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16 **UNITED STATES DISTRICT COURT**
17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

18 CAROLYN JEWEL, TASH HEPTING, *et al.*,)
19)

Plaintiffs,)

v.)

21 NATIONAL SECURITY AGENCY, *et al.*,)

Defendants.)

23 FIRST UNITARIAN CHURCH OF LOS)
24 ANGELES, *et al.*,)

Plaintiffs,)

v.)

26 NATIONAL SECURITY AGENCY, *et al.*,)

Defendants.)
27)
28)

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

**PLAINTIFFS' REPLY BRIEF RE
EVIDENCE PRESERVATION**

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

Case Nos. 08-cv-4373-JSW;
13-cv-3287-JSW

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INTRODUCTION

1
2 Since 2006, Plaintiffs have been diligently and consistently pursuing litigation aimed at
3 stopping the Government's mass spying. This includes both mass collection of telephone records
4 and Internet metadata, and the mass collection of communications content and records of ordinary
5 Americans, including Plaintiffs. Plaintiffs' claims have always been based on the NSA's conduct
6 and its technological methods of collection, not on the often shifting and secret legal authority upon
7 which the Government has relied to justify its surveillance.

8 The Court need only resolve two issues in this proceeding.

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

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

26
27 ¹Plaintiffs disagree with the Government's argument that the same records are not relevant to *Jewel*
28 *v. NSA*. However, because there need be only one basis for preservation, if the Court decides to
preserve all the records it need not resolve that dispute in this proceeding.

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

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

9 **ARGUMENT**

10 **A. Ongoing Evidence Preservation Orders**

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

15 **1. This Preservation Dispute Can be Avoided if The Government** 16 **Admits its Collection of Plaintiffs' Communications and** 17 **Communications Records**

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

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

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

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

3 In any event, this Court is certainly not limited to the two preservation options presented by
4 the Government. Of the two, however, the one it proposed to the FISC (which the FISC accepted as
5 a temporary order), by which it simply keeps the records it has collected and renders them
6 operationally unavailable except for use as needed in the litigation, is preferable and plainly more
7 practicable. March 14, 2014 FISC Order at 6-7.⁴ But while making the terms of the FISC order
8 apply for the life of both *First Unitarian* and *Jewel* would be sufficient, Plaintiffs are cognizant of
9 the concerns that information that they believe should not have been collected in the first place
10 should not be kept any longer than necessary. After all, Plaintiffs brought these cases because they
11 believed that both the law and the Constitution prevent their communication records and content
12 from being collected on a mass scale and kept for years at a time. They are also extremely sensitive
13 to the fact that as long as the records exist, there remains a potential for misuse. Thus Plaintiffs'
14 proposed third option is the most reasonable, and practicable, given the need to balance the privacy
15 interests and the litigation needs.

16 **2. The Preservation Orders in *First Unitarian v. NSA* and *Jewel v. NSA* Are Tied to the Activity of Bulk Collection, Not the
17 Government's Claimed Legal Authority.**
18

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

26
27 _____
28 ⁴ The FISC also provided that it be notified of any further accesses to the records, a requirement that the Plaintiffs do not object to but that need not be part of this Court's order. If the FISC wishes an ongoing notification of access, it can so order.

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

- 5 4. The Associational Tracking Program is vast. It collects telephone
6 communications information for all telephone calls transiting the networks
7 of all major American telecommunication companies, including Verizon,
8 AT&T, and Sprint, *ostensibly* under the authority of section 215 of the USA
9 PATRIOT Act, codified at 50 U.S.C. § 1861 (emphasis added).
- 10 66. Defendants' bulk seizure, collection, acquisition, and retention of the
11 telephone communications information of Plaintiffs, their members, and
12 their staffs is done without lawful authorization, probable cause, and/or
13 individualized suspicion. It is done in violation of statutory and
14 constitutional limitations and in excess of statutory and constitutional
15 authority. Any judicial, administrative, or executive authorization (*including*
16 any order issued pursuant to the business records provision of 50 U.S.C.
17 § 1861) of the Associational Tracking Program or of the acquisition and
18 retention of the communications information of Plaintiffs, their members,
19 and their staffs is unlawful and invalid (emphasis added).
- 20 73. Defendants' searching of the telephone communications information of
21 Plaintiffs is done without lawful authorization, probable cause, and/or
22 individualized suspicion. It is done in violation of statutory and
23 constitutional limitations and in excess of statutory and constitutional
24 authority. Any judicial, administrative, or executive authorization (*including*
25 any business records order issued pursuant 50 U.S.C. § 1861) of the
26 Associational Tracking Program or of the searching of the communications
27 information of Plaintiffs is unlawful and invalid (emphasis added).

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

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

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

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

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

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

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

22 It now seems apparent that the Government, as a result of its secret unwarranted and
23 extremely narrow reading of the *Jewel* Complaint, has not adequately preserved evidence regarding
24 the claims in *Jewel*. As revealed to Plaintiffs for the first time at 1:00 PM yesterday, as part of an
25 89 page filing containing a 38 page brief, the Government decided, in secret, that Plaintiffs’
26 complaint does not reach the government’s collection activities other than those done solely under
27 “presidential authority.” This assertion is both absurd and outrageous, flying in the face of the eight
28 years that Plaintiffs have been seeking to stop the Government’s mass surveillance programs, six
years of which (and a trip to the Ninth Circuit and back) occurred under the *Jewel* complaint. It is

1 no less outrageous for the fact that the Government has apparently been maintaining this position –
2 secretly – since at least 2007.⁵

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

8 Moreover, there appears to be a serious question about whether the Government has been
9 complying with its preservation obligations in *First Unitarian*. The Complaint was filed in
10 September 2013, and, as Plaintiffs noted in their opening brief, on October 31, 2013, the
11 Government told the Court that it was complying with its preservation obligations. *First Unitarian*
12 Joint Case Management Conference Statement, ECF No. 20 in No. 13-cv-3287- JSW. Yet the
13 Government has now admitted that it has been destroying evidence continuously through March
14 10, 2014. Declaration of Teresa Shea (*Jewel* ECF No. 193-3) at ¶ 20. It did not bring this to the
15 attention of any court before, or even shortly after, the October Joint CMC Statement, but rather
16 only in February 2014, six months after it was on unequivocal notice of Plaintiffs' claims. The
17 Government fails to address this directly in its Opposition and the Court should require the
18 Government to state, clearly and unequivocally, what it has been doing with telephone records it
19 has collected after the *First Unitarian* Complaint was filed.

20
21
22
23 ⁵ The failure to disclose this declaration previously was in violation of this Court's September 27,
24 2013, order, in which it ordered the Government to re-file its prior secret declarations by
25 December 20, 2013: "I'm going to require that *all* the previous declarations be declassified and
26 presented to the Court. All of them, without exception, because I want a full record in this Court."
27 Transcript of Proceedings held on 9-27-2013 (ECF No. 164) at 24:15-18 (emphasis added).
28 Plaintiffs note that the Government failed to do so with the declaration attached to its Response. If
the Government had obeyed this Court's order in December, Plaintiffs may have been able to
identify the issues earlier, before two months more destruction occurred. *See* Plaintiffs' Response
to Defendants' Public Declarations at 11-13 (ECF No. 173) (noting classified filings remained in
case, contrary to Court's order).

1 **1. Plaintiffs Have Always Alleged Ongoing Mass Collection and**
 2 **Have Never Limited Their Claims to Merely the Collection**
 3 **Occurring Under “Presidential Authority.”**

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

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

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

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

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

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

3 Ignoring these allegations, the Government instead cherry-picks portions of the *Jewel*
4 complaint that reference lack of judicial authority. The Government points to paragraphs 110, 120,
5 129, and 138, of the *Jewel* complaint, which allege defendants have acted “without judicial or other
6 lawful authorization, probable cause, and/or individualized suspicion, in violation of statutory and
7 constitutional limitations, and in excess of statutory and constitutional authority.” Govt. Br. at 19.
8 Even if the Government’s reading were correct, the allegation would be merely an alternate, not
9 exclusive, claim. Rule 8(d) permits a plaintiff to plead alternative or inconsistent claims.

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

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

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

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

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

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

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

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

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

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

9 As an initial matter, the 2007 declaration references activity "under the TSP," meaning the
10 so-called Terrorist Surveillance Program. *See Gov't Opp.* at 7-8 (summarizing various paragraphs).
11 But there never was an actual program called the "TSP," it was a label made up by the Bush
12 Administration for aspects of a broader program, the President's Surveillance Program (PSP).
13 Department of Defense, *et al.*, Offices of Inspector Gen., *Unclassified Report on the President's*
14 *Surveillance Program* (July 10, 2009) at 1 ("OIG PSP Report") [Summary of Evidence (*Jewel* ECF
15 No. 113) Vol. III, Ex. 33, p. 1197]. "[B]efore December 2005, the term 'Terrorist Surveillance
16 Program' was not used to refer to these activities, collectively or otherwise. It was only in early
17 2006, as part of the public debate that followed the unauthorized disclosure and the President's
18 acknowledgement of *one aspect* of the NSA activities, that the term Terrorist Surveillance Program
19 was first used." *Letter from Att'y Gen. Alberto Gonzalez to Sen. Patrick Leahy* (Aug. 1, 2007)
20 [Summary of Evidence Vol. V, Ex. 102, p. 3481] (emphasis added).

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

25 As far as Plaintiffs are aware, the Government never returned to the Court to seek any
26 clarification of its preservation obligations, either in the MDL or in *Jewel*. It certainly never raised
27 the scope of Plaintiffs' complaint with Plaintiffs. The Government's self-serving declarations in
28

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

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

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

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

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

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

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

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

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

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

10 **4. The Government Could Have Raised this Preservation Issue** 11 **Long Ago**

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

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

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

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

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

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

11 **CONCLUSION**

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

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

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

23 3. That the Court order the Government defendants within 15 days to disclose to the
24 Court and to Plaintiffs what they have done to comply with the existing preservation orders, and to
25 disclose whether they have destroyed telephone metadata records ("call detail records"), Internet
26 metadata records, Internet or telephone content data, or any other evidence potentially relevant to
27

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

3
4 DATE: March 18, 2014

Respectfully submitted,

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