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12 **UNITED STATES DISTRICT COURT**
 13 **NORTHERN DISTRICT OF CALIFORNIA**
SAN FRANCISCO DIVISION

14 FIRST UNITARIAN CHURCH OF LOS) 15 ANGELES, <i>et al.</i> ,) 16) Plaintiffs,) 17) v.) 18) NATIONAL SECURITY AGENCY, <i>et al.</i> ,) 19) Defendants.) 20) 21) 22) 23) 24) 25) 26) 27) 28)	Case No. 3:13-cv-03287-JSW GOVERNMENT DEFENDANTS’ NOTICE OF MOTION AND MOTION TO DISMISS; OPPOSITION TO PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT Date: April 25, 2013 Time: 9:00 a.m. Courtroom: 11 – 19th Floor Judge Jeffrey S. White
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NOTICE OF MOTION

1
2 PLEASE TAKE NOTICE that, on April 25, 2013 at 9:00 a.m, before Judge Jeffrey S.
3 White, Defendants NATIONAL SECURITY AGENCY; KEITH B. ALEXANDER, Director of
4 the NSA, in his official capacity; the UNITED STATES DEPARTMENT OF JUSTICE and
5 ERIC HOLDER, the Attorney General, in his official capacity; Acting Assistant Attorney
6 General for National Security JOHN P. CARLIN, in his official capacity; the FEDERAL
7 BUREAU OF INVESTIGATION and JAMES B. COMEY, Director of the FBI, in his official
8 capacity; and JAMES R. CLAPPER, Director of National Intelligence, in his official capacity
9 (hereafter the “Government Defendants”) will move to dismiss the claims in the First Amended
10 Complaint pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, and
11 will also oppose the motion for partial summary judgment filed by Plaintiffs pursuant to Rule 56
12 of the Federal Rules of Civil Procedure. The grounds for this motion and opposition are as
13 follows:

14 1. The Court lacks subject matter jurisdiction with respect to all claims because
15 Plaintiffs’ First Amended Complaint fails to establish their standing to sue, and Plaintiffs have
16 adduced no evidence in support of their motion for partial summary judgment that establishes
17 their standing in fact.

18 2. The Court lacks subject matter jurisdiction with respect to Plaintiffs’ claim that
19 the Government’s alleged conduct exceeds its statutory authority under the Foreign Intelligence
20 Surveillance Act because such a claim is precluded by statute.

21 3. The First Amended Complaint fails to state claims upon which relief can be
22 granted that the Government’s alleged conduct exceeds its statutory authority under the Foreign
23 Intelligence Surveillance Act, that the Government’s alleged conduct violates the First, Fourth,
24 and Fifth Amendments, or that Plaintiffs are entitled to a return of property under Federal Rule
25 of Criminal Procedure 41(g).

26 4. The Court should also deny partial summary judgment with respect to Plaintiffs’
27 aforementioned statutory and First Amendment claims—the only claims as to which Plaintiffs
28 have moved for summary judgment—for the reasons stated above, and because (a) Plaintiffs’

1 have failed to adduce sufficient evidence to establish that the Court has subject matter
2 jurisdiction over such claims; and (b) Plaintiffs have failed to adduce sufficient evidence to
3 establish essential elements of such claims.

4 The grounds for this motion and opposition, where applicable, are set forth in the
5 accompanying (i) Memorandum of Points and Authorities in Support of the Government
6 Defendants' Motion to Dismiss and Opposition to Plaintiffs' Motion for Partial Summary; and
7 (ii) Exhibits A through R, as set forth in the Declaration of James J. Gilligan, filed herewith.

8 Dated: December 6, 2013

Respectfully Submitted,

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12 **UNITED STATES DISTRICT COURT**
 13 **NORTHERN DISTRICT OF CALIFORNIA**
SAN FRANCISCO DIVISION

14	FIRST UNITARIAN CHURCH OF LOS)
15	ANGELES, <i>et al.</i> ,)
16	Plaintiffs,)
17	v.)
18	NATIONAL SECURITY AGENCY, <i>et al.</i> ,)
19	Defendants.)

Case No. 3:13-cv-03287-JSW

**GOVERNMENT DEFENDANTS’
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 THEIR MOTION TO DISMISS AND
 OPPOSITION TO PLAINTIFFS’
 MOTION FOR PARTIAL
 SUMMARY JUDGMENT**

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INTRODUCTION

1
2 One of the greatest challenges the United States faces in combating international
3 terrorism and preventing potentially catastrophic terrorist attacks on our country is identifying
4 terrorist operatives and networks, particularly those operating within the United States. The
5 Government's exploitation of terrorist communications is a critical tool in this effort. Plaintiffs
6 in this case seek to invalidate an important means by which the National Security Agency
7 (NSA), acting under authority of the Foreign Intelligence Surveillance Court (FISC), has
8 gathered information about communications among known and unknown terrorist actors in order
9 to thwart future terrorist attacks.

10 Specifically, Plaintiffs challenge the NSA's collection, under a provision of the Foreign
11 Intelligence Surveillance Act (FISA) known as Section 215, of bulk "telephony metadata"—
12 business records created by (and belonging to) telecommunications service providers that include
13 such information as the time and duration of calls made, and the numbers dialed, but not the
14 content of anyone's calls, or their names and addresses. Collection of these records, which has
15 been repeatedly authorized by the FISC as consistent with governing law, and constitutional,
16 permits NSA analysts, acting under strict controls imposed by FISC orders, to detect
17 communications between foreign terrorists and any of their contacts located in the United States.
18 Plaintiffs assert that this activity is unauthorized by FISA, and violates the First, Fourth, and
19 Fifth Amendments. For the reasons discussed herein, the Court lacks jurisdiction to entertain
20 these claims, and Plaintiffs fail in any event to state claims on which relief can be granted. Thus,
21 the First Amended Complaint should be dismissed, and Plaintiffs' motion for partial summary
22 judgment on their statutory and First Amendment claims should be denied.

23 First, Plaintiffs fail to establish their standing to sue. The FISC's orders limit review of
24 the metadata for intelligence purposes to records with connections to identifiers (e.g., telephone
25 numbers) that are believed, based on reasonable, articulable suspicion, to be associated with
26 foreign terrorist organizations approved for targeting by the FISC. This requirement bars the
27 type of indiscriminate querying of the metadata, using identifiers not connected with terrorist
28 activity, to create comprehensive profiles of ordinary Americans' associations, as Plaintiffs

1 speculate. There is no non-speculative basis, then, to expect that queries of the metadata under
2 this standard will return information about calls either made by Plaintiffs, or made to them by
3 others. Plaintiffs' allegations that records of their calls could be used to glean the identities of
4 their members, constituents, and others who wish their association with Plaintiffs to remain
5 confidential, and that such persons are "chilled" by that prospect from contacting them, at most
6 state an injury attributable to misperceptions and conjecture about the Government's activities,
7 but not one fairly traceable to the Government's actual conduct. Second, Plaintiffs' contention
8 that the Government's alleged conduct exceeds its statutory authority under FISA is precluded,
9 *inter alia*, by FISA's detailed scheme for judicial review of specified intelligence activities. In
10 any event, as the FISC has repeatedly (and twice recently) found, the Government's bulk
11 collection of telephony metadata is lawful under FISA because there are reasonable grounds for
12 believing that such data as a whole are relevant to authorized FBI counter-terrorism
13 investigations. Contrary to Plaintiffs' contentions, this collection is not prohibited by the Stored
14 Communications Act, and nothing in Section 215 bars the FISC from prospectively directing the
15 production of electronic business records as they are created.

16 Third, the Government's collection of telephony metadata is constitutional, and Plaintiffs
17 make no showing to the contrary. Plaintiffs fail to state a Fourth Amendment claim because,
18 consistent with the FISC's repeated holdings, there has been no search or seizure of their
19 property or effects, and, as the Supreme Court held in *Smith v. Maryland*, 442 U.S. 735 (1979),
20 telephone subscribers have no protected privacy interest in the type of information at issue here.
21 In addition, even if the Government's conduct implicated a protected Fourth Amendment
22 interest, the bulk collection of telephony metadata would be "reasonable" and permissible in
23 light of the strong national interest in preventing terrorist attacks, and the minimal intrusion on
24 individual privacy. Plaintiffs also fail to state a First Amendment claim, primarily because good
25 faith intelligence-gathering conducted in a manner consistent with the Fourth Amendment,
26 without purpose to deter or punish protected speech or association, does not violate the First
27 Amendment. No parallel can be drawn between the intelligence-gathering activities Plaintiffs
28 seek to put at issue here and cases in which individuals or organizations were compelled to

1 disclose personally identifying information, or membership lists, based on their protected
2 associational activities. Nor, for purposes of their summary judgment motion, have Plaintiffs
3 met their burden of establishing a prima facie case of infringement of their associational
4 freedoms. Finally, Plaintiffs' due process claims fail for want of a constitutionally protected
5 privacy interest in telephony metadata, and even assuming such an interest exists, it does not
6 entitle them to notice of the Government's intelligence-gathering activities that could undermine
7 the Government's compelling interest in preventing terrorist attacks.

8 **STATEMENT OF FACTS**

9 **I. Statutory Background**

10 Congress enacted FISA to authorize and regulate certain governmental surveillance of
11 communications and other activities for purposes of gathering foreign intelligence. In enacting
12 FISA, Congress also created the FISC, an Article III court of 11 appointed U.S. district judges
13 with authority to consider applications for and grant orders authorizing electronic surveillance
14 and other forms of intelligence-gathering by the Government. 50 U.S.C. § 1803(a); *see In re*
15 *Motion for Release of Court Records*, 526 F. Supp. 2d 484, 486 (F.I.S.C. 2007).

16 At issue here is FISA's "business records" provision, 50 U.S.C. § 1861, enacted by
17 section 215 of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (Section 215).
18 Section 215 authorizes the FISC to issue an order for the "production of any tangible things
19 (including books, records, papers, documents, and other items) for an investigation [1] to obtain
20 foreign intelligence information not concerning a United States person or [2] to protect against
21 international terrorism." 50 U.S.C. § 1861(a)(1). The Government's application must include,
22 among other things, a statement of facts showing that there are "reasonable grounds to believe
23 that the tangible things sought are relevant to an authorized investigation . . . to obtain foreign
24 intelligence information not concerning a United States person or to protect against international
25 terrorism." *Id.* § 1861(b)(2)(A). The investigation must be authorized and conducted under
26 guidelines approved by the Attorney General under Executive Order 12333 (or a successor
27 thereto). *Id.* § 1861(a)(2)(A), (b)(2)(A). Information acquired from the records or other tangible
28 items received in response to a Section 215 order "concerning any United States person may be

1 used and disclosed by [the Government] without the consent of [that] person only in accordance
2 with . . . minimization procedures,” adopted by the Attorney General and enumerated in the
3 Government’s application, that “minimize the retention, and prohibit the dissemination, of
4 nonpublicly available information concerning unconsenting United States persons consistent
5 with the [Government’s] need . . . to obtain, produce, and disseminate foreign intelligence
6 information.” *Id.* § 1861(b)(2)(B), (g)(2), (h). The FISC must find that these requirements have
7 been met before it issues the requested order, which in turn must direct that the minimization
8 procedures described in the application be followed. *Id.* § 1861(c)(1).

9 Section 215 includes a scheme providing for judicial review of a production order once it
10 is granted, but only in limited circumstances. Specifically, it allows “[a] person receiving a
11 production order [to] challenge [its] legality” by filing a petition with the “review pool” of FISC
12 judges designated under 50 U.S.C. § 1803(e)(1) to review such orders. *Id.* § 1861(f)(1),
13 (2)(A)(i). A “pool” judge considering a petition to modify or set aside a production order may
14 grant the petition if the judge finds that the order does not meet the requirements of Section 215
15 or “is otherwise unlawful.” *Id.* § 1861(f)(2)(B). Either the Government or a recipient of a
16 production order may appeal the decision of the pool judge to the FISA Court of Review, with
17 review available thereafter on writ of certiorari in the Supreme Court. *Id.*; *see id.* § 1803(b).
18 Section 215’s carefully circumscribed provisions for judicial review were added when Congress
19 reauthorized the USA PATRIOT Act in 2006, and these provisions authorized contested
20 litigation before the FISC for the first time. 1 D. Kris & J. Wilson, National Security
21 Investigations & Prosecutions §§ 5:5, 19:7 (2d ed. 2012) (Kris & Wilson). The FISA does not
22 provide for review of Section 215 orders at the behest of third parties.

23 **II. The Collection and Analysis of Bulk Telephony Metadata Authorized by the FISC**

24 Plaintiffs here challenge the NSA’s FISC-authorized collection and analysis of bulk
25 telephony metadata to discover communications with and among unknown terrorist operatives.
26 Under this program, the Federal Bureau of Investigation (FBI) obtains orders from the FISC
27 pursuant to Section 215 directing certain telecommunications service providers to produce to the
28 NSA on a daily basis electronic copies of certain “call detail records, or ‘telephony metadata,’”

1 created by the recipient providers for calls to, from, or wholly within the United States. The
2 NSA then stores, queries, and analyzes the metadata for counter-terrorism purposes. Under the
3 FISC's orders, the NSA's authority to continue the program expires after approximately 90 days
4 and must be renewed. The FISC first authorized the program in May 2006, and since then has
5 renewed the program thirty-four times, under orders issued by fifteen different FISC judges.¹

6 Under the FISC's orders, telephony metadata is defined as "comprehensive
7 communications routing information" including but not limited to "originating and terminating
8 telephone number[s], International Mobile Subscriber Identity (IMSI) number[s], International
9 Mobile Station Equipment Identity (IMEI) number[s], trunk identifier[s], telephone calling card
10 numbers, and time and duration of call." Primary Order at 3 n.1. By the terms of the FISC's
11 orders, "[t]elephony metadata does not include the name, address, or financial information of a
12 subscriber or customer" or any party to a call. *Id.*; Secondary Order at 2. Nor do the FISC's
13 orders permit the Government, under this program, to listen to or record the contents of any
14 telephone conversations. Shea Decl. ¶¶ 7, 14-15, 18; Skule Decl. ¶¶ 7, 11.

15 The Government obtains these orders by submitting detailed applications from the FBI
16 explaining that the records are sought for investigations to protect against international terrorism
17 that concern specified foreign terrorist organizations identified in each application. Skule Decl.
18 ¶ 10; *see* 50 U.S.C. § 1861(a)(1), (b)(2)(A). As required by Section 215, the application contains
19 a statement of facts showing that there are reasonable grounds to believe that the metadata as a
20 whole are relevant to these investigations, supported by a declaration from a senior official of
21 NSA's Signals Intelligence Directorate. Skule Decl. ¶ 10. FISC orders authorizing collection of
22 the metadata are predicated on the Court's findings that there are "reasonable grounds to believe
23

24 ¹ Declaration of Teresa H. Shea (Shea Decl.) ¶¶ 13-14, 16-17, 20 (Exh. A); Declaration
25 of Joshua Skule (Skule Decl.) ¶¶ 3, 6 (Exh. B); *In re Application of the FBI for an Order*
26 *Requiring the Production of Tangible Things from [Redacted]*, Dkt. No. BR13-109 (F.I.S.C.
27 Aug. 29, 2013) (Aug. 29 FISC Op.) (Exh. C) at 29; *In re Application of the FBI for an Order*
28 *Requiring the Production of Tangible Things from [Redacted]*, Dkt. No. BR 13-158 (F.I.S.C.
Oct. 11, 2013) (Oct. 11 FISC Mem.) (Exh. D) at 2-6; *see also In re Application of the FBI for an*
Order Requiring the Production of Tangible Things [etc.], Dkt. No. BR13-80, Primary Order
(F.I.S.C. Apr. 25, 2013) (Primary Order) (Exh. E) at 3-4, 17; *In re Application of the FBI for an*
Order Requiring the Production of Tangible Things [etc.], Dkt. No. BR13-80 (F.I.S.C. Apr. 25,
2013) (Secondary Order) (Exh. F) at 1-2, 4.

1 that the [records] sought are relevant to authorized investigations . . . being conducted by the FBI
2 . . . to protect against terrorism.” *See* Primary Order at 1-2; Aug. 29 FISC Op. at 28.

3 As also required by Section 215, the FISC’s orders direct the Government to comply with
4 “minimization procedures” that strictly limit access to and review of the metadata, and limit
5 dissemination of information derived from the data, to valid counter-terrorism purposes. *See*
6 50 U.S.C. § 1861(b)(2)(B), (g), (h); Primary Order at 4-17; Skule Decl. ¶ 8; Shea Decl. ¶¶ 29-35.
7 Under these restrictions, NSA analysts may access the metadata only for purposes of obtaining
8 foreign intelligence information, and may do so only through “contact-chaining” queries
9 (electronic term searches) of the metadata using identifiers (typically telephone numbers)
10 approved as “seeds” by one of twenty-two designated officials in NSA’s Signals Intelligence
11 Directorate. Such approval may only be given upon a determination that, based on the factual
12 and practical considerations of everyday life on which reasonable and prudent persons act, there
13 are facts giving rise to a reasonable, articulable suspicion that a selection term used to query the
14 database is associated with one or more foreign terrorist organizations previously identified to
15 and approved for targeting by the FISC. Where the selection term is reasonably believed to be
16 used by a U.S. person, NSA’s Office of General Counsel must also determine that the term is not
17 regarded as associated with a foreign terrorist group solely on the basis of activities protected by
18 the First Amendment. These determinations are effective for finite periods of time. Shea Decl.
19 ¶¶ 19-23, 31; Primary Order at 6-9. This “reasonable, articulable suspicion” requirement bars
20 the indiscriminate querying of the telephony metadata based on identifiers not connected with
21 terrorist activity. Indeed, because of this requirement, the vast majority of the data obtained
22 under this program are never seen by any person; only the tiny fraction of the records responsive
23 to queries authorized under the “reasonable, articulable suspicion” standard are reviewed or
24 disseminated by NSA analysts. Shea Decl. ¶¶ 20, 23.

25 The accessible results of an approved query are limited by the FISC’s orders to records of
26 communications within three “hops,” or degrees of contact, from the seed. That is, the query
27 results may only include identifiers and associated metadata having a direct contact with the seed
28 (the first “hop”), identifiers and associated metadata having a direct contact with first “hop”

1 identifiers (the second “hop”), and identifiers and associated metadata having a direct contact
2 with second “hop” identifiers (the third “hop”). *Id.* ¶¶ 22, 31. Query results do not include the
3 names or addresses of individuals associated with the responsive telephone numbers, because
4 that information is not included in the database in the first place. *Id.* ¶ 21.

5 The NSA’s ability under this program to accumulate metadata in bulk, and to quickly
6 conduct contact-chaining analyses beyond the first hop, is crucial to the utility of the database.
7 These capabilities allow the NSA to conduct a level of historical analysis, and to discover contact
8 links, that cannot practically be accomplished through targeted intelligence-gathering authorities.
9 For example, the metadata may reveal that a seed telephone number has been in contact with a
10 previously unknown U.S. number. Examining the chain of communications out to the second
11 and in some cases a third hop may reveal a contact with other telephone numbers already known
12 to be associated with a foreign terrorist organization, thus establishing that the previously
13 unknown telephone number is itself likely associated with terrorism. This type of contact-
14 chaining is possible because the bulk collection of telephony metadata under the program creates
15 an historical repository that permits retrospective analysis of terrorist-related communications
16 across multiple telecommunications networks, and that can be immediately accessed as new
17 terrorist-associated identifiers come to light. *Id.* ¶¶ 46-49, 57-63; Skule Decl. ¶¶ 27-29.

18 Under the FISC’s orders, the results of NSA’s queries and analysis may be shared only to
19 allow Government investigators to discover persons, including persons (and their associates)
20 located in the United States, who have been in contact with known or suspected terrorist
21 organizations, and may themselves be engaged in terrorist activity. The NSA does not use query
22 results to provide the FBI with complete profiles even on suspected terrorists, or comprehensive
23 records of their associations, without determining that they would be useful to the FBI’s counter-
24 terrorism mission. Nor does it indiscriminately provide the FBI with a list of all identifiers
25 directly or indirectly connected (at one, two, and three hops) with a suspected terrorist identifier.
26 Rather, NSA applies the tools of signals intelligence tradecraft to focus only on those identifiers
27 which, based on its analytic judgment and experience, and other intelligence available to it, may
28 be of use to the FBI in detecting persons in the United States who may be associated with the

1 specified foreign terrorist organizations, and acting in furtherance of their goals. Shea Decl.
2 ¶¶ 26, 28; *see* Primary Order at 4.

3 In addition to these safeguards, the FISC's orders impose an extensive regime of internal
4 reporting, audits, and oversight; regular consultation between the NSA Office of the Inspector
5 General and the Department of Justice to assess compliance with FISC requirements; and
6 monthly reports to the FISC including, *inter alia*, a discussion of NSA's application of the
7 "reasonable, articulable suspicion" standard and the number of times query results containing
8 U.S. person information have been shared with anyone outside NSA. Primary Order at 4-16.

9 **III. Plaintiffs' Allegations**

10 According to Plaintiffs' First Amended Complaint (ECF No. 9) ("FAC"),² Plaintiffs are
11 social-welfare, interest-group, and political-advocacy organizations that bring suit on their own
12 behalf and (purportedly) on behalf of their members, staff, and volunteers. FAC ¶¶ 2, 17-38, 40.
13 Plaintiffs allege that in furtherance of their missions and operations, they make and receive
14 telephone calls within the United States both to and from their members, staffs, constituents, and
15 others. *Id.* ¶ 39. Based on the alleged premise that the NSA collects metadata on all (or at least
16 the "vast majority") of the telephone calls transiting the networks of all major
17 telecommunications carriers in the United States, *id.* ¶¶ 4-5, 53, 59, Plaintiffs assert that the NSA
18 has acquired and retained call-detail records of their communications, *id.* ¶¶ 12, 60, 62. And
19 although Plaintiffs' communications allegedly have no relevance to existing counter-terrorism
20 investigations, *id.* ¶¶ 65, 72, Plaintiffs nevertheless assert that the NSA has searched and
21 continues to search records of their telephone communications to construct "associational
22 network graph[s]" of their communications patterns, thus "disclos[ing] the[ir] expressive and
23 private associational connections," *id.* ¶¶ 7, 11-12, 69-71.

24 Plaintiffs allege that their associations and political-advocacy efforts (and those of their
25 members and staffs) "are chilled by [this] search and analysis of information" about their

26
27 ² For purposes of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the well-pleaded
28 factual allegations of a complaint must be accepted as true. *OSU Student Alliance v. Ray*, 699
F.3d 1053, 1061 (9th Cir. 2012). Defendants reserve the right, however, to contest Plaintiffs'
allegations, and/or their ability to prove their allegations without implicating protected state
secrets, as may be necessary or appropriate in further proceedings.

1 telephone calls. *Id.* ¶ 64. Specifically, they assert in their complaint and in their motion papers
2 that they “have lost the ability to assure their members and constituents [and others] that the fact
3 of their communications to Plaintiffs will be kept confidential.” *Id.* ¶¶ 63, 76; Pls.’ Mem. at 20.
4 As a result, Plaintiffs’ members and constituents have allegedly become “very worried,”
5 “afraid,” and “concerned” about the confidentiality of their communications with Plaintiffs, and
6 “having their calls [with Plaintiffs] taped and stored” or “logged” by Government agencies.
7 FAC ¶ 77; Pls.’ Mem. at 22. Plaintiffs allegedly “ha[ve] experienced a decrease in
8 communications from members and constituents” since the telephony metadata program became
9 publicly known, FAC ¶ 76, and due to the “[k]nowledge” that their communications “may
10 likely” be “monitored,” have in some cases restricted what their employees and members say
11 over the telephone about their organizational activities, or adopted other, more costly means of
12 holding confidential conversations. *Id.* ¶ 77(d), (e); *see also* Pls.’ Mem. at 21-23.

13 Plaintiffs maintain that the telephony metadata program thus violates their First, Fourth,
14 and Fifth Amendments rights, and is not authorized under Section 215. FAC ¶¶ 80-105. By way
15 of relief they seek an injunction “prohibiting [the Government’s] continued use” of the program,
16 an inventory of the records of their communications (assuming any) obtained under the program,
17 and the destruction of those records remaining in the Government’s possession. *Id.* at 24.

18 ARGUMENT

19 To avoid dismissal of their claims, Plaintiffs must show that their complaint “contain[s]
20 sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.”
21 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation omitted). “[C]onclusory
22 statements” and “bare assertions” of fact “are not entitled to the presumption of truth” and must
23 be “discount[ed]” prior to “determining whether a claim is plausible.” *Salameh v. Tarsadia*
24 *Hotel*, 726 F.3d 1124, 1129 (9th Cir. 2013) (internal quotation omitted). A “claim has facial
25 plausibility” when the remaining “well-pleaded allegations” allow “the court to draw the
26 reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at
27 678-79. Equally so, Plaintiffs cannot rely on “conclusory and bare bones” allegations to
28 establish their standing to sue. *Perez v. Nidek Co.*, 711 F.3d 1109, 1113 (9th Cir. 2013).

1 The Court may grant Plaintiffs' summary judgment motion only if, when the evidence is
2 viewed in the light most favorable to Defendants, there is no genuine issue as to any material fact
3 and Plaintiffs are entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S.
4 317, 322-23 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). Summary judgment
5 must be denied if Plaintiffs fail to adduce sufficient evidence to establish an essential element of
6 their claims, *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 987 (9th Cir. 2006), such as their
7 standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

8 **I. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THEIR STANDING**

9 **A. The Requirements of Article III Standing**

10 "The judicial power of the United States" is limited by Article III of the Constitution "to
11 the resolution of 'cases' and 'controversies,'" *Valley Forge Christian Coll. v. Americans United*
12 *for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). Demonstration of a plaintiff's
13 standing to sue "is an essential and unchanging part of the case-or-controversy requirement,"
14 *Lujan*, 504 U.S. at 560. The standing inquiry must be "especially rigorous" when reaching the
15 merits of a claim would force the Court to decide whether actions of a coordinate Branch of the
16 Federal Government in the field of intelligence gathering are unconstitutional. *Clapper v.*
17 *Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). To establish their standing, Plaintiffs must
18 show they have suffered an injury in fact that is "concrete, particularized, and actual or
19 imminent." *Id.* at 1147. Any "threatened injury must be *certainly* impending to constitute injury
20 in fact," whereas "allegations of *possible* future injury are not sufficient." *Id.* The injury must
21 be "fairly traceable to the challenged action" and be "redressable by a favorable ruling."
22 *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010).

23 At the summary judgment stage, to show that they have standing Plaintiffs must submit
24 "cognizable evidence of specific facts," and cannot rest on "mere allegations." *Snake River*
25 *Farmers' Ass'n v. Dep't of Labor*, 9 F.3d 792, 795 (9th Cir. 1993); *see Lujan*, 504 U.S. at 561.
26 The court may also consider extrinsic evidence on standing for purposes of resolving
27 Defendants' Rule 12(b)(1) motion. *See Table Bluff Reserv. (Wiyot Tribe) v. Phillip Morris, Inc.*,
28 256 F.3d 879, 882 (9th Cir. 2001); *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir.

1 1983). If Plaintiffs cannot carry their threshold jurisdictional burden of demonstrating their
 2 standing to sue, *Lujan*, 504 U.S. at 561, then “the [C]ourt cannot proceed” and must grant the
 3 Government’s motion to dismiss, *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998),
 4 and deny Plaintiffs’ partial summary judgment motion.

5 **B. Plaintiffs Have Failed to Establish Their Standing**

6 Plaintiffs’ summary judgment motion should be denied, and the complaint dismissed,
 7 because Plaintiffs have failed to demonstrate an injury meeting Article III’s standards. As
 8 discussed below, the consequences Plaintiffs are assertedly suffering as a result of the telephony
 9 metadata program arise from speculation on the part of their members, constituents, and others
 10 that the NSA has reviewed, or might in future review, call-detail records of their communications
 11 with Plaintiffs—and the consequent reluctance of these third parties to contact Plaintiffs for fear
 12 that the confidentiality of their communications may be compromised. These allegations are
 13 insufficient to confer standing on Plaintiffs, in particular because any resulting decisions by these
 14 third parties not to contact Plaintiffs are the product of their own unsubstantiated fears, and so
 15 are not fairly traceable to the telephony metadata program for Article III purposes.

16 Plaintiffs’ core allegations of injury stem from their assertion that to carry out their
 17 organizational missions they engage in communications with members, constituents, and other
 18 persons who wish their communications with Plaintiffs to remain confidential. FAC ¶ 76; *see*,
 19 *e.g.*, HRW Decl. ¶¶ 4, 8, 10; CAIR-F Decl. ¶¶ 4, 6. Plaintiffs emphasize that these third parties
 20 allegedly contact them less frequently since the public revelation and media coverage of the
 21 telephony metadata program, *see, e.g.*, Bill of Rights Comm. Decl. ¶ 4; Shalom Center Decl. ¶ 7;
 22 Students Decl. ¶ 5; Franklin Armory Decl. ¶ 4; Calguns Decl. ¶ 6, PPR Decl. ¶¶ 6, 7; Acorn
 23 Decl. ¶ 7; NLG ¶ 4; CA-NORML Decl. ¶ 9; CAL-FFL Decl. ¶ 5; Media Alliance Decl. ¶ 9,³ and
 24 that such third parties have expressed concern that their calls are being monitored, logged, or
 25 tracked by the NSA, or that they will be identified as supporting or being associated with a

26 ³ Besides the insufficiency of relating their asserted injury to the media’s portrayal of the
 27 program, rather than the actual conduct of the program itself, *see Lujan*, 504 U.S. at 560 (injury
 28 must be fairly traceable to challenged conduct), the Ninth Circuit has held that assertions of
 “coincident” timing are, in the context of establishing a prima facie First Amendment violation,
 insufficient to demonstrate a “causal link” between the two events. *See Dole v. Local Union*
375, 921 F.2d 969, 971-73 (9th Cir. 1990) (“Documenting a result does not prove its cause.”).

1 particular Plaintiff, *see, e.g.*, Acorn Decl. ¶ 8; Students Decl. ¶ 6; Bill of Rights Comm. Decl. ¶
2 8b; Franklin Armory Decl. ¶ 4; UUSC Decl. ¶ 4; Free Software Decl. ¶¶ 4c, 5; Free Press Decl.
3 ¶¶ 4, 5; CAL-FFL Decl. ¶ 4; Media Alliance Decl. ¶ 6; First Unitarian Decl. ¶¶ 4c, 8; CAIR-F
4 Decl. ¶ 4d; CAIR-CA Decl. ¶ 11. *See also* FAC ¶ 77.

5 But these allegations are all based on speculative fears and misconceptions about the
6 telephony metadata program, and are plainly insufficient to establish an injury satisfying the
7 requirements of Article III. The fears of third parties that call-detail records collected by the
8 NSA could be used to identify them as persons who associate with Plaintiffs are conjectural, at
9 best, and arise in large part from a failure to grasp how the program operates. Thus, the resulting
10 “chill” on their willingness to communicate with Plaintiffs cannot support Plaintiffs’ standing.
11 NSA personnel could identify persons with whom Plaintiffs speak by phone, either individually
12 or collectively, only by retrieving and reviewing metadata records of calls to or from Plaintiffs
13 (and then taking the next step of ascertaining the identities of the subscribers whose numbers are
14 documented in the records). But under the FISC’s orders, NSA personnel may only review
15 records responsive to queries initiated using identifiers that are believed, based on reasonable,
16 articulable suspicion, to be associated with specific foreign terrorist organizations approved for
17 targeting by the FISC. *See supra* at 6; Primary Order at 7; Shea Decl. ¶ 20. As a result, only a
18 tiny fraction of the records are ever seen by any person. Shea Decl. ¶ 23. The complaint
19 contains no well-pleaded, non-conclusory allegations, much less have Plaintiffs adduced any
20 evidence, that records of their calls are among the very few that NSA has accessed or reviewed
21 as a result of queries made under the “reasonable, articulable suspicion” standard (or otherwise).
22 Thus, it is sheer speculation to suggest that metadata records of calls to or from Plaintiffs either
23 have been or ever will be retrieved or reviewed through queries of the database, much less mined
24 by the NSA to develop “associational network graph[s]” of their contacts. FAC ¶ 7.

25 The Supreme Court’s decision in *Amnesty International* establishes that such speculation
26 concerning the reach of Government intelligence-gathering activities is insufficient to confer
27 standing on Plaintiffs. In *Amnesty International*, various organizations challenged the
28 constitutionality of amendments to FISA that expanded the Government’s authority to intercept

1 the communications of non-U.S. persons located abroad. 133 S. Ct. at 1144. The organizations
2 alleged that they interacted and engaged in sensitive communications with persons who were
3 likely to be considered by the Government as potential terrorists, or persons of interest in
4 terrorism investigations, *see id.* at 1145-46, and that communications to which they were parties
5 were likely therefore to be unlawfully intercepted. *Id.* at 1147. The Supreme Court held that this
6 allegation of harm was insufficient to establish standing, because it was “speculative whether the
7 Government w[ould] imminently target communications to which [the plaintiffs were] parties.”
8 *Id.* at 1148-50. The plaintiffs also argued, however, “that third parties might be disinclined to
9 speak with them due to a fear of surveillance.” *Id.* at 1152 n.7. The Court held that this
10 assertion, even if factual, “d[id] not establish an injury that [was] fairly traceable” to the
11 challenged statute, because it was “based on third parties’ subjective fear of surveillance.” *Id.*
12 (citing *Laird v. Tatum*, 408 U.S. 1, 10-14 (1972)).

13 The same analysis is controlling here. Any concerns Plaintiffs may harbor about the
14 confidentiality of their communications cannot give rise to standing, because it is just as
15 speculative that records of their communications have been, or will be, reviewed under the
16 telephony metadata program as it was in *Amnesty International* that “the Government w[ould]
17 imminently target communications to which [the plaintiffs there] were parties.” 133 S. Ct. at
18 1148. Any concerns of third parties about the confidentiality of their communications with
19 Plaintiffs likewise “do not establish injury that is fairly traceable to” the telephony metadata
20 program, “because they are based on third parties’ subjective fear of surveillance,” and not on
21 the actual operation of the program. *See id.* at 1152 n.7; *see also Ass’n of Pub. Agency*
22 *Customers v. Bonneville Power Admin.*, 733 F.3d 939, 950 (9th Cir. 2013) (injury cannot be
23 “result of the independent action of some third-party not before the court”) (internal quotations
24 omitted), and not on the actual operation of the program.⁴ Therefore, the subjective fears of
25

26 ⁴ In a similar vein, most Plaintiffs make the general assertion that now they can no longer
27 assure their clients and other associates of the confidentiality of their communications, *see, e.g.*,
28 Acorn Decl. ¶ 10, in other words, that they cannot allay the speculative fears of these third
parties. This is no more than a repackaged version of their third-party “chill” argument, and
suffers the same fate. *See Amnesty Int’l USA*, 133 S. Ct. at 1151 (refusing to accept a
“repackaged version” of the plaintiffs’ other “failed theory of standing”).

1 these third-parties (and the concomitant effect on Plaintiffs) furnish insufficient grounds on
2 which to base Plaintiffs' standing.⁵

3 The alternative and allegedly more costly and inefficient means of communicating that
4 some Plaintiffs claim to have adopted to preserve the confidentiality of their contacts, such as
5 holding in-person meetings, or communicating by U.S. mail,⁶ "fare[] no better" as a basis on
6 which to establish Plaintiffs' standing than the similar measures the plaintiffs took in *Amnesty*
7 *International*, 133 S. Ct. at 1150-51.⁷ This is so because Plaintiffs "do not face a threat of
8 certainly impending" review under the "reasonable, articulable suspicion" standard of any
9 records of their calls that may have been collected under the telephony metadata program. *See*
10 *supra* at 12. Hence, "the costs that they have incurred to avoid" such scrutiny "are simply the
11 product of their fear of surveillance," which the Supreme Court's decisions make clear "is
12 insufficient to create standing." *Amnesty Int'l*, 133 S. Ct. at 1152; *Laird*, 408 U.S. at 10, 14
13 ("Allegations of a subjective 'chill'" arising from plaintiffs' knowledge of the existence of "a
14 governmental investigative and data-gathering activity," without "any specific action of the
15 [Government] against them," were "not an adequate substitute for a claim of specific present
16 objective harm or a threat of specific future harm"); *Vernon v. City of Los Angeles*, 27 F.3d 1385,

17
18 ⁵ Rendering these third parties' fears even more highly speculative is the fact that
19 Plaintiffs have offered no proof that metadata of their calls actually have been or will imminently
20 be collected under the telephony metadata program. The Government has acknowledged that the
21 program remains ongoing, and that multiple electronic communication service providers have
22 been participants in the program since its inception in 2006, *see supra* at 4-5, but it has not
23 officially acknowledged the identities of the providers from which the Government continues to
24 collect telephony metadata in bulk. Thus Plaintiffs can only speculate as to whether providers
25 from which they receive telephone service have participated in the program—and this is
26 insufficient. *See Amnesty Int'l USA*, 133 S. Ct. at 1147-48. The Government has acknowledged
27 the authenticity of the now-expired April 25, 2013, FISC Secondary Order directed to Verizon
28 Business Network Services (VBNS), but none of the Plaintiffs allege or provide evidence that
they were VBNS customers during the lifespan of that order. Twenty-one of the twenty-four
plaintiff organizations either do not identify the companies from which they obtain telephone
service, or name companies other than VBNS. Three Plaintiffs attest that they are current
customers of "Verizon Business," but do not specify whether they were customers of VBNS at
the time the acknowledged April 25, 2013, Secondary Order remained in effect. Franklin
Armory Decl. ¶ 6; Shalom Center Decl. ¶ 3; HRW Decl. ¶ 13.

⁶ *See, e.g.*, Acorn Decl. ¶ 9; Charity & Security Network Decl. ¶¶ 5, 9; NLG Decl. ¶ 4;
HRW Decl. ¶¶ 7, 9; PPR Decl. ¶ 12b; CAIR-F Decl. ¶¶ 4-5; CAIR-Ohio Decl. ¶¶ 9, 11, 15; PPR
Decl. ¶ 12; Shalom Center Decl. ¶ 6.

⁷ Many of these measures (such as delaying publishing articles or limiting content of
telephone calls) seem to have nothing to do with the operation of the challenged program.

1 1394-95 (9th Cir. 1994) (applying *Laird* when plaintiff did not show actual monitoring of his
 2 First Amendment activities). To the extent Plaintiffs have adopted these alternative means of
 3 communication in an effort to allay the fears of their associates who may be reluctant to speak
 4 with Plaintiffs by telephone, then the injury is again traceable only to the subjective fears of
 5 these third parties, and not to the actual conduct of the telephony metadata program.⁸

6 In short, Plaintiffs' allegations of injury are plainly insufficient to establish Article III
 7 standing and avoid dismissal. In any event, they have failed to carry their burden of proving
 8 their standing in fact for purposes of summary judgment.

9 **II. CONGRESS IMPLIEDLY PRECLUDED JUDICIAL REVIEW OF PLAINTIFFS'** 10 **STATUTORY CLAIM**

11 Even if Plaintiffs could demonstrate their standing, Congress has impliedly precluded
 12 judicial review of the type of statutory claim Plaintiffs assert—that is, a claim for declaratory and
 13 injunctive relief by telephone subscribers that the provision of telephony metadata to the
 14 Government, pursuant to a FISC order, violates Section 215. *See* FAC, ¶¶ 102-108. Thus,
 15 Plaintiffs cannot rely on the waiver of sovereign immunity codified in the Administrative
 16 Procedure Act (APA), 5 U.S.C. § 702, to supply the needed waiver for their statutory claim. The
 17 APA's waiver of sovereign immunity does not apply where, as here, Congress has granted
 18 consent to suit in specified circumstances or fora, or by specified parties, under another statute,
 19 and thus impliedly foreclosed the relief sought. *Id.* § 702. Nor does the APA authorize suit
 20 where “statutes preclude judicial review,” as Section 215 clearly does. *Id.* § 701(a)(1).
 21 Plaintiffs' statutory claim must therefore be dismissed.

22 “It is elementary that the United States, as sovereign, is immune from suit save as it
 23 consents to be sued” *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (internal
 24 quotations omitted); *see also FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (“Absent a waiver,

25 ⁸ In *Vernon* the Ninth Circuit distinguished a prior case, *Presbyterian Church (USA) v.*
 26 *United States*, 870 F.2d 518 (9th Cir. 1989), in which the Court of Appeals had found *Laird*
 27 inapplicable. *See id.* at 521-23. In that case the Court of Appeals found standing existed where
 28 government agents actually “entered the churches wearing ‘body bugs’ and surreptitiously
 recorded church services,” *id.* at 520, and, “as a result of the surveillance of worship services,”
id. at 521, those particular churches claimed injuries to their operations. *See id.* at 522. In
 contrast here, Plaintiffs have not properly alleged or adduced evidence that any of the telephony
 metadata associated with their calls (never mind the content of those calls) has been, or certainly
 will be, reviewed or analyzed by the NSA.

1 sovereign immunity shields the Federal Government and its agencies from suit.”). It is further
2 axiomatic that the existence of consent to sue the United States “is a prerequisite for
3 jurisdiction.” *United States v. Mitchell*, 463 U.S. 206, 212 (1983). As a general matter, section
4 702 of the APA grants the Government’s consent to suit in actions “seeking relief other than
5 money damages.” It is subject to a number of significant exceptions, however, two of which
6 apply here. First, section 702 itself provides that “[n]othing herein . . . confers authority to grant
7 relief if any other statute that grants consent to suit expressly or impliedly forbids the relief
8 which is sought.” 5 U.S.C. § 702. Second, mirroring the first exception, the APA provides that
9 its chapter on judicial review, including section 702, does not apply “to the extent that . . .
10 statutes preclude judicial review.” 5 U.S.C. § 701(a)(1).

11 The first exception “prevents plaintiffs from exploiting the APA’s waiver to evade
12 limitations on suit contained in other statutes.” *Match-E-Be-Nash-She-Wish Band of*
13 *Pottawatomí Indians v. Patchak*, 132 S. Ct. 2199, 2204-05 (2012). As Congress explained when
14 it enacted the APA’s waiver of immunity, this “important carve-out,” *id.* at 2204, makes clear
15 that section 702 was “not intended to permit suit in circumstances where statutes forbid or limit
16 the relief sought,” that is, where “Congress has consented to suit and the remedy provided is
17 intended to be the exclusive remedy.” H.R. Rep. No. 94-1656, at 12-13 (1976), 1976 WL 14066,
18 *12-13. “For example, . . . a statute granting the United States’ consent to suit, i.e., the Tucker
19 Act, ‘impliedly forbids’ relief other than the [damages] remedy provided by the Act.” *Id.* Thus,
20 “[w]hen Congress has dealt in particularity with a claim and [has] intended a specified
21 remedy’—including its exceptions—to be exclusive, that is the end of the matter; the APA does
22 not undo the judgment.” *Pottawatomí Indians*, 132 S. Ct. at 2205 (quoting *Block v. North*
23 *Dakota ex rel. Bd. of Univ. and Sch. Lands*, 461 U.S. 273, 286, n.22 (1983)).

24 To much the same effect, section 701(a)(1) of the APA withdraws section 702’s waiver
25 of immunity where “statutes preclude judicial review.” *Id.* § 701(a)(1) (“This chapter applies,
26 according to the provisions thereof, except to the extent that statutes preclude judicial review”).
27 “Whether and to what extent a particular statute precludes judicial review is determined not only
28 from its express language, but also from the structure of the statutory scheme, its objectives, its

1 legislative history, and the nature of the administrative action involved.” *Block v. Cmty.*
2 *Nutrition Inst.*, 467 U.S. 340, 345 (1984). “[W]hen a statute provides a detailed mechanism for
3 judicial consideration of particular issues at the behest of particular persons, judicial review of
4 those issues at the behest of other persons may be found to be impliedly precluded.” *Id.*; *see*
5 *Pottawatomí Indians*, 132 S. Ct. at 2213.

6 The USA PATRIOT Act permits specified suits against the United States but impliedly
7 forbids Plaintiffs’ statutory claim for equitable relief. Two provisions of that Act are pertinent.
8 First, section 223 of the Act, 18 U.S.C. § 2712, titled “Civil actions against the United States,”
9 authorizes suits against the United States to recover money damages only—not injunctive
10 relief—for willful violations of the Wiretap Act, the Stored Communications Act (SCA), and
11 three particular provisions of FISA, all involving the use and disclosure of information, not its
12 collection. Pub. L. No. 107-56, § 223, 115 Stat. 294 (2001). The three specified provisions of
13 FISA are sections 106(a), 305(a), and 405(a), which respectively impose restrictions on the use
14 and disclosure of information obtained from electronic surveillance, physical searches, and pen
15 registers or trap and trace devices authorized under FISA. *See* 50 U.S.C. §§ 1806(a), 1825(a),
16 1845(a). Significantly, violations of the parallel “use” provision of Section 215, 50 U.S.C.
17 § 1861(h), which restricts the Government’s use and disclosure of tangible things received in
18 response to a production order, are *not* made actionable under section 2712 (and even if they
19 were, it would only be for money damages, not injunctive relief).⁹ Congress further stipulated
20 that an action under § 2712 shall be the exclusive remedy against the United States for claims
21 falling within its purview. *Id.* § 2712(d). Section 2712 thus deals with claims for misuses of
22 information obtained under FISA in great detail, including the intended remedy, and Plaintiffs
23 cannot rely on section 702 to bring a claim for violation of FISA’s terms that Congress did not
24 provide for under 18 U.S.C. § 2712. *Pottawatomí Indians*, 132 S. Ct. at 2205.

25 This Court recently reached this very conclusion in the *Jewel* and *Shubert* cases, a
26 broader challenge to alleged NSA “dragnet” acquisition of communications records and

27
28 ⁹ The enactment of section 223 of the USA PATRIOT Act in 2001 preceded enactment of
50 U.S.C. § 1861(h) in 2006. 1 *Kris & Wilson* § 19:11 at 718. Congress has not since amended
§ 2712 to include violations of § 1861(h) as a basis for suit.

1 surveillance of communications content after the 9/11 attacks. *Jewel v. NSA*, 2013 WL 3829405
2 (N.D. Cal. July 23, 2013). The Court concluded there that § 2712, “by allowing suits against the
3 United States only for damages based on three provisions of [FISA], impliedly bans suits against
4 the United States that seek injunctive relief under any provision of FISA.” *Id.* at *12. Thus, the
5 Court held that the plaintiffs could not rely on section 702 of the APA as a waiver of sovereign
6 immunity for their FISA-based claim for injunctive relief. *Id.* The same result is required here.¹⁰

7 Second, Section 215 forecloses the specific statutory claim for injunctive relief asserted
8 here, by this type of plaintiff, in this forum. Section 215 carefully delineates who may seek
9 review of a production order and in what court, specifying that “[a] person receiving a
10 production order” may challenge its legality “by filing a petition with [the FISC review] pool” to
11 “modify or set [it] aside.” 50 U.S.C. §§ 1861(f)(1), (f)(2)(A)(i), (B). Congress explicitly stated
12 that the FISC petition review pool “shall have jurisdiction to review petitions filed pursuant to
13 section 1861(f)(1) . . . of this title.” *Id.* § 1803(e)(1). Congress provided for further review of
14 the resulting FISC’s decisions in the FISA Court of Review and the Supreme Court, not in
15 district court. *Id.* § 1861(f)(3). Congress also expressly provided that a Section 215 order “shall
16 remain in effect” unless it has been “explicitly modified or set aside consistent with this
17 subsection.” *Id.* § 1861(f)(2)(D). Thus, Congress specifically authorized challenges to Section
18 215 production orders only by recipients of those orders—the entities that create and own the
19 records, *see United States v. Miller*, 425 U.S. 435, 440-41 (1976)—and permitted those entities
20 to challenge production orders only by filing a challenge in the FISC, thereby impliedly
21 precluding a challenge brought by subscribers of telecommunications services in district court.

22 Congress chose this process for subjecting Section 215 orders to “a substantial and
23 engaging adversarial process,” Aug. 29 FISC Op. at 15, in order to ensure meaningful judicial
24 review of those orders while at the same time protecting the critical national security interests
25 that FISA is designed to advance. The purpose of Section 215’s judicial review procedure was
26 to “place Section 215 proceedings on a par with grand jury proceedings, where the subpoena

27 ¹⁰ The *Jewel* plaintiffs’ FISA claim, brought under 50 U.S.C. §§ 1809, 1810 (*see Jewel*,
28 2013 WL 3829405 at *3), was also not included in the list of FISA claims actionable under §
2712, as is the case here. *See id.* at *12 (noting the plaintiffs’ argument that they were bringing a
different claim, seeking different relief, from the specific FISA provisions listed in § 2712(a)).

1 recipient obviously knows of its existence and can challenge it in court.” *Implementation of the*
2 *USA PATRIOT Act: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland*
3 *Security, Comm. on the Judiciary*, 109th Cong. at 65 (2005) (statement of Robert Khuzami).
4 Congress specifically considered whether to extend a similar right of action to third parties but
5 declined to do so because it would have been incompatible with the secrecy required for Section
6 215 orders.¹¹ To promote its effective functioning as a tool for counter-terrorism, Section 215,
7 like other provisions of FISA, establishes a secret and expeditious process that involves only the
8 Government and the recipient of the order. *See* 50 U.S.C. § 1861(d)(1) (recipient may not
9 “disclose to any other person that the [FBI] has sought or obtained” a production order). Under
10 the statutory framework, third parties such as Plaintiffs, who are not recipients of Section 215
11 orders, are not even supposed to know of their existence, nor play a role in the process of testing
12 their compliance with the statute. *See, e.g.*, H.R. Rep. No. 109-174 at 128 (2005). The fact that
13 Plaintiffs learned about the program they seek to challenge as the result of an unauthorized and
14 unlawful disclosure does not change this essential facet of FISA’s structure. Allowing third
15 parties to contest an order’s compliance with Section 215’s relevance and other requirements
16 would potentially compromise the secrecy and efficiency of the process Congress envisioned.

17 This “detailed mechanism for judicial consideration of particular issues” under Section
18 215 “at the behest of particular persons” means that “judicial review of those issues at the behest
19 of other persons” is “impliedly precluded.” *Cnty. Nutrition Inst.*, 467 U.S. at 349 (holding that
20 statutory scheme allowing dairy handlers to seek review of milk market orders precluded suits by
21 consumers); *Overton Power District No. 5 v. O’Leary*, 73 F.3d 253, 256 (9th Cir. 1996) (power
22 suppliers lacked right of action to challenge rate-setting decision where Congress intended only
23 contractors named in statute to do so); *Dellums v. Smith*, 797 F.2d 817, 823 (9th Cir. 1986)
24 (private citizens lacked right of action to challenge Attorney General’s decision not to conduct
25 preliminary investigation under the Ethics in Government Act, where Congress envisioned

26 ¹¹ *See id.* (“Beyond this amendment, however, the confidentiality provisions of Section
27 215 should not be disturbed. You do not want potential terrorists to know you are investigating
28 them or are aware of their plans.”). *See also* H.R. Rep. No. 109-174 at 128 (right to challenge
Section 215 order can only be given to the recipient, not the target, because the target does not
know about it); *id.* at 268 (statutory prohibition on disclosing Section 215 order to subject
prevents the subject from challenging it).

1 enforcement by congressional judiciary committees, not private citizens); *In re Application of the*
 2 *U.S. for an Order Pursuant to 18 U.S.C. § 2703(d)*, 830 F. Supp. 2d 114, 128-29 (E.D. Va. 2011)
 3 (provision of Stored Communications Act allowing Twitter subscribers to challenge orders
 4 requiring production to Government of “backup information” impliedly prohibited statutory
 5 challenge by subscribers to order requiring production of electronic records pertaining to them).

6 **III. THE GOVERNMENT’S BULK COLLECTION OF TELEPHONY METADATA IS AUTHORIZED UNDER SECTION 215.**

7 Plaintiffs assert that NSA’s collection of bulk telephony metadata is not authorized under
 8 Section 215 because (i) the records obtained are not “relevant” to authorized national security
 9 investigations, (ii) the Stored Communications Act, 18 U.S.C. § 2701, *et seq.* (SCA), does not
 10 permit the Government to obtain telephony metadata pursuant to Section 215; and (iii) Section
 11 215 does not authorize the FISC to order production of electronic business records on a
 12 prospective basis. Pls.’ Mem. at 6-17. Even if review of Plaintiffs’ statutory claim were not
 13 precluded, these contentions lack merit and should be rejected.

14 **A. The Government’s Bulk Collection of Telephony Metadata Comports** 15 **With Section 215’s Relevance Requirement.**

16 Section 215 authorizes the FISC to order “production of any tangible things” upon
 17 application by the FBI “showing that there are reasonable grounds to believe that the tangible
 18 things sought are relevant to an authorized [counter-terrorism] investigation.” 50 U.S.C.
 19 § 1861(a)(1), (b)(2)(A). Since May 2006, fifteen separate judges of the FISC have concluded on
 20 thirty-five occasions that the Government satisfied this requirement. Skule Decl. ¶¶ 6, 11.
 21 Plaintiffs now ask this Court to second-guess the FISC’s repeated conclusions and declare
 22 instead that the call-detail records the FISC ordered produced to the NSA are not, in fact,
 23 relevant to authorized counter-terrorism investigations. The Court should reject this invitation.

24 **1. The bulk telephony metadata collected under the FISC’s orders** 25 **are “relevant” to authorized national security investigations.**

26 The concept of “relevance” has developed an accepted legal meaning in the context of
 27 official investigations and civil proceedings, for which purposes documents are considered
 28 “relevant” not only where they directly bear on a matter, but also where they reasonably could
 lead to other information that may bear on the matter. In civil discovery, for example, the phrase

1 “relevant to the subject matter involved in the pending action” broadly encompasses “any matter
 2 that bears on, *or that reasonably could lead to other matters that could bear on*, any issue that is
 3 or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (emphasis
 4 added). An even broader relevance standard applies to grand jury subpoenas, which must be
 5 enforced unless “there is no reasonable possibility that *the category of materials* the Government
 6 seeks will produce information relevant to the general subject of the grand jury’s investigation.”
 7 *United States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991) (emphasis added). Likewise, the
 8 statutory authority conferred on administrative agencies to subpoena evidence that is “relevant to
 9 [a] charge under investigation” affords them “access to virtually any material that might cast
 10 light on the allegations” at issue, *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984).

11 In light of that basic understanding of relevance, courts in each of these contexts have
 12 categorically authorized the production of entire repositories of records, even when any
 13 particular record is unlikely to bear directly on the matter being investigated, where searching a
 14 large volume of information is the only feasible means of locating much smaller amounts of
 15 critical information within the data that directly bears on the matter under investigation.¹²
 16 Analogously, courts also issue search warrants permitting Government agents to copy entire
 17 computer hard drives and then later review their contents for the specific evidence described in
 18 the warrant. *See* Fed. R. Crim. P. 41(e)(2)(B).¹³

19 Both the text and legislative history confirm that Congress was acutely aware of and
 20 incorporated this accepted legal concept of relevance when it enacted Section 215’s relevance

21 ¹² *See, e.g., In re Subpoena Duces Tecum*, 228 F.3d 341, 350-51 (4th Cir. 2000)
 22 (subpoena for 15,000 patient files); *In re Grand Jury Proceedings*, 827 F.2d 301, 305 (8th Cir.
 23 1987) (upholding grand jury subpoenas for records of wire money transfers “involving hundreds
 24 of innocent people”); *FTC. v. Invention Submission Corp.*, 965 F.2d 1086 (D.C. Cir. 1992);
 25 *Carrillo Huettel, LLP v. SEC*, 2011 WL 601369, at *2 (S.D. Cal. Feb. 11, 2011) (trust account
 26 information for all of law firm’s clients held relevant to investigation); *Goshawk Dedicated Ltd.*
 27 *v. American Viatical Servs., LLC*, 2007 WL 3492762 at *1 (N.D. Ga. Nov. 5, 2007) (compelling
 production of business’s entire underwriting database); *In re Adelpia Commc’ns. Corp.*, 338
 B.R. 546, 549 and 553 (Bankr. S.D.N.Y. 2005) (permitting inspection of “approximately 20,000
 large bankers boxes of business records”); *Medtronic Sofamor Danek, Inc. v. Michelson*, 229
 F.R.D. 550, 552 (W.D. Tenn. 2003) (compelling discovery of “approximately 996 network
 backup tapes . . . plus an estimated 300 gigabytes of other electronic data”).

28 ¹³ *See, e.g., United States v. Hill*, 459 F.3d 966, 975 (9th Cir. 2006) (recognizing that
 “blanket seizure” of the defendant’s entire computer system, followed by subsequent review,
 may be permissible); *United States v. Upham*, 168 F.3d 532, 535 (1st Cir. 1999).

1 requirement, *see* USA PATRIOT Act Improvement Act of 2005, Pub. L. No. 109-177, § 106(b),
2 120 Stat. 192 (2006). It was well recognized at the time that relevance was the equivalent of the
3 “established standard” applied to grand jury subpoenas, administrative subpoenas, and civil
4 discovery requests. *See* 152 Cong. Rec. S1598, 1606 (Mar. 2, 2006) (statement of Sen. Kyl).¹⁴
5 And Congress in fact described the items subject to production under Section 215 as things
6 obtainable by “a subpoena duces tecum issued by a court . . . in aid of a grand jury investigation”
7 or “any other order issued by a court . . . directing the production of records or tangible things.”
8 50 U.S.C. § 1861(c)(2)(D).¹⁵

9 Of course, the case law in these contexts does not involve data acquisition on the scale of
10 the telephony metadata collection authorized by the FISC, because the information gathered in
11 these contexts is sought in aid of focused judicial and administrative proceedings involving
12 identifiable individuals and events. But in this context relevance must be evaluated in light of
13 the special nature, purpose, and scope of national security investigations. *See Okla. Press Publ’g*
14 *Co. v. Walling*, 327 U.S. 186, 209 (1946). Routine criminal or administrative inquiries, which
15 ordinarily focus retrospectively on specific crimes or violations that have already occurred and
16 the persons known or suspected to have committed them. The key purpose of counter-terrorism
17 investigations, in contrast, is to prevent terrorist attacks before they occur. Hence, national
18 security investigations often have remarkable breadth, spanning long periods of time and
19 multiple geographic regions to identify terrorist groups, their members, intended targets, and
20 means of attack, many of which are often unknown to the Intelligence Community at the outset.
21 *See CIA v. Sims*, 471 U.S. 159, 171 (1985) (“foreign intelligence [gathering] consists of securing
22 all possible data pertaining to . . . the national defense and security of the United States”); *United*
23

24 ¹⁴ *See also* 152 Cong. Rec. S1379, 1395 (Feb. 16, 2006) (statement of Sen. Kyl) (“We all
25 know the term ‘relevance’ The relevance standard is exactly the standard employed for the
26 issuance of discovery orders in civil litigation, grand jury subpoenas in a criminal investigation,
27 and for each and every one of the 335 different administrative subpoenas currently authorized by
28 the United States Code.”); 151 Cong. Rec. S13636, 13642 (Dec. 15, 2005) (statement of Sen.
Hatch); H.R. Rep. No. 109-174, pt. 1 at 131 (statement of Rep. Lungren).

¹⁵ *See also NLRB v Amax Coal Co.*, 453 U.S. 322, 329 (1981) (“Where Congress uses
terms that have accumulated settled meaning under either equity or the common law, a court
must infer, unless the statute otherwise dictates, that Congress means to incorporate the
established meaning of these terms.”).

1 *States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 322-23 (1972); Skule Decl. ¶¶ 17-18.

2 Relevance in this context, therefore, must take into account the far-reaching information-
3 gathering required to shed light on suspected terrorist organizations, their size and composition,
4 recruitment, geographic reach, relation to foreign powers, financial resources, past acts, goals,
5 and capacity for carrying out their plans.

6 When Congress codified the relevance standard under Section 215, the critical
7 differences between the breadth and attributes of counter-terrorism investigations and routine
8 criminal investigations were well understood. *See* H.R. Rep. No. 109-174(1) at 129 (statement
9 of Rep. Lungren) (“[t]his is in the nature of trying to stop terrorists before they act, not in the
10 nature of a regular criminal investigation . . . and it strikes . . . precisely at when a 215 order is
11 most useful”); *see also* 152 Cong. Rec. S1325, 1330 (Feb. 15, 2006) (statement of Sen.
12 Feingold). The purpose underlying the USA PATRIOT Act, and Section 215 in particular, was
13 to provide the Intelligence Community the enhanced investigatory tools needed to bring terrorist
14 activities to light before they culminate in a loss of life and property. *See* H.R. Rep. No. 109-
15 174, pt. 2 at 4 (“[M]any of the core enhanced authorities of the [Patriot Act] are fundamentally
16 intelligence authorities intended to gather information to counter threats to national security from
17 terrorists”); S. Rep. No. 109-85 at 40 (noting “critical” nature and “broad reach” of authority
18 conferred by Section 215). Consistent with this core legislative objective, Section 215 should be
19 understood to authorize the collection of records that can help to identify previously unknown
20 operatives and activities, and thus detect and prevent terrorist attacks before they are launched.

21 Bulk telephony metadata are therefore relevant (at the least) to FBI counter-terrorism
22 investigations because, as experience has shown, the collection and aggregation of these data
23 permit the effective use of NSA analytical tools to detect contacts between foreign terrorists and
24 their unknown associates located in the United States who may be planning attacks on the U.S.
25 soil. Skule Decl. ¶¶ 8-9, 18-26; Shea Decl. ¶¶ 44, 46-48; *see* Aug. 29 FISC Op. at 20. Targeted
26 tools of investigation that do not involve bulk collection of the data cannot always achieve this
27 objective as effectively, if at all, because the Government cannot know, in advance of linking a
28 phone number (or other identifier) to a terrorist organization, where in the data the terrorists’

1 communications can be found. Skule Decl. ¶¶ 9, 27-29; Shea Decl. ¶¶ 57-63. Absent the
 2 creation of an historical repository of information that bulk collection and aggregation of the data
 3 allow, it may not be feasible for NSA to identify chains of communications among known and
 4 unknown terrorist operatives that cross different time periods and providers' networks. Skule
 5 Decl. ¶¶ 9, 27-29; Shea Decl. ¶ 60; *see* Aug. 29 FISC Op. at 21-22. Thus, there are reasonable
 6 grounds, at the least, for concluding that "the whole of the metadata produced" is "relevant" to
 7 authorized national security investigations. Aug. 29 FISC Op. at 22.¹⁶

8 **2. Congress has legislatively ratified the construction of Section 215**
 9 **as allowing for the bulk collection of telephony metadata records**

10 The conclusion that bulk telephony metadata are "relevant" within the meaning of
 11 Section 215 is reinforced, as the FISC recently recognized, by Congress's extension of Section
 12 215's authorization in 2010 and 2011, without substantive change, after receiving notice that the
 13 FISC and the Executive Branch had interpreted Section 215 to authorize the bulk collection of
 14 telephony metadata. Aug. 29 FISC Op. at 23-28. On both occasions the Executive Branch
 15 worked to ensure that *all* Members of Congress had access to information about this program
 16 and the legal authority for it. In December 2009, a classified briefing paper, explaining that the
 17 Government and the FISC had interpreted Section 215 to authorize the bulk collection of
 18 telephony metadata, was provided to the House and Senate Intelligence Committees and made
 19 available for review, as well, by all Members of Congress, "to inform the legislative debate about
 20 reauthorization of Section 215."¹⁷ Additionally, the classified use of this authority has been

21 ¹⁶ Notably in this regard, Section 215 permits the collection of information relevant "to
 22 an authorized investigation," 50 U.S.C. § 1861(b)(2)(A), not simply information relevant to the
 23 "subject matter" involved, as in civil discovery, Fed. R. Civ. P. 26(b)(1). Business records can
 24 therefore be "relevant" to an investigation not merely if they relate to its subject matter, but also
 25 if there is reason to believe they are necessary or useful to the application of investigative
 techniques that will advance its purposes. As discussed above, NSA analysis enables discovery
 of otherwise hidden connections between individuals suspected of engaging in terrorist activity
 and unknown co-conspirators with whom they maintain contact in the United States. The
 metadata records are therefore relevant to FBI investigations whose object is to thwart the plots
 in which these individuals are engaged before they come to bitter fruition.

26 ¹⁷ *See* Letter from Ronald Weich to the Hon. Silvestre Reyes (Dec. 14, 2009) (Exh. G);
 27 Report on the [NSA's] Bulk collection Programs for USA-PATRIOT Act Reauthorization (Exh.
 28 H). Both Intelligence Committees made this document available to all Members of Congress
 prior to the February 2010 reauthorization of Section 215. *See* Letter from Sens. Feinstein and
 Bond to Colleagues (Feb. 23, 2010) (Exh. I); Letter from Rep. Reyes to Colleagues (Feb. 24,
 2010) (Exh. J); *see also* 156 Cong. Rec. H838 (daily ed. Feb. 25, 2010) (statement of Rep.

1 briefed numerous times over the years to the Senate and House Intelligence and Judiciary
2 Committees, as several Members of Congress have acknowledged.¹⁸

3 After receiving these “extensive and detailed” briefing papers “regarding the nature and
4 scope” of the program, Congress twice extended Section 215’s authorization, in 2010 and 2011.
5 Aug. 29 FISC Op. at 25 & n.23.¹⁹ “Congress is presumed to be aware of an administrative or
6 judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute
7 without change.” *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009) (quoting
8 *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)). That presumption is ironclad in this instance,
9 where Congress had actual and repeated notice of the Executive Branch’s administrative
10 construction of Section 215 over a period of years. Imposing a limiting construction now on
11 Section 215 that would prohibit bulk collection of telephony metadata would be contrary to the
12 express understanding of the statute that Congress ratified on two separate occasions.²⁰

13
14 Hastings); 156 Cong. Rec. S2109 (daily ed. Mar. 25, 2010) (statement of Sen. Wyden). An
15 updated version of the briefing paper, *see* Exh. M, was provided to the Senate and House
16 Intelligence Committees again in February 2011 in connection with the reauthorization that
17 occurred later that year. *See* Letter from Ronald Weich to Hon. Diane Feinstein and the Hon.
18 Saxby Chambliss (Feb. 2, 2011) (Exh. K); Letter from Ronald Weich to the Hon. Mike Rogers
19 and the Hon. C.A. Dutch Ruppersberger (Feb. 2, 2011) (Exh. L). The Senate Intelligence
20 Committee made this updated paper available to all Senators later that month. *See* Letter from
21 Sens. Feinstein and Chambliss to Colleagues (Feb. 8, 2011) (Exh. N).

18 ¹⁸ *See* Press Release of Sen. Select Comm. on Intelligence (June 6, 2013) (Exh. O)); *How*
19 *Disclosed NSA Programs Protect Americans, and Why Disclosure Aids Our Adversaries:*
20 Hearing Before the House Perm. Select Comm. on Intelligence 2, 35, 58, 113th Cong., 1st Sess.
21 (2013) (statements of Reps. Rogers, Langevin, and Pompeo) (Exh. P).

20 ¹⁹ USA PATRIOT Act – Extension of Sunsets, Pub. L. No. 111-141, § 1(a), 124 Stat. 37;
21 PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-14, § 2(a), 125 Stat. 216.

22 Moreover, in both 2009 and 2011, when the Senate Judiciary Committee was considering
23 possible amendments to Section 215, it made clear that it had no intention of affecting the
24 telephony metadata collection program. The Committee reports accompanying the USA
25 PATRIOT Act Sunset Extension Acts of 2009 and 2011 explained that proposed changes to
26 Section 215 were “not intended to affect or restrict any activities approved by the FISA court
27 under existing statutory authorities.” S. Rep. No. 111-92, at 7 (2009); S. Rep. No. 112-13, at 10
28 (2011). Ultimately, Section 215 was extended to June 1, 2015 without change. *See* Patriot
Sunsets Extension Act of 2011, Pub. L. No. 112-14, 125 Stat. 216 (2011).

26 ²⁰ Plaintiffs overstate the requirements for application of the doctrine of legislative
27 ratification. Pls.’ Mem. at 15-17. The Supreme Court has often found “clear[]” and
28 “undoubted” Congressional awareness of the pertinent judicial and executive interpretations
based on references in committee reports, without requiring evidence as to how many Members
of Congress actually read those reports. *See EEOC v. Shell Oil Co.*, 466 U.S. 54, 69 & n.21
(1984); *Haig v. Agee*, 453 U.S. 280, 297-98 & n.37 (1981); *NLRB v. Gullett Gin Co.*, 340 U.S.
361, 365-66 & n.3 (1951).

1 **3. Plaintiffs present no persuasive reasons for second-guessing**
 2 **the FISC’s repeated conclusions that bulk telephony metadata**
 3 **are “relevant” to authorized counter-terrorism investigations**

4 Plaintiffs nevertheless maintain that the NSA’s FISC-authorized collection of bulk
 5 telephony metadata exceeds the Government’s authority under Section 215 because it disregards
 6 the relevance requirement. But since May 2006, fifteen separate judges of the FISC have
 7 concluded otherwise, finding “reasonable grounds to believe” that the telephony metadata sought
 8 by the Government “are relevant to authorized investigations . . . being conducted by the FBI . . .
 9 to protect against international terrorism.” Skule Decl. ¶¶ 6, 11; *see* Primary Order at 1; Aug. 29
 10 FISC Op. at 11; Oct. 11 FISC Mem. at 3.²¹ As the FISC concluded recently:

11 [b]ecause known and unknown international terrorist operatives are using
 12 telephone communications, and because it is necessary to obtain the bulk
 13 collection of a telephone company’s metadata to determine those
 14 connections between known and unknown international terrorist
 15 operatives as part of authorized investigations, the production of the
 16 information sought meets the standard for relevance under Section 215.

17 Aug. 29 FISC Op. at 18; *see also* Oct. 11 FISC Mem. at 3.

18 Considering that the Government has consistently demonstrated the relevance of the
 19 requested records to the FISC’s satisfaction, as Section 215 requires, it is difficult to understand
 20 how the Government can be said to have acted in excess of its statutory authority. At bottom,
 21 Plaintiffs are asking this Court to conclude that the FISC exceeded *its* authority when it
 22 authorized the NSA’s bulk collection of telephony metadata, and that this Court should substitute
 23 its judgment for the decisions that the FISC reached thirty-five times.

24 That approach cannot be reconciled with the legislative plan. When courts are called on
 25 to enforce grand jury or administrative subpoenas—instruments that informed Congress’s
 26 understanding of Section 215, *see supra* at 19 & n.11—the Government’s determination that
 27 records are “relevant” to its investigation is subject only to the most deferential review.²² In the

28 ²¹ In another recently released FISC opinion, the FISC concluded that bulk collection of
 Internet metadata satisfied the relevance requirement of FISA’s pen/trap provision, 50 U.S.C.
 § 1842, because bulk collection of the metadata was necessary for the NSA to employ analytical
 techniques that generate useful leads for FBI counter-terrorism investigations. *[Redacted]*, Dkt.
 No. PR/TT [redacted], Opinion and Order (F.I.S.C. [redacted]) (declassified and released on
 Nov. 18, 2013) (Exh. Q) (“*[Redacted]*”) 47-49; *see id.* at 40-46.

²² *See R. Enters.*, 498 U.S. at 301 (grand jury subpoena challenged on relevancy grounds
 must be upheld unless “there is no reasonable possibility that the category of materials the
 Government seeks will produce information relevant to the general subject of the grand jury’s

1 analogous context of electronic surveillance, FISC orders receive only “minimal scrutiny by
2 [reviewing] courts.” *United States v. Abu-Jihaad*, 630 F.3d 102, 130 (2d Cir. 2010).

3 An equally deferential standard of review is called for in this context, where ensuring the
4 Government’s access to the information needed to carry out its national security mission is
5 imperative, and where deferential review is commanded by the terms of Section 215 itself.
6 Section 215 conditions the Government’s access to business records, not on a showing of
7 relevance, but on a showing of “*reasonable grounds to believe* that the [records] are relevant” to
8 authorized counter-terrorism investigations. 50 U.S.C. § 1861(b)(2)(A) (emphasis added), (c)(1).
9 Under this standard, in order to find that the FISC’s production orders exceeded its authority, this
10 Court would have to conclude that the fifteen FISC judges who repeatedly issued those orders
11 lacked any reasonable basis for doing so. That proposition is self-defeating.

12 Principally, Plaintiffs argue that bulk telephony metadata cannot be considered relevant
13 under Section 215 because the vast majority of the records collected are not related to specific
14 counter-terrorism investigations. Pls.’ Mem. at 7-8. But the Government has always
15 acknowledged, and the FISC has understood, that the vast majority of the call-detail records the
16 Government expects to collect do not themselves document communications between terrorist
17 operatives. *See supra* at 6; Shea Decl. ¶¶ 5, 23-24; Aug. 29 FISC Op. at 20-23. At the same
18 time, the FISC has recognized that bulk collection of the data is necessary to the program—and
19 therefore that the records are relevant as a whole—because the NSA cannot know in advance of
20 making authorized queries (under the “reasonable articulable suspicion” standard) which
21 communications occurring at what times, on which providers’ networks, will reflect connections
22 between terrorist groups and operatives located in the United States. *See id.* at 22. Thus, the
23 collateral acquisition of records that do not pertain to such communications is not evidence that
24 the Government (or the FISC) has exceeded its authority, but an outgrowth of the leeway that
25 Congress extended to the Government—subject to statutory and court-ordered safeguards—to

26
27 investigation”); *NLRB v. Am. Med. Response, Inc.*, 438 F.3d 188, 193 (2d Cir. 2006) (in a
28 proceeding to enforce an administrative subpoena, the agency’s appraisal of relevancy to its
investigation “must be accepted so long as it is not obviously wrong,” and the district court’s
finding of relevancy will be affirmed unless it is “clearly erroneous”); *FTC v. Invention
Submission Group*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) (same).

1 obtain foreign intelligence information under Section 215 “to meet its national security
2 responsibilities.” *Id.* at 11, 23; *see* Shea Decl. ¶¶ 29-35.²³

3 Plaintiffs invoke the principle that “[g]rand juries are not licensed to engage in arbitrary
4 fishing expeditions.” *R. Enters.*, 498 U.S. at 299. But the FISC’s decisions authorizing the
5 NSA’s bulk collection of telephony metadata cannot be dismissed as arbitrarily licensing
6 “fishing expeditions into private papers . . . in the [mere] hope that something will turn up.” Pls.’
7 Mem. at 7 (citing *FTC v. Am. Tobacco Co.*, 264 U.S. 298, 305-06 (1924)). Rather, as the FISC
8 has stated, prior experience “demonstrate[es] that information concerning known and unknown
9 affiliates of international terrorist organizations [is] contained within the non-content metadata
10 the government [seeks] to obtain.” Aug. 29 FISC Op. at 20; *see also id.* at 21 (“[a]nalysts know
11 that the terrorists’ communications are located somewhere’ in the metadata”); Shea Decl. ¶¶ 52-
12 55. Reason and experience also teach that the data are relevant, and fruitful, to the FBI’s core
13 mission of protecting national security. The NSA’s analysis of bulk telephony metadata
14 produces valuable tips and leads that have given rise (or new impetus) to FBI counter-terrorism
15 investigations, and contributed to the prevention of terrorist attacks. *Id.* ¶¶ 44-56; Skule Decl.
16 ¶¶ 18, 20-26. Plaintiffs disclaim knowledge “of any precedent” that supports a finding of
17 relevance on these grounds, Pls.’ Mem. at 9, but in the counter-terrorism context at issue here,
18 the FISC has upheld the bulk collection of telephony metadata on this basis thirty-five times.

19 The reasoning adopted by the FISC does not render the limits of relevance “illusory,” as
20 Plaintiffs predict. Pls.’ Mem. at 9. The relevance of bulk telephony metadata is a function of

21
22 ²³ Notably, when Congress passed the USA PATRIOT Act in 2001, it expanded the
23 Government’s authority to obtain business records under FISA by eliminating the requirement in
24 prior law of “specific and articulable facts giving reason to believe that the person to whom the
25 records pertain is a foreign power or an agent of a foreign power.” 50 U.S.C. § 1862(b)(2)(B)
26 (2000 ed.); Pub. L. 107-56, § 215, 115 Stat. 288; *see* Aug. 29 FISC Op. at 13. Again in 2006,
27 when Congress codified Section 215’s relevance requirement, it rejected a proposal to restrict the
28 statute’s scope to records pertaining to individuals suspected of terrorist activity. *See* S. 2369,
109th Cong. § 3, *reprinted at* 152 Cong. Rec. S1791 (Mar. 6, 2006); 151 Cong. Rec. S14275-01
(Dec. 21, 2005) (statement of Sen. Dodd) (“Unfortunately, the conference report . . . maintains
the minimal standard of relevance without a requirement of fact connecting the records sought,
or the individual, [to] suspected . . . terrorist activity”). *See also* 152 Cong. Rec. S1598-03
(2006) (statement of Sen. Levin); 152 Cong. Rec. H581-02 (Mar. 7, 2006) (statement of Rep.
Nadler). Limiting the reach of Section 215 to specific records bearing directly on known
terrorist threats and operatives would inhibit the use of this authority for its intended purposes—
detecting unknown terrorist threats—and frustrate, not vindicate, the will of Congress.

1 distinctive characteristics not common to most other types of records—specifically, their highly
2 standardized and inter-connected nature, which makes them easily susceptible of analysis in
3 large datasets to bring previously unknown connections with suspected terrorist operatives to
4 light, Shea Decl. ¶ 46, and enable the Government to identify individuals who may be planning
5 terrorist attacks against this Nation. Precisely because the concept of relevance is so inherently
6 “variable in relation to the nature, purposes, and scope of [an] inquiry,” *Oklahoma Press*, 327
7 U.S. at 209, a decision here that bulk telephony metadata are relevant, as a whole, to counter-
8 terrorism investigations in no way foretells, much less compels, the decision the FISC would
9 reach were the Government to seek an order directing bulk production of other records. The
10 result in any such case would depend, at the least, on the nature of the records in question, the
11 bearing they have on the Government’s investigations, the scope of the production sought, and
12 any constitutional considerations, none of which can be predicted or assessed in the abstract.²⁴

13 In the final analysis, Plaintiffs succeed only in proving their own disagreement with the
14 FISC’s repeated determinations that bulk telephony metadata are relevant to FBI counter-
15 terrorism investigations. They cite nothing in the text or legislative history of Section 215
16 demonstrating that the FISC, in reaching those conclusions, exceeded the authority that Congress
17 intended it to exercise. Congress assigned the FISC the responsibility of making relevance
18 determinations under Section 215, and Plaintiffs have not explained how the FISC has exercised
19 that authority in a way, not simply that they object to, but that Congress did not intend.²⁵

20 ²⁴ Observing that Section 215 permits the acquisition of “such thing[s] [as] can be
21 obtained with a [grand jury] subpoena duces tecum,” 50 U.S.C. § 1861(c)(2)(D), Plaintiffs argue
22 at length that the Government has exceeded its authority because bulk collection of telephony
23 metadata exceeds the scope of production that a grand jury could obtain by subpoena. Pls.’ Mem.
24 at 9-11. As an initial matter, subparagraph (c)(2)(D) concerns the type, not the volume, of
25 records the Government may obtain pursuant to a Section 215 order. Moreover, in support of
26 their argument Plaintiffs cite a series of cases (all but one long preceding the Supreme Court’s
27 decision in *R. Enterprises*) holding that grand jury subpoenas “seeking the entirety of a person’s
documents are improper.” *Id.* (citing, *inter alia*, *Hale v Henkel*, 201 U.S. 43, 76 (1906), and
Schwimmer v. United States, 232 F.2d 855, 8611 (8th Cir. 1956)). These cases are not
instructive for purposes here, because the bulk collection of telephony metadata does not involve
the compelled production “of the entirety of [anyone’s] documents,” particularly Plaintiffs’.
Rather, it involves a single, specified class of records—call-detail records—that are created and
maintained by, and belong to, telecommunications service providers.

28 ²⁵ Two groups of *amici* argue in support of Plaintiffs, respectively, that they “have seen”
no evidence that the telephony metadata program has “provided any intelligence of value that
could not have been gathered through less intrusive means,” Brief of *Amici Curiae* Senator[s]

1 **B. The Stored Communications Act Does Not Prohibit the Government’s**
2 **Acquisition of Telephony Metadata Pursuant to Section 215.**

3 Plaintiffs next argue that the Government’s collection of call-detail records under Section
4 215—whether in bulk or otherwise—is prohibited by the SCA, specifically, 18 U.S.C. § 2703(c).
5 The FISC has previously held otherwise, *In re Prod. of Tangible Things from [Redacted]*, Dkt.
6 No. BR 08-13, Supp. Op. (F.I.S.C. Dec. 12, 2008) (Exh. R), and so, too, should this Court.

7 Section 2703, enacted by § 201(a) of the Electronic Communications Privacy Act, Pub.
8 L. 99-508, 100 Stat. 1848 (“ECPA”) (Title II of which is known as the SCA), provides that a
9 governmental entity may require providers of electronic communication or remote computing
10 service to disclose records or other information pertaining to their subscribers or customers
11 (other than the contents of communications) only when one of five conditions is met, 18 U.S.C.
12 § 2703(c)(1)(A)-(E), including circumstances when, as pertinent here, the government “obtains a
13 court order for such disclosure under subsection (d).” *Id.* § 2703(c)(1)(B). Subsection 2703(d)
14 provides that a court may issue an order for disclosure of communications records under
15 subsection (c) on a showing by the government “of specific and articulable facts showing that
16 there are reasonable grounds to believe that the ... records or other information sought ... are
17 relevant and material to an ongoing criminal investigation.” *Id.* § 2703(d).

18 Because disclosure pursuant to Section 215 for purposes of a counter-terrorism
19 investigation is not among the five enumerated circumstances under which subsection 2703(c)
20 authorizes the Government to obtain communications records from a provider, Plaintiffs contend
21 that production of telephony metadata under Section 215 is barred by the SCA. Pls.’ Mem. at
22 12. But Plaintiffs overlook subsection (c) of Section 215 itself, 18 U.S.C. § 1861(c). When the
23 FISC finds “that the [Government’s] application meets the requirements” for a production order,
24 *id.* § 1861(c)(1), Section 215 provides that the Government may acquire “such thing[s] [as] can

25 Wyden, *et. al.*, at 2, and that the Court should “apply Section 215’s ‘relevance’ requirement as a
26 restraint on expansive surveillance” Brief *Amicus Curiae* of Experts in the History of
27 Executive Surveillance at 15. So long as the telephony metadata program is lawful—and it is—
28 any question as to whether the program should continue in its present form is a matter of national
 security for the political branches, not the courts, to decide. *See Dep’t of the Navy v. Egan*, 484
 U.S. 518, 530 (1988). It is a question to which Congress even now is devoting substantial
 attention, and one that Congress will have to decide, one way or another, before Section 215’s
 current authorization expires on June 1, 2015. *See Pub. L. 109-177 § 102(b)(1)*, 120 Stat. 195
 (50 U.S.C. § 1805 note), as amended by *Pub. L. 112-4 § 2(a)*, 125 Stat. 216.

1 be obtained with a [grand jury] subpoena . . . or with any other order issued by a court of the
2 United States directing the production of records or tangible things.” *Id.* § 1861(c)(2)(D)
3 (emphasis added). Subsections 2703(c) and (d) of the SCA make clear that subscriber
4 communications records may be obtained by the Government pursuant to an order issued by a
5 U.S. court directing their production. Hence, by operation of the express terms of 50 U.S.C.
6 § 1861(c)(2)(D), the same records may also be obtained under authority of Section 215. *See In*
7 *re Prod. of Tangible Things, supra*, Supp. Op. at 2 n.1. As the FISC observed, this result also
8 promotes the objective of a coherent and harmonious legislative scheme. *Id.* at 4-5.

9 **C. Nothing in Section 215 Prohibits the FISC from Prospectively Directing**
10 **the Production of Electronic Business Records as They Are Created**

11 Finally, Plaintiffs make a two-fold argument that Section 215 does not permit the FISC to
12 order the production of electronic business records of any kind, or to do so on a prospective
13 basis, because such records do not constitute “tangible things” within the meaning of the statute.
14 Pls.’ Mem. at 13-15. Congress passed the USA-PATRIOT Act, including Section 215, to
15 provide the Government with the enhanced investigatory tools needed to bring terrorist activities
16 to light before they culminate in a loss of life and property. *See* H.R. Rep. No. 109-174(1) at 4.
17 Yet Plaintiffs posit that in the immediate wake of the September 11, 2001, attacks, in the full
18 bloom of the digital age, Congress intended to relegate this important tool for combatting
19 terrorism to the acquisition of paper records. That untenable proposition should be rejected.

20 Section 215 authorizes the FISC to order “production of tangible things (including books,
21 records, papers, documents, and other items)” 50 U.S.C. § 1861(a)(1). The meaning of the
22 word “tangible,” as understood at the time the statute was enacted, *see BedRoc, Ltd. v. United*
23 *States*, 541 U.S. 176, 184 (2004); *cf.* Pls.’ Mem. at 14 & n.6, is “able to be perceived as
24 materially existent, especially by the sense of touch,” or “substantially real” or “material.”
25 Webster’s Third New Int’l Dictionary (2002); *see also* The American Heritage Dictionary (4th
26 ed. 2000) (defining “tangible” as “possible to be treated as fact, real or concrete”). Thus, the
27 term “tangible” can be used to connote not only tactile items such as pieces of paper, but other
28 things that are perceptible as materially existent or real, such as electronically stored information.

1 Any question about the matter is resolved by the statute's inclusion of "documents" and
2 "records" among the "tangible things" whose production can be compelled. These terms have
3 been understood for decades to include electronically stored information. For example, as long
4 ago as 1970, the description of the term "documents" in Rule 34 of the Federal Rules of Civil
5 Procedure was amended to include "data compilations," in order "to accord with changing
6 technology" and "make clear that Rule 34 applies to electronic data compilations from which
7 information can be obtained" *Proposed Amendments to the Fed. R. Civ. P. Relating to*
8 *Discovery*, 48 F.R.D. 487, 525, 527 (1970). That understanding had entered common usage by
9 the time Section 215 was enacted. *See* The American Heritage Dictionary (4th ed. 2000)
10 (defining "document" to include "a computer file contain[ing] ...data").

11 Plaintiffs' related contention, that Section 215 does not authorize the FISC to compel
12 production of records "on an ongoing daily basis . . . for the duration of [its] [o]rder[s],"
13 Secondary Order at 2, because the records "do not yet exist" at the time an order is issued, Pls.'
14 Mem. at 13, is equally meritless. Nothing in the statute's terms suggests that FISC orders may
15 apply only to records created before an order is rendered. What is pertinent under the statute is
16 that the records exist at the time of production, and that nothing in the FISC's orders require the
17 creation of records that providers otherwise would not keep. Notably, courts have held that the
18 Government may seek prospective disclosure of communications records under the SCA because
19 "the prospective . . . information sought by the Government . . . becomes a 'historical record' as
20 soon as it is recorded by the provider," and the statute "in no way limits the ongoing disclosure
21 of records to the Government as soon as they are created." *In re Application of the United*
22 *States*, 632 F. Supp. 2d 202, 207 n.8 (E.D.N.Y. 2008).²⁶ The same is true under Section 215.

23
24
25
26 ²⁶ *See also United States v. Booker*, 2013 WL 2903562, *6-7 (N.D. Ga. June 13, 2013);
27 *In re Application of the United States*, 622 F. Supp. 2d 411, 418-19 (S.D. Tex. 2007); *In re*
28 *Application of the United States*, 460 F. Supp. 2d 448, 459 (S.D.N.Y. 2006); *In re Application of*
the United States, 433 F. Supp. 2d 804, 806 (S.D. Tex. 2006); *In re Application of the United*
States, 411 F. Supp. 2d 678, 680 (W.D. La. 2006); *In re Application of the United States*, 405 F.
Supp. 2d 435, 446-47 (S.D.N.Y. 2005).

1 **IV. THE TELEPHONY METADATA PROGRAM DOES NOT VIOLATE**
2 **PLAINTIFFS' FOURTH AMENDMENT RIGHTS.**

3 Even assuming, *arguendo*, that Plaintiffs had established their standing, their remaining
4 claims under the First, Fourth, and Fifth Amendments should still be dismissed, and their motion
5 for summary judgment on their First Amendment claim denied, because the telephony metadata
6 program adheres to all constitutional requirements.

7 **A. Plaintiffs Have No Fourth Amendment Privacy Interest in Telephony Metadata**

8 The Fourth Amendment provides in relevant part that “[t]he right of the people to be
9 secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,
10 shall not be violated.” As the Supreme Court remarked just last year, “for most of our history the
11 Fourth Amendment was understood to embody a particular concern for government trespass
12 upon the areas (‘persons, houses, papers, and effects’) it enumerates.” *United States v. Jones*,
13 132 S. Ct. 945, 949-50 (2012). In addition to the core concern over searches and seizures within
14 these enumerated areas, it is now understood that a Fourth Amendment “search” takes place
15 when the government’s investigative activities “violate a person’s ‘reasonable expectation of
16 privacy.’” *Id.* (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967)).

17 The Government’s collection of telephony metadata pursuant to orders of the FISC does
18 not involve a “search” of individual subscribers or their property, ending the Fourth Amendment
19 inquiry. The orders are directed to telecommunications service providers, not to subscribers, and
20 direct the production of what are indisputably the providers’ own business records. Nor do
21 telephone subscribers have a reasonable expectation of privacy in telephony metadata. In *Smith*
22 *v. Maryland*, 442 U.S. 735, 741-46 (1979), the Supreme Court held that the government’s
23 recordation of numbers dialed from an individual’s home telephone, through a pen register
24 installed at the telephone company’s central offices, did not constitute a search of that individual
25 under the Fourth Amendment, because persons making telephone calls, even from their own
26 homes, lack a reasonable expectation of privacy in the numbers they call. In contrast to the
27 contents of telephone calls, the Court doubted that individuals had any actual expectation of
28 privacy in telephone numbers they dialed, because telephone users “typically know that they
must convey numerical information to the phone company; that the phone company has facilities

1 for recording this information; and that the phone company does in fact record this information
2 for a variety of legitimate business purposes,” such as billing and fraud detection. *Id.* at 743.

3 Furthermore, the Court reasoned, even if a subscriber harbored a subjective expectation
4 that the phone numbers he dialed would remain private, such an expectation of privacy would
5 not be reasonable, because “a person has no legitimate expectation of privacy in information he
6 voluntarily turns over to third parties.” *Id.* at 743-44. The Court explained that someone who
7 uses a phone has “voluntarily conveyed numerical information to the telephone company and
8 ‘exposed’ that information to its equipment in the ordinary course of business,” and therefore has
9 “assumed the risk that the company would reveal to police the numbers he dialed.” *Id.* at 744.
10 The third-party doctrine has consistently been applied to telephone call detail records like the
11 business records at issue here, which are also third-party records. *See, e.g., Reporters Comm. for*
12 *Freedom of the Press v. AT&T*, 593 F.2d 1030, 1043-46 (D.C. Cir. 1978); *United States v.*
13 *Baxter*, 492 F.2d 150, 167 (9th Cir. 1973); *United States v. Fithian*, 452 F.2d 505, 506 (9th Cir.
14 1971). In recent years the Ninth Circuit has also applied *Smith* to find no reasonable expectation
15 of privacy in email “to/from” and Internet protocol (“IP”) addressing information, *United States*
16 *v. Forrester*, 512 F.3d 500, 510-11 (9th Cir. 2008), and in text message addressing information.
17 *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892, 905 (9th Cir. 2008), *rev’d on other*
18 *grounds*, 130 S. Ct. 2619 (2010).

19 *Smith* is fatal to Plaintiffs’ claim that the collection of their telephony metadata violates
20 the Fourth Amendment. *See United States v. Moalin*, 2013 WL 6079518, *6-8 (S.D. Cal. Nov.
21 18, 2013) (relying on *Smith* to reject criminal defendant’s argument that NSA’s collection of
22 metadata about his telephone calls, which were then used to link him to a Somali terrorist group,
23 violated his Fourth Amendment rights); Aug. 29 FISC Op. at 6 (“The production of telephone
24 service provider metadata is squarely controlled by *Smith* [*Smith*] and its progeny have
25 governed Fourth Amendment jurisprudence with regard to telephony and communications
26 metadata for more than 30 years.”); *cf. [Redacted]*, Opinion & Order at 58-66 (bulk collection of
27 Internet metadata does not violate the Fourth Amendment). So far as metadata include such
28 information as the times and duration of calls, and the dialing and receiving numbers, that is

1 information that telephone subscribers voluntarily turn over to their providers. The remaining
2 data, such as trunk identifiers, is information generated by the phone companies themselves. *See*
3 Primary Order at 3 n.1; FAC ¶ 54. Call-detail records memorializing this information belong to
4 the phone companies, as the parties providing the equipment and services required to make those
5 calls possible. *See United States v. Miller*, 425 U.S. at 440-41 (rejecting a bank depositor’s
6 Fourth Amendment challenge to a subpoena of bank records because, inasmuch as the bank was
7 a party to the transactions, the records belonged to the bank). Thus, under *Smith*, there can be no
8 reasonable expectation of privacy in this information, even if there were an understanding that
9 the third party (*i.e.*, the telephone company) would treat the information as confidential. *SEC v.*
10 *Jerry T. O’Brien, Inc.*, 467 U.S. 735, 743 (1984); *Miller*, 425 U.S. at 443.

11 Importantly, the call-detail records reveal only phone numbers and other routing
12 information, not the names or addresses of the parties to the calls. *See* Shea decl. ¶¶ 15, 21;
13 Skule Decl. ¶¶ 7, 11. Thus, these data do not in fact reveal any information about the
14 subscriber’s associations or activities. The mere fact that the numbers dialed from a phone
15 could, in some hypothetical sense, reveal the identities of the persons and the places called, was
16 raised by the dissenters in *Smith*, 442 U.S. at 748 (Stewart, J., dissenting), where, unlike here, the
17 government did know the caller’s identity, but the Court nonetheless ruled that there is no
18 reasonable expectation of privacy in telephone numbers dialed. *Id.* at 741-42.

19 *Smith* is not distinguishable on the basis of the broad scope of the telephony metadata
20 program. *See [Redacted]*, Opinion & Order at 62-63. Fourth Amendment rights “are personal in
21 nature, and cannot bestow vicarious protection on those who do not have a reasonable
22 expectation of privacy in the place to be searched.” *Steagald v. United States*, 451 U.S. 204, 219
23 (1981); *accord, Minnesota v. Carter*, 525 U.S. 83, 88 (1998); *Rakas v. Illinois*, 439 U.S. 128,
24 133-34 (1978). No Fourth Amendment interest of Plaintiffs is implicated, therefore, by virtue of
25 the fact that the metadata of many other individuals’ calls are collected as well as their own. *See*
26 *In re Grand Jury Proceedings*, 827 F.2d 301, 305 (8th Cir. 1987) (rejecting argument that a
27 subpoena was unreasonable under the Fourth Amendment because it “may make available to the
28 grand jury [money transfer] records involving hundreds of innocent people”); *United States v.*

1 *Rigmaiden*, 2013 WL 1932800, at *13 (D. Ariz. May 8, 2013) (Government did not violate
2 defendant’s Fourth Amendment rights by acquiring a high volume (1.8 million) of IP addresses).

3 Thus, *Smith* controls the outcome here. There has been no “search” of metadata about
4 Plaintiffs’ telephone calls, for purposes of the Fourth Amendment.

5 **B. The Government’s Acquisition of Telephony Metadata Is Reasonable**

6 Even if collecting telephony metadata involved a Fourth Amendment “search,” the
7 Fourth Amendment bars only “unreasonable” searches and seizures, whereas the collection of
8 metadata at issue here is reasonable under the standard the Supreme Court applies to assess
9 suspicionless searches that serve special government needs. As the Supreme Court has
10 explained, “where a Fourth Amendment intrusion serves special governmental needs, beyond the
11 normal need for law enforcement, it is necessary to balance the individual’s privacy expectations
12 against the Government’s interests to determine whether it is impractical to require a warrant or
13 some level of individualized suspicion in the particular context.” *Nat’l Treasury Emps. Union v.*
14 *Von Raab*, 489 U.S. 656, 665-66 (1989). More specifically, the scope of the legitimate
15 expectation of privacy and the character of the intrusion are balanced against the nature of the
16 government interests to be furthered, as well as the immediacy of the government’s concerns
17 regarding those interests and the efficacy of the policy at issue in addressing those concerns. *See*
18 *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658, 660, 662-63 (1995).

19 The NSA’s collection of telephony metadata clearly serves special governmental needs
20 above and beyond normal law enforcement. The undisputed programmatic purpose of the
21 collection of this metadata is identifying unknown terrorist operatives and preventing terrorist
22 attacks—forward-looking goals that fundamentally differ from most ordinary criminal law
23 enforcement, which typically focuses on solving crimes that have already occurred, not
24 preventing unlawful activity and protecting public safety and national security. *See, e.g., Keith*,
25 407 U.S. at 322-23; *In re Sealed Case*, 310 F.3d 717, 746 (FISC-R 2002).

26 If, contrary to *Smith*, Plaintiffs could be said to have any Fourth Amendment privacy
27 interest that is implicated by collection of non-content telephony metadata, that interest would be
28 minimal. Moreover, the intrusion on that interest would be mitigated still further by the

1 statutorily mandated restrictions on access to and dissemination of the metadata written into the
2 FISC's orders. Primary Order, at 4-14. *See also Maryland v. King*, 133 S. Ct. 1958, 1979
3 (2013); *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822,
4 833 (2002); *Vernonia*, 515 U.S. at 658.

5 On the other side of the balance, the collection and analysis of telephony metadata
6 promote overriding public interests. The Government's interest in identifying and tracking
7 terrorist operatives for the purpose of preventing terrorist attacks is a national security concern of
8 overwhelming importance. *See Haig v. Agee*, 453 U.S. 280, 307 (1981) ("no governmental
9 interest is more compelling than the security of the Nation.") (internal quotation marks omitted);
10 *In re Directives*, 551 F.3d 1004, 1012 (FISC-R 2008) ("the relevant governmental interest—the
11 interest in national security—is of the highest order of magnitude."). Requiring individualized
12 suspicion here would indeed be impracticable. The Government's interests in identifying
13 unknown terrorist operatives and preventing terrorist attacks cannot be as effectively achieved by
14 requiring individualized suspicion to collect metadata, because such a requirement would not
15 permit the type of historical analysis and contact chaining that the broader collection enables and
16 to quickly identify contacts. *See Aug. 29 FISC Op.* at 20-22. Given that the program might be
17 rendered entirely infeasible, it would certainly be "impracticable" to require individualized
18 suspicion in this context. *See Von Raab*, 489 U.S. at 665-66.

19 **V. PLAINTIFFS' FIRST AMENDMENT CLAIM FAILS AS A MATTER OF LAW**

20 **A. Good-Faith Investigatory Conduct Not Intended to Deter or Punish**
21 **Protected Speech or Association Does Not Violate the First Amendment**

22 Plaintiffs' First Amendment claim, that the FISC-authorized collection of telephony
23 metadata violates their expressive and associational rights, FAC ¶¶ 78-83, Pls.' Mem. at 17-25,
24 perishes in the wake of their failed Fourth Amendment claim. Recognizing the need to
25 accommodate the Government's interests where prevention of crime, or, even more imperatively,
26 potential threats to national security are concerned, courts distinguish for purposes of First
27 Amendment analysis between government investigations that may have the incidental effect of
28 deterring First Amendment activity, and concrete government action of a regulatory,

1 proscriptive, or compulsory nature that is directed against individuals based on their expressive
2 or associational activities. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978); *Laird*, 408
3 U.S. at 11; *United States v. Mayer*, 503 F.3d 740, 751-53 (9th Cir. 2007). Accordingly, the law
4 is clear that governmental investigative activities conducted in good faith—that is, not “for the
5 purpose of abridging first amendment freedoms”—do not violate the First Amendment. *Mayer*,
6 503 F.3d at 751. *See also Reporters Comm.*, 593 F.2d at 1051-53.

7 Here, Plaintiffs do not contend that the Government’s collection of non-content telephony
8 metadata has any objective other than furthering the compelling national interest in identifying
9 and tracking terrorist operatives and ultimately thwarting terrorist attacks. Neither their
10 complaint nor their declarations even purport to assert that such collection is aimed at curtailing
11 any First Amendment expressive or associational activities. *See Mayer*, 503 F.3d at 752. To the
12 contrary, Plaintiffs’ allegations regarding the FISC-authorized breadth of the collection, FAC
13 ¶¶ 4-6, 11, 53-55, 59-60; Pls.’ Mem. at 1-5, highlight the fact that it is undertaken without
14 targeting Plaintiffs or any other persons, and without reference to anyone’s conduct protected by
15 the First Amendment. Plaintiffs have thus failed to state a First Amendment claim that plausibly
16 gives rise to an entitlement to relief. *Iqbal*, 556 U.S. at 678-79.

17 **B. The Telephony Metadata Collection Program Imposes No Direct or**
18 **Significant Burden on Plaintiffs’ Speech or Associational Rights**

19 Plaintiffs’ contention that the challenged program should be subjected to “exacting
20 scrutiny” because it burdens Plaintiffs’ associational rights, Pls.’ Mem. at 18-24, also fails. That
21 test applies to “significant encroachments on First Amendment rights of the sort that compelled
22 disclosure imposes.” *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1003 (9th Cir.
23 2010); *Mayer*, 503 F.3d at 748. However, the underlying premise of Plaintiffs’ summary
24 judgment motion—that the program exposes to government scrutiny their identities and sensitive
25 contacts with members, supporters, and constituents—is without foundation. As explained
26 above, the metadata collected do not reveal Plaintiffs’ names or addresses or that of anyone with
27 whom they speak, Shea Decl. ¶¶ 7, 15, 18, 21, and, regardless, Plaintiffs offer no evidence that
28 metadata related to their communications have ever been accessed or reviewed by NSA analysts

1 for any purpose, whether as the results of queries based on the “reasonable, articulable
2 suspicion” standard, or otherwise.²⁷ Nor do Plaintiffs plausibly allege that the challenged
3 program is content-based, much less directed at curtailing or punishing free speech or
4 association. Indeed, numerous safeguards built into the program prevent the Government from
5 acquiring or using the data for purposes forbidden by the First Amendment.²⁸

6 Nor can Plaintiffs draw any meaningful parallel between this case and compelled
7 disclosure cases where courts have applied exacting scrutiny to government conduct. In *NAACP*
8 *v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), on which Plaintiffs principally rely, Pls.’
9 Mem. at 18-19, the Alabama courts had ordered the NAACP to produce local membership lists
10 (containing names and addresses of all members) in connection with litigation to oust it from the
11 State as an unregistered corporation. *Id.* at 451-53. The Supreme Court held that Alabama could
12 not compel the NAACP to disclose its lists because it “made an uncontroverted showing that on
13 past occasions revelation of the identity of its rank-and-file members has exposed these members
14 to economic reprisal, loss of employment, threat of physical coercion, and other manifestations
15 of public hostility.” *Id.* at 462. “Under these circumstances,” the Court found it “apparent that
16 compelled disclosure of [NAACP]’s Alabama membership” entailed a “substantial restraint” on
17 the organization’s freedom of association. *Id.*; see *Brown v. Socialist Workers ‘74 Campaign*
18 *Comm.*, 459 U.S. 87, 98-99 (1982) (similarly holding unconstitutional the targeted, compelled
19 disclosure of contributions to and expenditures by Socialist Workers Party, based on “substantial
20

21 ²⁷ Even if the program did reveal such information—which it does not—it still would not
22 violate the First Amendment. In *United States v. Gering*, the Ninth Circuit reaffirmed that a
23 targeted mail cover did not violate a defendant’s rights because “he could expect no privacy as to
24 the outside of his incoming mail, and any ‘chill’ on the exercise of First Amendment rights
25 resulting from that ‘lack of privacy’ is not significant enough to be constitutionally
26 impermissible when, as here, the challenged activity [a mail cover] does not concern the
27 substance of a communication and fits within regulatory restrictions.” 716 F.2d 615, 619 (9th
28 Cir. 1983) (quoting *United States v. Choate*, 576 F.2d 165, 181 (9th Cir. 1978)). See also *United*
States v. Ramsey, 431 U.S. 606, 623-24 (1977) (where mail is subject to inspection by customs
officers only when they have “reasonable cause to suspect” it contains something other than
correspondence, and may not be read absent a warrant, the First Amendment is not violated).

²⁸ See Primary Order at 8-9 (requiring NSA General Counsel’s Office to review all
findings of reasonable, articulable suspicion for numbers reasonably believed to be used by U.S.
persons to ensure the findings are not based on activities protected by the First Amendment); 50
U.S.C. § 1861(a)(1) (prohibiting any investigation of a United States person “conducted solely
upon the basis of activities protected by the first amendment to the Constitution”).

1 evidence” of harassment, threats, assaults, and reprisals against its members); *Bates v. City of*
 2 *Little Rock*, 361 U.S. 516, 524 (1960) (similar).

3 In contrast, the FISC’s orders authorizing the telephony metadata program do not compel
 4 Plaintiffs, providers, or anyone else to disclose the names or addresses of Plaintiffs, their
 5 members, clients, or anyone else with whom they associate (or expose them to the public
 6 hostility suffered by the parties in such cases as *NAACP*, *Bates*, and *Brown*).²⁹

7 **C. Plaintiffs Have Failed to Meet Their Burden of Establishing a “Prima Facie**
 8 **Infringement” of Protected First Amendment Associational Rights**

9 Alternatively, Plaintiffs argue that they can establish a “prima facie infringement” of their
 10 First Amendment rights of association by showing (1) that compelled disclosure of their
 11 members’ identities has resulted in harassment, membership withdrawal, or the discouragement
 12 of new members; or (2) other factors objectively suggesting a “chilling” of members’
 13 associational rights. Pls.’ Mem. at 20 (citing, *inter alia*, *Brock v. Local Union 375*, 860 F.2d 346
 14 350 n.1 (9th Cir. 1988)).

15 Plaintiffs’ statement of this test, however, is incomplete.³⁰ While the Ninth Circuit has
 16 outlined the test in the disjunctive, it has made clear that, for both factors, “*Brock’s* prima facie

17 ²⁹ Nor can a parallel be drawn between the telephony metadata program and the
 18 compelled-disclosure statute at issue in *Shelton v. Tucker*, 364 U.S. 479 (1960), which required
 19 every public educator, as a condition of employment, to file annually an affidavit listing every
 20 organization to which he or she belonged or regularly contributed within the preceding five
 21 years. *Id.* at 480. In striking down the statute under the Due Process Clause, the Supreme Court
 22 emphasized the lack of any safeguards to prevent disclosure of personally identifying
 23 information, and pointed to objective evidence supporting a chilling effect. *Id.* at 486-87 & nn.6-
 24 7 (noting that the law did “not provide that the information it requires be kept confidential,” and
 25 that the record reflected public disclosure of the information as well as evidence that a certain
 26 group sought “access to some of the Act 10 affidavits with a view to eliminating from the school
 27 system persons who supported organizations unpopular with the group,” such as “the American
 28 Civil Liberties Union”); *see also Dole v. Local Union 375*, 921 F.2d 969, 974 (9th Cir. 1990)
 (rejecting First Amendment claim based on alleged chilling effect of disclosure where, *inter alia*,
 “Department [of Labor] policy protects the subpoenaed information from public disclosure”).

³⁰ Even under Plaintiffs’ recitation of the test, their summary judgment motion fails
 because, as explained above, the program does not compel disclosure of Plaintiffs’ names or
 addresses or those with whom they speak. Moreover, Plaintiffs’ characterization of the second
 prong of the test does not accurately represent Ninth Circuit law. In explaining the required
 showing of consequences that “objectively” suggest a chilling effect, Plaintiffs cite *California*
Pro-Life Council, Inc. v. Getman, 328 F.3d 1088 (9th Cir. 2003) (*CPLC*), for the proposition that
 such a showing can be met “by demonstrating that the plaintiff is self-censoring by not engaging
 in particular communications.” Pls.’ Mem. at 20. The language referenced from *CPLC*,
 however, concerns the threshold Article III standing requirement to support a vagueness claim,
 not a substantive showing under the First Amendment on a motion for summary judgment. *See*

1 test has two tiers.” *Dole v. Local Union 375*, 921 F.2d 969, 972 (9th Cir. 1990). First, Plaintiffs
 2 must establish “a causal link between the disclosure and the prospective harm to associational
 3 rights. Second, [they] must demonstrate that it is the type of association where disclosure could
 4 incite threats, harassment, acts of retribution, or other adverse consequences that could
 5 reasonably dissuade persons from affiliating with it.” *Id.* Neither of these showings is made in
 6 the numerous declarations that accompany Plaintiffs’ motion.

7 None of the declarations contains the “careful documentation of membership decline”
 8 that the “first tier” requires. *Id.* at 973.³¹ Instead, they uniformly allege a tenuous temporal
 9 connection between media reports of the telephony metadata program and a decrease in
 10 constituent communication. *E.g.*, Patient Privacy Decl. ¶ 6 (“[P]rior to the revelations of NSA
 11 tracking, we received on average 40 calls per month. After the NSA revelations became public,
 12 we received on average only 20 calls per month.”); *accord, e.g.*, Bill of Rights Comm. Decl. ¶ 4;
 13 Acorn Decl. ¶ 7.³² This documentation is insufficient under Ninth Circuit law. The allegation of
 14

15 *CPLC*, 328 F.3d at 1093. Indeed, it would defy logic to treat an allegation of self-censorship as
 16 an “objective and articulable fact[], which go[es] beyond broad allegations or subjective fears.”
Dole, 921 F.2d at 972 (outlining prima facie First Amendment showing).

17 ³¹ Indeed, the declarations simply paraphrase, often in rote fashion, the language
 18 describing this test as recited in Plaintiffs’ legal memoranda, followed by vague and subjective
 19 allegations of harm. *Compare* Pls.’ Mem. at 20, *with, e.g.*, CAL-FFL Decl. ¶ 3; Calguns Decl. ¶
 20 3; Free Software Decl. ¶ 3; CAIR-F Decl. ¶ 3. While some of these declarations vaguely
 21 reference a “decrease in communications from members and constituents,” CAL-FFL Decl. ¶ 31,
 22 they do not allege, in any specific fashion, a reduction in membership. Furthermore, the only
 23 two declarations that attempt do so—those of First Unitarian and Media Alliance—do not
 24 objectively connect the decline to the challenged program and, at any rate, contain the very
 25 allegations deemed insufficient by the Ninth Circuit in *Dole*. *Compare* Media Alliance Decl. ¶ 9
 26 (“Several organization members have asked to have their membership terminated . . . in the wake
 27 of *recent publicity about* the extent of telephone metadata surveillance.”) (emphasis added), *and*
 28 First Unitarian Decl. ¶ 4(c) (alleging that the “threat of exposure” from prior experience with
 government surveillance “has caused potential visitors to stay away, and members to withdraw
 from the community”), *with Dole*, 921 F.3d at 973 (rejecting allegations of chill with no
 “objective and articulable facts” causally connecting it to challenged governmental activity).

³² Some fail even to allege these vague temporal connections. *See* Free Press Decl. ¶ 5;
 First Unitarian Decl. ¶ 5; People for Am. Way Decl. ¶ 6; Franklin Armory Decl. ¶ 4. *See also*,
e.g., Free Software Decl. ¶ 5 (“As a concrete example [of a chilling effect], some of our
 supporters are refusing to attend [our annual conference] explicitly because of surveillance.”);
 Charity & Security Decl. ¶ 5 (“We have experienced an increase in members expressing concern
 about the confidentiality of the fact of their communications, among each other and with staff.”).
 Others cite fears that stem from the mistaken belief that their “private communications may be
 turned over to the government” under the challenged program. Free Software Decl. ¶ 4(c). *See*
 Shea Decl. ¶¶ 7, 15, 21.

1 a decrease in communication “coincident with the start” of the program “does not satisfy the first
2 tier of the *Brock* test. Documenting a result does not prove its cause.” *Dole*, 921 F.2d at 973.

3 Even assuming, however, that Plaintiffs could satisfy *Brock*’s first tier, their declarations
4 fall well short of the proof required for the second tier because they are “devoid of objective
5 facts indicating a well-founded fear of threats, harassment, or other adverse consequences” if
6 non-content telephony metadata related to their calls were disclosed. *Id.* These declarations
7 broadly and subjectively “argu[e], rather than factually document[] an alleged chill of
8 associational freedom,” *id.* at 974, and entirely fail to connect the alleged chill to the challenged
9 program,³³ much less “establish that . . . members legitimately feared retribution by those few
10 governmental employees who would have access to its records,” *id.* Nor do they explain “how
11 [their] subjective fear[s] . . . could be realized, given that” where any metadata are collected
12 under the program, the statutory framework and FISC-ordered minimization requirements
13 “protect[] the [metadata] from public disclosure,” as explained above. *Id.* at 974; *Perry v.*
14 *Schwarzenegger*, 591 F.3d 1126, 1140 n.6 (9th Cir. 2010) (“A protective order limiting the
15 dissemination of disclosed associational information may mitigate the chilling effect and could
16 weigh against a showing of infringement.”); *McLaughlin v. Serv. Emps. Union*, 880 F.2d 170,
17 175 (1989). For each of these reasons, Plaintiffs have failed to adduce sufficient evidence to
18 establish a prima facie case of First Amendment infringement.³⁴

19 ³³ See, e.g., First Unitarian Decl. ¶ 8 (explaining why “spying makes people afraid to
20 belong to the church community”); CAIR-F Decl. ¶ 3; UUSC Decl. ¶ 3 (“We believe that these
21 partners are now hesitant to contact our organization or speak freely as a result of the NSA’s
22 dragnet surveillance”); Free Press Decl. ¶¶ 3-5. To the extent any declarants actually point to
23 prior incidents of alleged government misconduct, those incidents did not involve the collection
24 of third-party telephony metadata or any activity resembling the challenged program. See, e.g.,
25 Bill of Rights Comm. Decl. ¶ 8(a) (basing present fear on prior “police violence and misconduct
26 in the context of prior restraints on First Amendment activity”); Shalom Center Decl. ¶ 5 (basing
27 present fear on being personally subject to “warrantless searches, theft, [and] forgery[] by the
28 FBI between 1968 and 1974”); First Unitarian Decl. ¶ 4 (basing present fear on subpoenas issued
to members by the House Un-American Activities Committee “[i]n the 1950s” or hearing
“personal stories of [immigrant church members] being physically tortured at the hands of their
[foreign] government”).

³⁴ Even assuming, *arguendo*, that Plaintiffs could establish a prima facie case, the
Government has clearly met its burden of showing “(1) that the information sought . . . is
rationally related to a compelling governmental interest”—namely, identifying and tracking
terrorist operatives and ultimately thwarting terrorist attacks—and “(2) that the government’s
disclosure requirements are the ‘least restrictive means’ of obtaining the desired information.”
Dole v. Serv. Emps. Union, 950 F.2d 1456, 1461 (9th Cir. 1991) (internal quotations omitted).

1 **VI. PLAINTIFFS FAIL TO STATE DUE PROCESS CLAIMS**

2 Plaintiffs' substantive due process claim is premised on an alleged liberty interest in the
3 privacy of their communications. *See* FAC ¶¶ 90-92. However, "[w]here a particular
4 Amendment 'provides an explicit textual source of constitutional protection' against a particular
5 sort of government behavior, 'that Amendment, not the more generalized notion of "substantive
6 due process," must be the guide for analyzing' these claims." *Albright v. Oliver*, 510 U.S. 266,
7 273 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)); *Ramirez v. Butte-Silver Bow*
8 *Cnty.*, 298 F.3d 1022, 1029 (9th Cir. 2002). Because Plaintiffs ground their substantive due
9 process claim on privacy interests allegedly protected by the Fourth Amendment, that claim must
10 be dismissed. *Accord Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir. 2002).

11 Plaintiffs also fail to state a viable procedural due process claim. They argue that the
12 Government deprived them of the aforementioned privacy interests by seizing, collecting,
13 searching and using telephony metadata related to their communications without providing any
14 pre-deprivation notice that would allow Plaintiffs to ascertain "specifically what conduct may
15 subject them to electronic surveillance." FAC ¶¶ 91-92, 95-96; *see also id.* ¶ 97 (alleging, for
16 same reasons, that 50 U.S.C. § 1861 is unconstitutionally vague).

17 To establish a violation of procedural due process, Plaintiffs must show that the
18 Government deprived them of a "constitutionally protected liberty or property interest," and a
19 "denial of adequate procedural protections." *Kildare v. Saenz*, 325 F.3d 1078, 1085 (9th Cir.
20 2003). Plaintiffs cannot survive the threshold inquiry here, as they have not shown a deprivation
21 of a constitutionally protected liberty or property interest. *See Erickson v. United States*, 67 F.3d
22 858, 861 (9th Cir. 1995). Although Plaintiffs assert an "informational privacy interest" in non-
23 content telephony metadata related to their calls, FAC ¶¶ 90, 95, they have no reasonable
24 expectation of privacy in such data, as explained *supra*, Part IV, and they do not plausibly allege
25 any other constitutionally protected privacy interest in these data. Without the deprivation of

26 The Government has explained that the program's objectives could not be achieved as
27 effectively by relying on the targeted collection of telephony metadata that Plaintiffs appear to
28 suggest, whether by subpoenas, national security letters, or pen-register and trap-and-trace
devices, as this would reduce the Government's ability to identify networks of previously
unknown foreign terrorist operatives in the United States as rapidly, reliably, and completely as
analysis of bulk telephony metadata. *See* Skule Decl. ¶¶ 9, 19-29; Shea Decl. ¶¶ 46, 57-63.

1 such an interest, the Due Process Clause is not implicated. *Ingraham v. Wright*, 430 U.S. 651,
2 672 (1977); *Johnson v. Rancho Santiago Cmty. Coll.*, 623 F.3d 1011, 1029 (9th Cir. 2010).³⁵

3 Even assuming, however, that Plaintiffs retain a residual privacy interest in non-content
4 telephony metadata related to their calls that is entitled to due-process protection—above and
5 beyond the protections already afforded by the Fourth Amendment—they are not “due” the pre-
6 deprivation notice they demand. When protected liberty interests are implicated (unlike here),
7 the determination of what process is due often requires consideration of three factors: “(1) the
8 private interest affected by the official action; (2) the risk of an erroneous deprivation of such
9 interest through the procedures used and probable value of additional safeguards; and (3) the
10 Government’s interest.” *Fairley v. Luman*, 281 F.3d 913, 918 & n.6 (9th Cir. 2002) (citing
11 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Due process “is not a technical conception
12 with a fixed content unrelated to time, place and circumstances,” but rather, it “is flexible and
13 calls for such procedural protections as the particular situation demands,” *Gilbert v. Homar*, 520
14 U.S. 924, 930 (1997) (internal quotation marks and citation omitted), and, as relevant here, takes
15 into account “essential national security considerations,” *Gonzalez v. Freeman*, 334 F.2d 570,
16 580 n.21 (D.C. Cir. 1964). See *Marshall v. Sawyer*, 365 F.2d 105, 111 (9th Cir. 1966).

17 Here, the Government’s interest in identifying and tracking terrorist operatives for the
18 purpose of preventing terrorist attacks far outweighs any residual “informational privacy”
19 interest that Plaintiffs may have in non-content telephony metadata related to their calls not
20 already protected by the Fourth Amendment, and by the same token outweighs any risk of
21 erroneous deprivation of that interest. “[N]o governmental interest is more compelling than the
22 security of the Nation.” *Haig*, 453 U.S. at 307; see also *Holder v. Humanitarian Law Project*,
23 130 S. Ct. 2705, 2724 (2010). The NSA’s collection of telephony metadata thus promotes a
24 governmental interest of the highest order. See, e.g., *id.*; *In re Sealed Case*, 310 F.3d 717, 746
25 (F.I.S.C.-R. 2002). Owing to this compelling interest, Congress specifically rejected providing
26

27 ³⁵ Plaintiffs’ vagueness claim also fails for lack of a protected liberty or property interest.
28 See, e.g., *Williams v. Vidmar*, 367 F. Supp. 2d 1265, 1275 (N.D. Cal. 2005) (“Since no
constitutionally-protected activity is being restricted, there can be no claim that the procedures
used to impose the restrictions are constitutionally insufficient.”).

1 the process Plaintiffs seek.³⁶ Requiring the Government to provide advance notice to every
 2 individual before acquiring non-content telephony metadata related to his or her communications
 3 would be incompatible with the secrecy required for the challenged program, see *supra* Part II,
 4 and fatal to its objectives. For example, if the Government disclosed to an individual associated
 5 with a foreign terrorist organization that metadata related to his communications were to be
 6 collected and subject to scrutiny by the Government, that individual, and his or her associates,
 7 could take steps to avoid detection and alter their plans, thus placing national security at greater
 8 risk.³⁷ Due process does not require the Government to put national security at risk in such
 9 fashion by providing communications services subscribers the process that Plaintiffs demand.
 10 *See Holder*, 130 S. Ct. at 2727; *Haig*, 453 U.S. at 309-10; *Al Haramain Islamic Found., Inc. v.*
 11 *U.S. Dep't of Treasury*, 686 F.3d 965, 980-81 (9th Cir. 2012).³⁸

CONCLUSION

13 For the reasons stated above, Defendants' Motion to Dismiss should be granted, and
 14 Plaintiffs' Motion for Partial Summary Judgment should be denied.

16 ³⁶ *See* 50 U.S.C. § 1861(f)(2)(A)(i) (providing only recipients the right to challenge
 17 lawfulness of Section 215 orders before the FISC); *supra* at 18-19 & n.11 *Cf. Jerry T. O'Brien,*
 18 *Inc.*, 467 U.S. at 742-50 (target of investigation not entitled to notice—under due process clause
 19 or otherwise—when SEC issues subpoenas to third party providers).

19 ³⁷ *See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974)
 20 (dispensing with pre-deprivation notice or hearing when exigent circumstances exist and the
 21 government demonstrates a “pressing need for prompt action”); *Al Haramain Islamic Found.,*
 22 *Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 985 (9th Cir. 2012) (“[A]s many courts have held,
 23 the potential for ‘asset flight’ almost certainly justifies OFAC’s decision not to provide notice
 24 before freezing the assets.”); *Global Relief Found., Inc. v. O’Neill*, 207 F. Supp. 2d 779, 803
 25 (N.D. Ill. 2002) (“Due to the exigencies of national security and foreign policy considerations,
 26 the Executive Branch historically has not provided pre-deprivation notice in sanctions programs
 27 under [the International Emergency Economic Powers Act].”).

28 ³⁸ Count V of the complaint, seeks “the return” of any call-detail records collected under
 the program about Plaintiffs’ telephone communications, pursuant to Fed. R. Crim. P. 41(g).
 FAC ¶¶ 111-112. Rule 41(g) provides that “[a] person aggrieved by an unlawful search and
 seizure of property or by the deprivation of property may move for the property’s return.” Count
 V must be dismissed, first, because Rule 41(g) provides the basis for a motion in a criminal case,
 not a civil cause of action. The rule “do[es] not apply where there is no criminal proceeding
 connected to the seizure.” *Hall v. City of Charlotte*, 2005 WL 2219326, *1 n.2 (D. Kan. Sept.
 13, 2005). Moreover, the property at issue—call-detail records—does not belong to Plaintiffs
 but is the property of telecommunications service providers, even if it had been unlawfully
 searched and seized (which it has not). *See United States v. Kaczynski*, 551 F.3d 1120, 1129 (9th
 Cir. 2009) (defendant not entitled to return of property he never lawfully possessed).

1 Dated: December 6, 2013

Respectfully Submitted,

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12 **UNITED STATES DISTRICT COURT**
 13 **NORTHERN DISTRICT OF CALIFORNIA**
SAN FRANCISCO DIVISION

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

16 Plaintiffs,

17 v.

18 NATIONAL SECURITY AGENCY, *et al.*,

19 Defendants.

Case No. 3:13-cv-03287-JSW

**[PROPOSED] ORDER GRANTING
 THE GOVERNMENT
 DEFENDANTS' MOTION
 TO DISMISS**

Date: February 7, 2014
 Time: 9:00 a.m.
 Courtroom 11, 19th Floor
 The Honorable Jeffrey S. White

21 This matter came for hearing before the Court on the Government Defendants' Motion
 22 To Dismiss. Having given full consideration to the parties' papers and evidence, the relevant
 23 authorities, and oral presentations of counsel, and good cause appearing, it is HEREBY
 24 ORDERED:

25 The Government Defendants' Motion To Dismiss is GRANTED.

26 IT IS SO ORDERED.

27 DATED: _____

28 HONORABLE JEFFREY S. WHITE
 UNITED STATES DISTRICT COURT JUDGE