”).) Thus, as to at least one of the First
 16 Amendment rights Microsoft asserts, Microsoft alleges that Section 2705(b) is “so broadly
 17 written that it infringes unacceptably on the First Amendment rights of third parties.” *Elcom*
 18 *Ltd.*, 203 F. Supp. 2d at 1132; *see also Times Mirror Co.*, 873 F.2d at 1217 (holding that there is
 no First Amendment right of public access to warrant materials before an indictment issues);
Custer Battlefield Museum & Store, 658 F.3d at 1194-95 (stating that the court “expressly
 reserved” the issue of “whether the public has a constitutional right of access after an
 investigation has been terminated”).

19 ¹² At this stage of the litigation, Microsoft need not present evidence of unconstitutional
 20 applications of Section 2705(b)—it must only allege “a claim to relief that is plausible on its
 21 face.” *Twombly*, 550 U.S. at 570; *see also Comite de Jornaleros de Redondo Beach v. City of*
 22 *Redondo Beach*, 657 F.3d 936, 944 (9th Cir. 2011) (stating on review of a district court’s grant
 of summary judgment that “[t]he party challenging the law need not necessarily introduce
 admissible evidence of overbreadth, but generally must at least ‘describe the instances of
 arguable overbreadth of the contested law’” (quoting *Wash. State Grange v. Wash. State*
Republican Party, 552 U.S. 442, 449 n.6 (2008))); *Martinez v. City of Rio Rancho*, --- F. Supp.
 3d ---, 2016 WL 3919491, at *10 (D. N.M. July 20, 2016) (“The plaintiff bears the burden of

1 c. *Other First Amendment Theories*

2 The Government also argues that Microsoft’s “other possible First Amendment
3 legal theories” fail. (MOT. at 24.) Specifically, the Government contends that
4 “Microsoft may challenge the continued need for secrecy at any time” and “lacks
5 standing to raise the claims of” third parties (*id.*), that Section 2705(b)’s “reason to
6 believe” standard is sufficient (*id.*), and that Section 2705(b) is constitutional because the
7 Government has sufficiently important interests in avoiding the list of harms under which
8 the Government can seek a nondisclosure order (*id.* at 25).

9 The court rejects the Government’s ancillary arguments. First, although Microsoft
10 may challenge whether any given order should subject Microsoft to continued secrecy,
11 that ability does not prevent Microsoft from bringing a constitutional challenge to the
12 statute under which the orders may be issued. *See, e.g., In re Sealing*, 562 F. Supp. 2d at
13 878, 881 (concluding that indefinite nondisclosure orders under 2705(b) may be
14 unconstitutional); *[Redacted]@yahoo.com*, 79 F. Supp. 3d 1091 (same). Further,
15 Microsoft has standing to assert its First Amendment claims because Microsoft alleges
16 that it has suffered a First Amendment injury and will likely suffer similar injuries in the
17 future. *See supra* § III.B.1.a. Microsoft therefore need not show third-party standing as
18 to its First Amendment claim. Finally, the Government’s arguments that the “reason to

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20 _____ demonstrating substantial overbreadth exists from the text of the statute and the facts of the case.”).

21 Further, because the court is not deciding the constitutionality of Section 2705(b)
22 as-applied to Microsoft, it is of no moment that the court ordinarily decides an as-applied challenge before deciding an overbreadth challenge. (*See* FAC ¶ 32); *Serafine v. Branaman*, 810 F.3d 354, 364 (5th Cir. 2016).

1 believe” standard that Microsoft contends is unconstitutional and that it has compelling
2 interests sufficient to justify indefinite nondisclosure orders under Section 2705(b) are
3 not properly before the court at this stage of litigation. For these reasons, the court rejects
4 Microsoft’s ancillary arguments to dismiss Microsoft’s First Amendment claims.

5 4. As-Applied Challenge

6 The Government’s final argument against Microsoft’s First Amendment claim
7 assails Microsoft’s as-applied challenge on the basis that Microsoft has not pleaded
8 sufficiently particular facts to support such a challenge. (Mot. at 28-29.) Specifically,
9 the Government asserts that “Microsoft has not provided specific facts about any instance
10 of the application of [S]ections 2703 and 2705(b) in support of its claims ‘as applied to
11 Microsoft’” and “provides no information about any particular instance or order.” (*Id.* at
12 29.) Microsoft counters that “[t]he distinction between facial and as-applied challenges
13 ‘goes to the breadth of the remedy employed by the [c]ourt, not what must be pleaded in
14 a complaint.’” (Resp. at 25 (quoting *Citizens United v. Fed. Election Comm’n*, 558 U.S.
15 310, 331 (2010)).)

16 A plaintiff asserting an as-applied challenge must allege sufficient facts to
17 demonstrate a statute’s “unconstitutionality as applied to [the plaintiff’s] activities.”
18 *Pickup v. Brown*, No. 2:12-cv-02497-KJM-EFB, 2016 WL 4192406, at *4 (E.D. Cal.
19 Aug. 9, 2016). “[A]n as-applied challenge requires an allegation that a law is
20 unconstitutional as applied to a particular plaintiff’s speech activity, even though it may
21 be valid as applied to others.” *Venice Justice Comm. v. City of L.A.*, --- F. Supp. 3d ---,
22 2016 WL 4724557, at *4 (C.D. Cal. Sept. 9, 2016).

1 Although the Government is correct that “[a]n as-applied challenge goes to the
2 nature of the application rather than the nature of the law itself” (Mot. at 29 (quoting
3 *Desert Outdoor Advert. v. Oakland*, 506 F.3d 798, 805 (9th Cir. 2007))), that observation
4 does not warrant dismissal of Microsoft’s as-applied challenge. Microsoft alleges in its
5 complaint that Section 2705(b) has been unconstitutionally applied to Microsoft because
6 in a 20-month period ending in May 2016, courts have issued more than 450 indefinite
7 nondisclosure orders accompanying a warrant. (FAC ¶ 32.) Each order allegedly
8 prevents Microsoft from speaking about the government investigations it is required to
9 participate in. (*Id.*) In addition, Microsoft alleges that all of those orders were issued
10 under Section 2705(b)’s “reason to believe standard,” which Microsoft contends does not
11 meet strict scrutiny, and that “it appears that a substantial number of the orders may have
12 relied on the . . . catchcall provision” that Microsoft also asserts is unconstitutional. (*Id.*
13 ¶¶ 29, 32.) The court finds that Microsoft has sufficiently stated an as-applied challenge
14 because Microsoft alleges that Section 2705(b) has been unconstitutionally applied to
15 Microsoft’s speech with acts that—taken as true—support a plausible claim for relief.

16 C. Fourth Amendment Claim

17 The Government argues that the court must dismiss Microsoft’s Fourth
18 Amendment claims because Microsoft cannot assert the Fourth Amendment rights of its
19 users.¹³ (Mot. at 14.) Specifically, the Government contends that Fourth Amendment

20 ¹³ The Government frames this issue as one of standing. (Mot. at 14 (“Microsoft’s
21 inability to bring a claim on behalf of its users is properly viewed as an absence of the personal
22 injury requirement for Article III standing.”).) However, the Supreme Court has held that
“definition of [Fourth Amendment] rights is more properly placed within the purview of
substantive Fourth Amendment law than within that of standing.” *Rakas v. Illinois*, 439 U.S.

1 rights are personal rights that a third party cannot assert. (*Id.*) Microsoft counters by
2 stating that it meets the test for third-party standing developed in *Powers v. Ohio*, 499
3 U.S. 400 (1991),¹⁴ which Microsoft contends allows third-party standing “where the
4 absent party is hindered from protecting its Fourth Amendment interests.” (Resp. at 28
5 n.13.) Because Microsoft addressed the Government’s argument only in a footnote, the
6 court invited the parties to file supplemental briefing on this particular issue in advance of
7 oral argument. (*See* 1/19/17 Order (Dkt. # 103); Msft. Supp. Br. (Dkt. # 104).)

8 In its supplemental brief, Microsoft concedes that two Supreme Court cases,
9 *Alderman v. United States*, 394 U.S. 165 (1969), and *Rakas v. Illinois*, 439 U.S. 128
10 (1978), establish a general rule against a third party vicariously asserting the Fourth
11 Amendment rights of another person, but Microsoft argues that this general rule yields in
12 “special circumstances,” such as where a person cannot assert his own Fourth
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14 _____
15 128, 140 (1978); *see also Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (“Central to our analysis
16 was the idea that in determining whether a defendant is able to show the violation of his (and not
17 someone else’s) Fourth Amendment rights, the definition of those rights is more properly placed
18 within the purview of substantive Fourth Amendment law than within that of standing.” (internal
19 quotation marks omitted)). On the other hand, the Ninth Circuit continues to refer to the analysis
20 as addressing standing. *See, e.g., Moreland v. Las Vegas Metro. Police Dep’t*, 159 F.3d 365, 371
(9th Cir. 1998) (“Regardless of whether Appellants have standing to assert a Fourth Amendment
claim based on Douglas’s death, they each may assert a Fourteenth Amendment claim based on
the related deprivation of their liberty interest arising out of their relationship with Douglas.”);
Ellwest Stereo Theatres, Inc. v. Wenner, 681 F.2d 1243, 1248 (9th Cir. 1982) (“Ellwest has no
standing to assert the [F]ourth [A]mendment rights of its customers.”). Whether the analysis is
viewed as one of substantive law or standing, however, does not impact the court’s subsequent
analysis.

21 ¹⁴ In *Powers*, the Supreme Court held that a plaintiff has standing to vindicate violations
22 of a third party’s constitutional rights when the plaintiff demonstrates (1) an injury in fact, (2) a
close relationship with the third party, and (3) a hindrance to the third party’s ability to protect its
own legal interests. 499 U.S. at 411.

1 Amendment rights.¹⁵ (Msft. Supp. Br. at 3.) Microsoft argues that even in the context of
2 the Fourth Amendment, third-party standing jurisprudence allows a plaintiff to bring suit
3 on another person’s behalf where the person could not “effectively vindicate[]” his
4 rights “except through an appropriate representative before the Court.” (*Id.* at 6
5 (quoting *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 459 (1958).) Microsoft contends that
6 *Alderman* explicitly contemplates this outcome because in that case, the Court concluded
7 that no “special circumstances” warranted allowing the plaintiff to assert the Fourth
8 Amendment rights of a party not before the Court. (*See id.* at 3-4.) Finally, Microsoft
9 argues that “courts do conduct *Powers* analyses to determine whether litigants may bring
10 claims based on infringement of others’ Fourth Amendment rights.” (*Id.* at 6.)

11 Having reviewed this area of Fourth Amendment law, the court concludes that the
12 Supreme Court and the Ninth Circuit have routinely held in a variety of circumstances
13 that a plaintiff may not assert the Fourth Amendment rights of another person. *See, e.g.*,
14 *Alderman*, 394 U.S. at 174 (stating the “general rule that Fourth Amendment rights are
15 personal rights which, like some other constitutional rights, may not be vicariously
16 asserted”); *Rakas*, 439 U.S. at 134. In *Alderman*, the Supreme Court unequivocally
17 stated that “Fourth Amendment rights are personal rights which, like some other
18 constitutional rights, may not be vicariously asserted.” 394 U.S. at 174. Based on this
19 principle, the Supreme Court concluded that a third party may not invoke the
20 exclusionary rule “because it is proper to permit only defendants whose Fourth
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22 ¹⁵ The Government did not file a supplemental brief. (*See Dkt.*)

1 Amendment rights have been violated to benefit from the rule’s protections.” *Rakas*, 439
2 U.S. at 134; *see also United States v. Salvucci*, 448 U.S. 83, 95 (1980) (“[T]he values of
3 the Fourth Amendment are preserved by a rule which limits the availability of the
4 exclusionary rule to defendants who have been subjected to a violation of their Fourth
5 Amendment rights.”). Specifically, the Supreme Court held that “[a] person who is
6 aggrieved by an illegal search and seizure only through the introduction of damaging
7 evidence secured by a search of a third person’s premises or property has not had any of
8 his Fourth Amendment rights infringed.” *Id.* at 134. In fashioning this rule, the Supreme
9 Court noted that “[t]here is no reason to think that a party whose rights have been
10 infringed will not, if evidence is used against him, have ample motivation to move to
11 suppress it.” *Id.*; *see also Alderman*, 394 U.S. at 174 (“None of the special circumstances
12 which prompted *NAACP v. Alabama* . . . and *Barrows v. Jackson* . . . are present here.”).
13 For this reason, third parties cannot benefit from the exclusionary rule when the third
14 party’s Fourth Amendment rights have not been violated. *See id.*

15 Courts also apply this rule outside of the exclusionary rule context. For example,
16 the Supreme Court and the Ninth Circuit have prevented plaintiffs in cases brought under
17 42 U.S.C. § 1983 from invoking another person’s Fourth Amendment rights. In *Plumhoff*
18 *v. Rickard*, the Supreme Court refused to allow the respondent, who was driving a car, to
19 show that the number of shots fired in a police interaction was constitutionally excessive
20 due to the presence of a passenger in the front seat. --- U.S. ---, 134 S. Ct. 2012, 2022
21 (2014). The Court based its decision on the fact that “Fourth Amendment rights are
22 personal rights which . . . may not be vicariously asserted” and concluded that the

1 passenger's "presence in the car [could not] enhance [the respondent's] Fourth
2 Amendment rights." *Id.* The Ninth Circuit has also held that "the general rule is that
3 only the person whose Fourth Amendment rights were violated can sue to vindicate those
4 rights." *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 369 (9th Cir. 1998)
5 (noting an exception to that general rule based on a statute that allowed "the survivors of
6 an individual killed as a result of an officer's excessive use of force [to] assert a Fourth
7 Amendment claim on that individual's behalf if the relevant state's law authorizes a
8 survival action" (citing 42 U.S.C. § 1988(a))); *see also Mabe v. San Bernardino Cty.,*
9 *Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1111 (9th Cir. 2001) (citing *United States v.*
10 *Taketa*, 923 F.2d 665, 670 (9th Cir. 1991)) ("[The plaintiff] has no standing to claim a
11 violation of [the plaintiff's daughter's] Fourth Amendment rights.").

12 As Microsoft points out, a "general rule" often has exceptions and courts have
13 found "special circumstances" to give rise to third-party standing. (*See* Msft. Supp. Br. at
14 3-4); *Alderman*, 394 U.S. at 174. However, the Supreme Court and Ninth Circuit have
15 also adhered to the principle that a third party may not sue to vindicate another person's
16 Fourth Amendment rights in cases that did not involve the exclusionary rule or Section
17 1983. For example, in a case involving facts similar to those here, bank customers, a
18 bank, and a bankers' association filed suit to challenge the constitutionality of the Bank
19 Secrecy Act of 1970. *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 25 (1974). "Under the
20 Act, the Secretary of the Treasury [was] authorized to prescribe by regulation certain
21 recordkeeping and reporting requirements for banks and other financial institutions in the
22 country" to combat "the unavailability of foreign and domestic bank records of customers

1 thought to be engaged in activities entailing criminal or civil liability.” *Id.* at 26. Among
2 other claims, the plaintiffs asserted a Fourth Amendment claim that the financial
3 transaction details the Act required banks to give to the Government amounted to an
4 unreasonable search. *Id.* at 64. The Supreme Court did not allow “the California
5 Bankers Association or the Security National Bank [to] vicariously assert such Fourth
6 Amendment claims on behalf of bank customers in general.” *Id.* at 69.

7 The Ninth Circuit also held that a threat of “dragnet searches” and “spying” did
8 not threaten a theater’s privacy interests under the Fourth Amendment, but rather “the
9 interests of its patrons.” *Ellwest*, 681 F.2d at 1248. The Court held that because “Fourth
10 [A]mendment rights are personal rights . . . which may not be vicariously asserted,”
11 “*Ellwest* ha[d] no standing to assert the [F]ourth [A]mendment rights of its customers.”
12 *Id.* Other federal courts have reached similar conclusions. *See, e.g., Daniels v. Southfort*,
13 6 F.3d 482, 484 (7th Cir. 1993) (holding that the plaintiff “lacks standing to complain
14 about injuries to his friends” because “Fourth Amendment rights cannot be asserted
15 vicariously” in a case involving a Fourth Amendment challenge to Chicago Police
16 Department harassment against the plaintiff and “his friends”); *Keller v. Finks*, No.
17 13-03117, 2014 WL 1283211, at *6 (C.D. Ill. Mar. 31, 2014) (citing *Salvucci*, 448 U.S. at
18 86-87) (stating that “[t]he rule against third-party standing is especially strong in the
19 context of the Fourth Amendment” and holding that “the rule against third-party standing
20 in the context of the Fourth Amendment bars Plaintiff’s claim”); *Haitian Refugee Ctr. v.*
21 *Gracey*, 809 F.2d 794, 809 (D.C. Cir. 1987) (summarizing “[t]he Supreme Court’s
22 rejection of litigants’ attempts to raise the [F]ourth [A]mendment rights of third parties”);

1 *but see Heartland Acad. Cmty. Church v. Waddle*, 427 F.3d 525, 532-33 (8th Cir. 2005)
2 (holding that a school had associational standing to assert the Fourth Amendment rights
3 of its students and distinguishing this case from cases that involve the exclusionary rule).
4 Taken together, these cases embody a particularly narrow view of third-party standing in
5 the Fourth Amendment realm.¹⁶

6 Microsoft argues that in all of these cases, the person to whom the Fourth
7 Amendment right belonged could go to court to vindicate his own right, whereas
8 Microsoft contends that its customers cannot do so here. (*See* Msft. Supp. Br. at 2-5.)
9 On this basis, Microsoft encourages the court to apply the three-part *Powers* test and
10 conclude that it has standing to pursue these Fourth Amendment claims. (*Id.* at 5-6); *see*
11 *also supra* n.18. Specifically, Microsoft contends that this case involves “special
12 circumstances” similar to those present in *N.A.A.C.P.* and *Barrows v. Jackson*, 346 U.S.
13 249 (1953). (*Id.* at 6.) In those cases, the Supreme Court allowed an organization to
14 assert its members’ rights and white property owners to assert the Fourteenth Amendment
15 rights of property owners of color. *See N.A.A.C.P.*, 357 U.S. at 459 (allowing the
16 N.A.A.C.P. associational standing to assert the constitutional rights of its members to
17 resist an order that required the N.A.A.C.P. to release its membership list); *Barrows*, 346

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20 ¹⁶ The general policies behind prudential limits on standing further support this
21 conclusion. The Supreme Court instructs that “[f]ederal courts must hesitate before resolving a
22 controversy, even one within their constitutional power to resolve, on the basis of the rights of
third persons not parties to the litigation.” *Singleton v. Wulff*, 428 U.S. 106, 114 (1976). The
Supreme Court cautions courts not to “adjudicate such rights unnecessarily” and indicates that
“third parties themselves usually will be the best proponents of their own rights.” *Id.* at 113-14.

1 U.S. at 255 (allowing white residents standing to assert the constitutional rights of other
2 people to invalidate a racially discriminatory restrictive covenant).

3 In addition, Microsoft cites four cases in which federal courts applied the *Powers*
4 test to determine whether a plaintiff had third-party standing to assert a Fourth
5 Amendment claim. (See Msft. Supp. Br. at 6); *DeRaffele v. City of Williamsport*, No.
6 4:14-cv-01849, 2015 WL 5781409, at *7 (M.D. Pa. Aug. 19, 2015) (applying the *Powers*
7 test and concluding that the plaintiff lacked standing to assert his tenants' First, Fourth,
8 Fifth, and Fourteenth Amendment rights because "he ha[d] not shown that the tenants
9 face[d] a substantial obstacle to asserting their own rights and interests"); *Al-Aulaqi v.*
10 *Obama*, 727 F. Supp. 2d 1, 24 (D.D.C. 2010) (applying *Powers* to a Fourth Amendment
11 claim and concluding that the plaintiff could not "show that a parent suffers an injury in
12 fact if his adult child is threatened with a future extrajudicial killing"); *Franklin v.*
13 *Borough of Carteret Police Dep't*, No. 10-1467 (JLL), 2010 WL 4746740, at *4 (D.N.J.
14 Nov. 15, 2010) (applying *Powers* to a Fourth Amendment claim and determining that the
15 plaintiff had third-party standing); *Daly v. Morgenthau*, No. 98 CIV. 3299(LMM), 1998
16 WL 851611, at *4 (S.D.N.Y. Dec. 9, 1998) (citing both *Rakas* and *Powers* and finding
17 that "there is no indication that" the person not before the court was "hindered in her
18 ability to protect her own interests"). These cases are not binding on the court.

19 Moreover, the court finds them unpersuasive in light of the Supreme Court's and the
20 Ninth Circuit's broad language and the wide range of applications in which those Courts
21 have applied the principle against third-party standing in the Fourth Amendment context.

22 //

1 Indeed, the cases Microsoft cites do not directly address the Supreme Court and Ninth
2 Circuit case law that the court examines above.

3 Based on the foregoing analysis, the court concludes that Microsoft may not bring
4 a claim to vindicate its customers' Fourth Amendment rights. Although the Supreme
5 Court and the Ninth Circuit routinely employ the third-party standing doctrine to cases
6 involving constitutional rights, that doctrine is in tension with Fourth Amendment
7 jurisprudence. Indeed, the court has identified only one non-binding case in which a
8 court has employed the *Powers* test to allow third-party standing when the party bringing
9 suit seeks to vindicate another person's Fourth Amendment rights. *See Franklin*, 2010
10 WL 4746740, at *3-4 (holding that a parent had standing to bring an excessive force
11 claim on the parent's minor child's behalf). On the other hand, the court has not
12 identified any binding case law or compelling rationale to limit the Supreme Court's and
13 Ninth Circuit's general holdings that Fourth Amendment rights are personal rights to
14 cases involving the exclusionary rule or to Section 1983 suits.

15 The court acknowledges the difficult situation this doctrine creates for customers
16 subject to government searches and seizures under Sections 2703 and 2705(b). As
17 Microsoft alleges, the indefinite nondisclosure orders allowed under Section 2705(b)
18 mean that some customers may never know that the government has obtained information
19 in which those customers have a reasonable expectation of privacy. (FAC ¶¶ 7 ("Section
20 2703 allows the government to search and seize customers' private information without
21 providing any notice to the customer, while Section 2705(b) permits the government to
22 obtain an order gagging the cloud services provider based upon a constitutionally

1 insufficient showing.”), 35 (“The interaction of these provisions means the government
2 can access a customer’s most sensitive information without the customer having any way
3 to learn about, or challenge, the government’s intrusion.”.) For this reason, some of
4 Microsoft’s customers will be practically unable to vindicate their own Fourth
5 Amendment rights. (*Id.* ¶ 38 (“[C]ustomers lack sufficient knowledge to challenge
6 government action because of the government’s tactic of operating behind a veil of
7 secrecy.”)); *see also Reforming ECPA’s Secret Docket* at 328 (“[T]he suppression
8 remedy is no consolation to the law-abiding citizen who is never charged with a crime
9 and who never learns, even after the fact, that her emails and phone records have been
10 obtained and reviewed by the government.”). This conundrum, however, is not unique to
11 this case; it is also true of the victim of an unreasonable search in a stranger’s home. *See*
12 *Alderman*, 394 U.S. at 134. The source of the court’s conclusion is thus the product of
13 established and binding precedent, which precludes the court from allowing Microsoft to
14 vindicate Fourth Amendment rights that belong to its customers. This court cannot
15 faithfully reconcile the broad language of those cases and Microsoft’s theory of Fourth
16 Amendment standing on the facts of this case; that task is more properly left to higher
17 courts.¹⁷

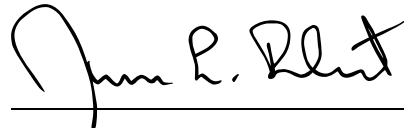
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19 ¹⁷ A court should freely give leave to amend “when justice so requires.” Fed. R. Civ. P.
20 15(a)(2). However, a court need not grant leave to amend where amendment would be futile.
21 *Miller v. Rykoff–Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988). A proposed amendment is
22 futile if it would not state a “cognizable legal theory” or “sufficient facts.” *Balistreri v. Pacifica*
Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990). Because of the binding authority regarding
third-party standing in the Fourth Amendment context, which the court addressed in detail *supra*,
the court concludes that any amendment of Microsoft’s Fourth Amendment claim on behalf of its
customers would be futile. For this reason, the court declines to grant Microsoft leave to amend
this claim.

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IV. CONCLUSION

For the foregoing reasons, the court GRANTS IN PART and DENIES IN PART the Government's motion to dismiss (Dkt. # 38).

Dated this 8th day of February, 2017.



JAMES L. ROBART
United States District Judge