

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MUSLIM COMMUNITY ASSOCIATION)
OF ANN ARBOR, et al.,)
)
Plaintiffs,) Civil Action No. 03-72913
)
v.) Honorable Denise Page Hood
)
JOHN ASHCROFT, in his official capacity as) Magistrate Judge R. Steven Whalen
Attorney General of the United States, et al.,)
)
Defendants.)

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

PETER D. KEISLER
Assistant Attorney General

JEFFREY G. COLLINS
United States Attorney

SHANNEN W. COFFIN
Deputy Assistant Attorney General

L. MICHAEL WICKS
Assistant United States Attorney
211 W. Fort St, Suite 2001
Detroit, Michigan 48226
Telephone: (313) 226-9760

SANDRA SCHRAIBMAN, D.C. Bar # 188599
JOSEPH W. LOBUE, D.C. Bar # 293514
U.S. Department of Justice
20 Massachusetts Avenue, N.W., Room 7300
Washington, D.C. 20530
Telephone: (202) 514-4640
Attorneys for Defendants

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
ARGUMENT	3
I. PLAINTIFFS LACK STANDING TO CHALLENGE SECTION 215	3
A. The Alleged Chilling Effect Resulting From Plaintiffs' Fear That They Might Be Served With A Subpoena Does Not Constitute An Injury In Fact	3
B. Section 215 Does Not Impose Any Prior Restraint On Plaintiffs	7
II. PLAINTIFFS' CLAIMS ARE NOT RIPE FOR JUDICIAL REVIEW	8
III. SECTION 215 COMPLIES WITH THE FOURTH AMENDMENT	10
A. Section 215 Is Narrow In Scope	10
B. The Fourth Amendment Does Not Require A Court To Find Probable Cause Before It May Order Production Of Documents	11
C. Section 215 Satisfies The Fourth Amendment Standards Applicable To Orders Compelling Production Of Documents	13
IV. SECTION 215 COMPLIES WITH THE DUE PROCESS CLAUSE	14
V. SECTION 215 COMPLIES WITH THE FIRST AMENDMENT	16
CONCLUSION	20

TABLE OF AUTHORITIES¹

<u>CASES</u>	<u>Page</u>
<i>Alexander v. United States</i> , 509 U.S. 544 (1993)	18
<i>Andresen v. Maryland</i> , 427 U.S. 463 (1976)	11
<i>Babbitt v. United Farm Workers Nat'l Union</i> , 442 U.S. 289 (1979)	3
<i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972)	4, 17
<i>Briggs v. Ohio Election Commission</i> , 61 F.3d 487 (6th Cir. 1995)	3
* <i>Butterworth v. Smith</i> , 494 U.S. 624 (1990)	19
* <i>California Bankers Association v. Shultz</i> , 416 U.S. 21 (1974)	8-9, 17
<i>Capital Cities Media, Inc. v. Toole</i> , 463 U.S. 1303 (1983) (opinion of Brennan, J.)	19
<i>Chambers v. NASCO, Inc.</i> , 501 U.S. 32 (1991)	16
<i>City Council of Los Angeles v. Taxpayers for Vincent</i> , 466 U.S. 789 (1984)	17
<i>City of Lakewood v. Plain Dealer Pub. Co.</i> , 486 U.S. 750 (1988)	6, 7, 9
<i>Cohen v. Cowles Media Company</i> , 501 U.S. 663 (1991)	4, 17
<i>Deja Vu of Nashville v. Metropolitan Gov't of Nashville and Davidson County</i> , 274 F.3d 377 (6th Cir. 2001), <i>cert. denied</i> 535 U.S. 1073 (2002)	3, 9
<i>Doe v. Bolton</i> , 410 U.S. 179 (1973)	3
* <i>Doe v. United States</i> , 253 F.3d 256 (6th Cir. 2001)	14
<i>Dombrowski v. Pfister</i> , 380 U.S. 479 (1965)	6
<i>Ferguson v. City of Charleston</i> , 532 U.S. 67 (2001)	13

¹ An * designates cases upon which defendants principally rely.

TABLE OF AUTHORITIES (Continued)

<u>CASES (Cont.)</u>	<u>Page</u>
<i>First Bank of Marietta v. Hartford Underwriters Insurance Co.</i> , 307 F.3d 501 (6th Cir. 2002)	16
<i>Fisher v. Marubeni Cotton Corporation</i> , 526 F.2d 1338 (8th Cir. 1975)	12
<i>Fisher v. United States</i> , 425 U.S. 391 (1976)	11
<i>Florida Star v. B.L.F.</i> , 491 U.S. 524 (1989)	19
<i>Freedman v. State of Maryland</i> , 380 U.S. 51 (1965)	7, 9
<i>FW/PBS, Inc. v. City of Dallas</i> , 493 U.S. 215, 226 (1990)	7
<i>G & V Lounge v. Michigan Liquor Control Comm'n</i> , 23 F.3d 1071 (6th Cir. 1994)	6
<i>Hahn v. Star Bank</i> , 190 F.3d 708 (6th Cir. 1999), <i>cert. denied</i> 529 U.S. 1020 (2000)	4
* <i>Hannah v. Larche</i> , 363 U.S. 420 (1960)	14
<i>Hutchins v. District of Columbia</i> , 188 F.3d 531 (1999)	17
<i>In re Administrative Subpoena</i> , 289 F.3d 843 (6th Cir. 2001)	13
<i>In re Grand Jury Proceedings 87-3 Subpoena Duces Tecum</i> , 955 F.2d 229 (4th Cir. 1992) ...	17
* <i>In re Sealed Case</i> , 310 F.3d 717 (Foreign Intel. Surv. Ct. of Rev. 2002)	15
<i>J.P. v. De Santi</i> , 653 F.2d 1080 (6th Cir. 1981)	4
* <i>Laird v. Tatum</i> , 408 U.S. 1 (1972)	5, 7
<i>Lamont v. Postmaster General</i> , 381 U.S. 301 (1965)	6
<i>Landmark Communications, Inc. v. Virginia</i> , 435 U.S. 829 (1978)	18
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	3

TABLE OF AUTHORITIES (Continued)

<u>CASES (Cont.)</u>	<u>Page</u>
<i>Maness v. Meyers</i> , 419 U.S. 449 (1975)	16
<i>NAACP v. Button</i> , 371 U.S. 415 (1963)	3
<i>National Student Association v. Hershey</i> , 412 F.2d 1103 (D.C. Cir. 1969)	6
<i>National Labor Relations Board v. Cincinnati Bronze, Inc.</i> , 829 F.2d 585 (6th Cir. 1987)	16
<i>New Hampshire Right To Life Political Action Committee v. Gardner</i> , 99 F.3d 8 (1st Cir. 1996)	3
<i>New York v. Ferber</i> , 458 U.S. 747 (1982)	17
<i>Nightclubs, Inc. v. Paducah</i> , 202 F.3d 884 (6th Cir. 2000)	7, 8, 18
<i>Nilva v. United States</i> , 352 U.S. 385 (1957)	12
* <i>Oklahoma Press Publishing Co. v. Walling</i> , 327 U.S. 186 (1946)	11, 12
<i>Presbyterian Church v. United States</i> , 870 F.2d 518 (9th Cir. 1989)	6-7
<i>Raines v. Byrd</i> , 521 U.S. 811 (1997)	3, 5
<i>Schlesinger v. Reservists Committee to Stop the War</i> , 418 U.S. 208 (1974)	8
* <i>Seattle Times Company v. Rhinehart</i> , 467 U.S. 20 (1984)	19
<i>Secretary of State of Maryland v. Joseph H. Munson Co.</i> , 467 U.S. 947 (1984)	6
* <i>Securities & Exchange Commission v. O'Brien</i> , 467 U.S. 735 (1984)	12-13, 14
<i>Shuttlesworth v. Birmingham</i> , 394 U.S. 147 (1969)	7
<i>Southeastern Promotions, Ltd. v. Conrad</i> , 420 U.S. 546 (1975)	18
<i>Steel Company v. Citizens for a Better Environment</i> , 523 U.S. 83 (1998)	3

TABLE OF AUTHORITIES (Continued)

<u>CASES (Cont.)</u>	<u>Page</u>
<i>Steffel v. Thompson</i> , 415 U.S. 452, 459 (1974)	3
<i>Taylor v. United States</i> , 221 F.2d 809 (6th Cir.), cert. denied 350 U.S. 834 (1955)	12
* <i>Texas v. United States</i> , 523 U.S. 296 (1998)	8
<i>Thomas v. Union Carbide Agricultural Products</i> , 473 U.S. 568 (1985)	8
* <i>United Presbyterian Church v. Reagan</i> , 738 F.2d 1375 (D.C. Cir. 1984)	5
<i>United States v. Boyd</i> , 116 U.S. 616 (1886)	11
<i>United States v. Bryan</i> , 339 U.S. 323 (1950)	12
<i>United States v. Calandra</i> , 414 U.S. 338 (1974)	4
<i>United States v. Doe</i> , 465 U.S. 605 (1984)	11
<i>United States v. Markwood</i> , 48 F.3d 969, 976 (6th Cir. 1995)	10
* <i>United States v. Miller</i> , 425 U.S. 435 (1976)	12
<i>United States v. New York Telephone Company</i> , 434 U.S. 159 (1977)	15
<i>United States v. Powell</i> , 379 U.S. 48 (1964)	11
<i>United States v. R. Enterprises</i> , 498 U.S. 292 (1991)	14
<i>United States v. Ryan</i> , 402 U.S. 530 (1971)	16
* <i>United States v. United States District Court</i> , 407 U.S. 297 (1972)	20
<i>University of Pennsylvania v. Equal Employment Opportunity Commission</i> , 493 U.S. 182 (1990)	17
<i>Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.</i> , 454 U.S. 464 (1982)	8

TABLE OF AUTHORITIES (Continued)

<u>CASES (Cont.)</u>	<u>Page</u>
<i>Virginia v. American Booksellers Association</i> , 484 U.S. 383 (1988)	3, 6
<i>Virginia v. Hicks</i> , 123 S.Ct. 2191 (2003)	17
<i>Whitmore v. Arkansas</i> , 495 U.S. 149 (1990)	3, 4
<i>Young v. United States ex rel. Vuitton Et Fils</i> , 481 U.S. 787 (1987)	16
* <i>Zurcher v. Stanford Daily</i> , 436 U.S. 547 (1978)	11
 <u>UNITED STATES CONSTITUTION</u>	
U.S. Const., Art. III	1, 5
U.S. Const. Amend. I	1, 16-20
U.S. Const. Amend. IV	2, 10-14
U.S. Const. Amend. V	2, 14-16
 <u>STATUTES</u>	
18 U.S.C. §§ 793-794	19
50 U.S.C. §§ 1801(c)	10
50 U.S.C. § 1801(e)	10
50 U.S.C. § 1803(c)	16
50 U.S.C. § 1861	14
50 U.S.C. § 1861(a)	10, 13
50 U.S.C. § 1861(c)	13, 15
50 U.S.C. § 1861(d)	18
USA Patriot Act, Pub. L. 107-56, § 215, 115 Stat. 272, 286-288 (Oct. 26, 2001)	<i>passim</i>

TABLE OF AUTHORITIES (Continued)

<u>RULES</u>	<u>Page</u>
Rule 6(e), Fed. R. Crim. P.	19
Rule 17(c), Fed. R. Crim. P.	10, 12
Rule 17(g), Fed. R. Crim. P.	12
Rule 41(d)(1), Fed. R. Crim. P.	12
Rule 45(a), Fed. R. Civ. P.	10, 12
Rule 45(e), Fed. R. Civ. P.	12
 <u>LEGISLATIVE MATERIALS</u>	
S. Rep. No. 95-604, 95th Cong. 1st Sess. 22 (Nov. 15, 1977) <i>reprinted at</i> 1978 U.S.C.C.A.N. 3904, 392-24	10
S. Rep. No. 95-701, 95th Cong. 2d Sess. 16 (March 14, 1978), <i>reprinted at</i> 1978 U.S.C.C.A.N. 3985	20
147 Cong. Rec. S10589 (Oct. 11, 2001)	15
147 Cong. Rec. S11003 (Oct. 25, 2001)	15
 <u>OTHER AUTHORITIES</u>	
Black's Law Dictionary at 477 (7th ed. 1999)	16

PRELIMINARY STATEMENT

With remarkable hyperbole, plaintiffs contend that section 215 of the Patriot Act "empowers" the FBI to demand production of a "virtually limitless array" of expression protected by the First Amendment from "membership lists in political organizations" to "religious books." Plaintiffs' Response to Defendants' Motion to Dismiss ("Pl. Mem.") at 11. They also assert that no judicial process is available to resolve constitutional objections to these demands. Neither assertion is correct. Section 215 authorizes the FBI to apply to the Foreign Intelligence Surveillance (FIS) Court for an order which, like a grand jury subpoena, commands the production of records. Unlike grand jury subpoenas (which issue without any court's prior review), Section 215 authorizes such an order only where the *FIS Court* finds the records are for an investigation to obtain foreign intelligence or protect against international terrorism or espionage. And nothing in Section 215 purports to block plaintiffs from raising - *prior* to making production - any constitutional or other objections to the FIS Court's order, and nothing relieves the FIS Court of its responsibility to resolve those objections.

These crucial particulars deprive plaintiffs of both Article III standing and a ripe "case or controversy." Though plaintiffs originally alleged that the FBI is using Section 215 to obtain their "records and personal belongings," it is now undisputed that none of the plaintiffs has received a Section 215 order, and it has had no effect on their "records or personal belongings." Plaintiffs seek to invoke this Court's jurisdiction not because they have been ordered to produce any of their records, but instead to ensure that those records are immune from legal process for the indefinite future – an immunity that they insist is necessary to avoid a "chilling effect" on their First Amendment rights. However, plaintiffs' generalized obligation to respond to future court orders – an obligation that plaintiffs share with everyone else in America – is in no sense a "legally cognizable injury" sufficient

to afford standing. The Court no more has jurisdiction to render judgment on the constitutionality of hypothetical Section 215 orders based on allegations that such orders *might* compel production of protected information, or *might* impose an unconstitutional requirement, than it has to make the same pronouncements with respect to hypothetical uses of the grand jury subpoena power. Instead, just as with a grand jury subpoena, plaintiffs must await an *actual* Section 215 order and present any *actual* constitutional or other objections concerning its *actual* scope to the FIS Court that issued it.

Plaintiffs' claims are likewise groundless on the merits. It is settled that the Fourth Amendment does not require a finding of probable cause before a court may order production of documents, and plaintiffs' suggestion that Section 215 authorizes the FIS court to order production of records that have no meaningful nexus to an investigation is irreconcilable with the statute.

Plaintiffs' claims under the Fifth Amendment are equally unavailing. Nothing in Section 215 deprives plaintiffs of an opportunity to be heard by the FIS Court on any objections they might have to the demand *prior* to making production, and equally clearly, nothing authorizes the FIS Court to impose any penalty for non-compliance with an order absent appropriate process. As for the putative rights of the "targets" of an investigation, the law is long settled: The Supreme Court has repeatedly rejected the notion that a "target" of an investigation is entitled to any form of notice or hearing under the Due Process Clause before the Government may obtain production of records from third parties.

Plaintiffs' claims under the First Amendment likewise misconceive the governing law. A statute is not facially invalid merely because one can conceive of an impermissible application. Nor does Section 215 impose a "prior restraint" by conditioning speech on the prior approval of the Government. Finally, plaintiffs' contention that all permanent restrictions on disclosure are unconstitutional is simply erroneous and contradicted by the authorities upon which plaintiffs rely.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO CHALLENGE SECTION 215

A. The Alleged Chilling Effect Resulting From Plaintiffs' Fear That They Might Be Served With A Subpoena Does Not Constitute An Injury In Fact

To satisfy the "injury in fact" component of standing, plaintiffs must allege and ultimately prove they have suffered harm as a result of Section 215 that is both "concrete and particularized," *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)), and "'actual or imminent,' not 'conjectural' or 'hypothetical.'" *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 103 (1998), quoting in part, *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). As Section 215 has never been used, plaintiffs have never been required to produce any records at all, much less records that implicate the First, Fourth or Fifth Amendment.

Nonetheless, plaintiffs assert that they have standing because they have a "reasonable fear that the government will use Section 215 to compel the production of material implicating their own First Amendment rights and that of their members." Pl. Mem. at 12. Their argument rests on cases in which courts have permitted pre-enforcement challenges to a criminal or regulatory statute if the plaintiff can establish a "credible threat of sanctions" for violation of its terms. Pl. Mem. at 13-15.²

² *Virginia v. American Booksellers Association*, 484 U.S. 383 (1988) (criminal statute prohibiting the display of sexually explicit materials); *NAACP v. Button*, 371 U.S. 415, 425 n. 7 (1963) (criminal statute proscribing legal solicitation); *Briggs v. Ohio Election Commission*, 61 F.3d 487 (6th Cir. 1995) (criminal statute regulating content of campaign literature); *Deja Vu of Nashville v. Metropolitan Gov't of Nashville and Davidson County*, 274 F.3d 377 (6th Cir. 2001), *cert. denied* 535 U.S. 1073 (2002) (ordinance requiring "sexually oriented businesses" to obtain license before operating); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979) (criminal statute regulating labor organizations); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (criminal statute regulating distribution of handbills); *Doe v. Bolton*, 410 U.S. 179 (1973) (criminal statute proscribing abortion); *New Hampshire Right To Life Political Action Committee v. Gardner*, 99 F.3d 8, 11 (1st Cir. 1996) (criminal statute regulating campaign expenditures).

These cases are plainly inapplicable. Section 215 does not purport to make protected behavior a crime; it simply allows the FIS Court to order the production of records in connection with an investigation. Plaintiffs can thus face no threat of sanctions under Section 215 without, first, being served with a Section 215 order and given an opportunity to move the FIS Court to quash the order. In this respect, Section 215 poses no greater threat of "sanctions" for noncompliance than a rule authorizing a grand jury subpoena. As no order has been issued, plaintiffs are presently incapable of violating the statute, much less demonstrating a "credible threat of sanctions." *See Whitmore*, 495 U.S. at 155 (harm must be "certainly impending" to constitute an injury-in-fact).

Plaintiffs alternatively contend that the "chilling effect" resulting from the possibility that they might receive a Section 215 in the future constitutes a present injury in fact. Pl. Mem. at 15-19, 21-22. However, "[t]he duty to testify has long been recognized as a basic obligation that every citizen owes his Government. . . . [that is] so necessary to the administration of justice that the witness' personal interest in privacy must yield to the public's overriding interest in full disclosure." *United States v. Calandra*, 414 U.S. 338, 345 (1974).³ As the NAACP candidly acknowledges in its amicus brief (at 4), this duty to produce documents in response to an order of a federal court affects the rights "not only of plaintiffs but of *all* organizations and their members" (emphasis added). Consequently, any chilling effect resulting from plaintiffs' generalized fear that their private

³ *Accord*, *Cohen v. Cowles Media Company*, 501 U.S. 663, 669 (1991) ("Neither does the First Amendment relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation"); *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972) ("Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence."); *see also Hahn v. Star Bank*, 190 F.3d 708, 714 (6th Cir. 1999), *cert. denied* 529 U.S. 1020 (2000), *quoting J.P. v. De Santi*, 653 F.2d 1080, 1090 (6th Cir. 1981) ("the Constitution does not encompass a general right to nondisclosure of private information.").

records *might* be subject to disclosure in response to a court order is hardly the type of "concrete and *particularized*" harm required to provide standing to assert a claim in federal court. *Raines v. Byrd*, 521 U.S. at 818. This is particularly true where, as here, the statute under which production can be ordered – like the grand jury's subpoena power – does not target categories of records (*e.g.*, membership lists) that have heightened protection under the law, and where the recipient of an order can raise pre-production challenges before the issuing court.

In any event, this claim is foreclosed by the Supreme Court's decision in *Laird v. Tatum*, 408 U.S. 1 (1972). *See generally* Def. Mem. at 13-14. As in *Laird*, plaintiffs here allege that their speech has been chilled not because of any affirmative proscription or threat of sanction by the Government, but instead solely because of the *existence* of the Government's power to engage in investigative activity (by applying for a court order compelling production of documents). As the Supreme Court held in *Laird*, an allegation "that the exercise of [] First Amendment rights is being chilled by the *mere existence*, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than reasonably necessary for the accomplishment of a valid government purpose" fails to afford any basis for standing under Article III. *Id.* at 10 (emphasis added). Instead, a party has standing based on allegations of a chilling effect on First Amendment rights only where "the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions or compulsions that he was challenging." *Id.* at 11; *accord*, *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984). Section 215, however, does not impose any compulsory requirements at all upon plaintiffs unless and until a court issues an order compelling production of documents pursuant to its terms – and even then, the requirements are no

greater than those attending a grand jury subpoena (*i.e.*, to make timely production *or* show cause why the order should be quashed). Because it is undisputed that no such order has been issued, plaintiffs are not subject to any "regulation, proscription or compulsion" under Section 215.

None of the cases cited by plaintiffs (Pl. Mem. at 15-19) suggests that a party has standing to challenge a statute even though that party is not subject to its requirements. Three involved criminal statutes which proscribed conduct in which the plaintiffs intended to engage. *Virginia v. American Booksellers*, 484 U.S. 383 (1988) (criminal statute prohibiting display of sexually explicit materials); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) (criminal statute prohibiting charitable solicitations where expenses totaled more than 25% of the amount raised); *Dombrowski v. Pfister*, 380 U.S. 479, 492-493 (1965) (criminal statute requiring plaintiff to register as member of "Communist-front organization"). Two others involved regulatory licensing schemes that prohibited plaintiffs from taking certain actions without first securing a license. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988) (license for news racks); *G & V Lounge v. Michigan Liquor Control Comm'n*, 23 F.3d 1071 (6th Cir. 1994) (liquor license). The others involved a statute that required the plaintiff to ask the Post Office for "communist political propaganda" as a precondition for receiving mail, *Lamont v. Postmaster General*, 381 U.S. 301 (1965), and a Selective Service policy that regulated the plaintiffs' speech by threatening revocation of their draft deferment. *National Student Association v. Hershey*, 412 F.2d 1103 (D.C. Cir. 1969). Because plaintiffs here cannot establish any actual or imminent regulation of their conduct under Section 215, these cases fail to provide any support for plaintiffs' claim of standing.⁴

⁴ The Ninth Circuit's decision in *Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989) is also inapposite. In *Presbyterian*, the plaintiffs alleged that Immigration and Naturalization Service agents violated the First and Fourth Amendments by entering the

B. Section 215 Does Not Impose Any Prior Restraint On Plaintiffs

Plaintiffs next assert that Section 215 is analogous to an "overly broad licensing scheme or prior restraint on speech" that fails to provide sufficient safeguards. Pl. Mem. at 20 (*citing Freedman v. State of Maryland*, 380 U.S. 51, 57 (1965)). However, the analogy is not even remotely apt, since Section 215 simply authorizes the FIS Court to command the production of documents. "A 'prior restraint' exists when speech is conditioned upon the prior approval of public officials." *Nightclubs, Inc. v. Paducah*, 202 F.3d 884, 889 (6th Cir. 2000). "Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990). "A scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech." *Id.* Consequently, the Supreme Court has "long held that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." *City of Lakewood v. Plain Dealer Publishing Company*, 486 U.S. at 755-756. A party subject to such a scheme has suffered an injury in fact because, by its very nature, it restrains the party's speech until he procures a license. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969).

The reasoning in these cases has no relevance to plaintiffs' standing here. Section 215 does not establish a licensing scheme under which "speech is conditioned upon the prior approval of

plaintiffs' churches "wearing 'body bugs' and surreptitiously recorded church services." *Id.* at 520. In contrast to both *Laird* and this case (where plaintiffs' claims are based on an alleged "chilling effect" from the mere existence of a data gathering capability), *Presbyterian* involved injuries from surveillance that had already occurred and was the subject of plaintiffs' challenge.

governmental officials." *Nightclubs, Inc. v. Paducah*, 202 F.3d at 889. And there is no risk that the Government could suppress protected speech simply by delaying issuance of a license. Moreover, unless an order is issued which requires production of documents in plaintiffs' possession, Section 215 imposes no obligation at all on plaintiffs – even to come forward to the FIS Court and show cause why the order should be quashed. Because no such order has been issued, plaintiffs are not subject to any restraint under the statute and therefore lack standing to challenge its requirements.⁵

II. PLAINTIFFS' CLAIMS ARE NOT RIPE FOR JUDICIAL REVIEW

Plaintiffs' claims are also not ripe for adjudication because they rest on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998), quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580-581 (1985); see Def. Mem. at 16-19. Plaintiffs' unqualified assertion that "[p]re-enforcement challenges are allowed in cases that implicate First Amendment rights" (Pl. Mem. at 25) is not supported by the cases they cite, and is irreconcilable with the Supreme Court's holding in *California Bankers Association v. Shultz*, 416 U.S. 21, 76 (1974). Indeed, in *California Bankers*, the ACLU asserted the *same* First Amendment claim as plaintiffs here. Specifically, the ACLU argued that the challenged statute and its implementing regulations "violate its members' First Amendment rights, since the provisions could possibly be used to obtain the identities of its members and contributors

⁵ Plaintiffs alternatively argue that they have standing to challenge Section 215 "because neither they nor others will be afforded any other opportunity to protect the rights that Section 215 infringes." Pl. Mem. at 22. However, there is little doubt that a party receiving an order to produce documents under Section 215 would have standing to challenge it. In any event, as the Supreme Court has observed, "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 489 (1982), quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974).

through the examination of the organization's bank records." *Id.*, at 55. Although the ACLU had asserted a "pre-enforcement challenge[] in [a] case[] that implicate[s] First Amendment rights" (Pl. Mem. at 25), the Supreme Court concluded that it was not ripe for judicial review because "[t]his Court, in the absence of a concrete factual situation in which competing associational and governmental interests can be weighed, is simply not in a position to determine whether an effort to compel disclosure of such records would or would not be barred" 416 U.S. at 56.

Plaintiffs' assertion that pre-enforcement challenges are permitted when the plaintiffs would otherwise be denied a "meaningful opportunity to vindicate their rights" is also unavailing.⁶ Pl. Mem. at 25. In *California Bankers Association*, the ACLU unsuccessfully advanced this argument, as well. Specifically, the ACLU claimed that "present injunctive relief is essential, since the banks might not notify it of the fact that their records have been subpoenaed, and might comply with the subpoena without giving the ACLU a chance to obtain judicial review." 416 U.S. at 56 n.26. In rejecting that claim, the Supreme Court responded that "[t]he record contains no showing of any attempt by the Government, formal or informal, to compel the production of bank records containing information relating to the ACLU." *Id.* Plaintiffs' claims here suffer from the same infirmity. Because Section 215 does not target membership lists or other protected records, and because the Government has not sought an order compelling production of plaintiffs' membership lists (or any other records) under Section 215, plaintiffs' challenge to such a hypothetical order is not ripe.

⁶ The cases upon which plaintiffs rely to support this proposition all involved challenges to licensing schemes that imposed prior restraints on speech. *City of Lakewood v. Plain Dealer Publishing Company*, 486 U.S. at 757; *Freedman v. State of Maryland*, 380 U.S. 51 (1965); *Deja Vu of Nashville v. Metropolitan Government of Nashville and Davidson County*, 274 F.3d 377 (6th Cir. 2001). As explained in Point I.B., Section 215 does not create a licensing scheme entailing prior restraints, and the reasoning of these cases has no application where, as here, plaintiffs seek to challenge the validity of hypothetical court orders which may never be issued.

III. SECTION 215 COMPLIES WITH THE FOURTH AMENDMENT

A. Section 215 Is Narrow In Scope

Notwithstanding plaintiffs' rhetoric, the authority conferred by Section 215 is quite narrow. It authorizes the FBI to make an application to the FIS Court for an order requiring production of documents "for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities" 50 U.S.C. § 1861(a)(1). Each of these terms is narrowly defined in the statute and its legislative history; thus, Section 215 applies to an extraordinarily limited class of investigations.⁷

Although plaintiffs make much of the fact that the statute permits the FIS court to order production of "tangible things (including books, papers, records, documents, and other items)," these items are no broader than those described in other statutes authorizing the issuance of a subpoena *duces tecum*. See e.g., Fed. R. Crim. P. 17(c) ("A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein."); Fed. R. Civ. P. 45(a)(1)(C) ("A subpoena may command each person . . . to produce . . . designated books, documents or tangible things"); *United States v. Markwood*, 48 F.3d 969, 976 (6th Cir. 1995)

⁷ Under the statute, "foreign intelligence information" must relate to the Government's ability to protect against an actual or potential attack, sabotage or international terrorism, or clandestine intelligence activities by a foreign power or agent of a foreign power, or information with respect to a foreign power or territory that relates to the national defense or conduct of foreign affairs. 50 U.S.C. § 1801(e). The term "international terrorism" is also narrowly defined to include violent criminal acts that occur totally outside the United States, or transcend national boundaries, and are intended to intimidate or coerce a government or civilian population or "to affect the conduct of a government by assassination or kidnapping." *Id.*, § 1801(c). As the legislative history reflects, "[t]he term 'clandestine intelligence activities' is directed primarily toward those traditional activities associated with 'spying,' that is, gathering of information in a clandestine manner or conducting covert operations for a foreign power." S. Rep. No. 95-604, 95th Cong. 1st Sess. 22 (Nov. 15, 1977), *reprinted at* 1978 U.S.C.C.A.N. 3904, 3923-24.

(A "subpoena duces tecum 'requires production of books, papers and other things.'").

B. The Fourth Amendment Does Not Require A Court To Find Probable Cause Before It May Order Production Of Documents

As defendants previously explained (Def. Mem. at 20-21), "orders of court for the production of specified records" present "no question of actual search and seizure," *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946), and need not "meet any standard of probable cause." *United States v. Powell*, 379 U.S. 48, 57 (1964); *Zurcher v. Stanford Daily*, 436 U.S. 547, 562, 563 (1978). Plaintiffs, nonetheless, urge that the Government must establish probable cause before the FIS Court may issue an order for production, relying on the Supreme Court's reasoning in *United States v. Boyd*, 116 U.S. 616 (1886), a case decided more than a century ago. However, "[s]everal of Boyd's express or implicit declarations have not stood the test of time." *Fisher v. United States*, 425 U.S. 391, 407 (1976); *Andresen v. Maryland*, 427 U.S. 463, 472 n.6 (1976) (noting that *Boyd's* "mere evidence" rule had been overturned); *see also United States v. Doe*, 465 U.S. 605, 611 n. 8 (1984) (the "broad statements" in the Court's earlier cases have been "discredited by later opinions."). In particular, "[t]he application of the Fourth Amendment to subpoenas was limited by . . . more recent cases." *Fisher*, 425 U.S. at 407. One of the "more recent cases" cited was *Oklahoma Press* in which the Court held a subpoena enforceable if "the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry." 327 U.S. at 209.

Plaintiffs argue that *Oklahoma Press* is inapplicable here because "[a] Section 215 order, like a search warrant, is a judicial command" and "failure to comply with a Section 215 order constitutes contempt" whereas a subpoena, according to plaintiffs, is "merely a request that may ultimately provide the basis for a court order." Pl. Mem. at 26. Plaintiffs' analysis is misguided for two

reasons. First, *Oklahoma Press* addressed the validity of a *judicial order* enforcing an administrative subpoena. Second, a subpoena issued in a civil or criminal proceeding in federal court is not "merely a request" that may be ignored by the subpoenaed party. *United States v. Bryan*, 339 U.S. 323, 331 (1950) ("A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase."). It is a "lawfully issued mandate of the court issued by the clerk thereof," *Fisher v. Marubeni Cotton Corporation*, 526 F.2d 1338, 1340 (8th Cir. 1975), and a subpoena *duces tecum* does not "request" production of documents; by rule, it must "*command* each person to whom it is directed" to produce designated documents. Fed. R. Civ. P. 45(a)(1)(C) (emphasis added); Fed. R. Crim. P. 17(c). "Failure by any person without adequate excuse to obey a subpoena served on that person may be deemed a contempt of the court from which the subpoena issued." Fed. R. Civ. P. 45(e); Fed. R. Crim. P. 17(g); *United States v. Bryan*, 339 U.S. 323; *Nilva v. United States*, 352 U.S. 385, 389 (1957); *Taylor v. United States*, 221 F.2d 809 (6th Cir.), *cert. denied* 350 U.S. 834 (1955) ("disobedience of a subpoena *duces tecum* is punishable as a contempt of court."). Consequently, there is no basis for plaintiffs' contention that a court order for production is subject to more stringent requirements than a subpoena *duces tecum*.⁸

⁸ Plaintiffs' remaining arguments are unavailing. Nothing in the statute suggests that the FIS Court may, much less must, order production of documents "immediately." Instead, the court has discretion to establish a reasonable time for compliance. Similarly, plaintiffs' assertion that Section 215 might be used to "evade" the "probable cause" requirement applicable to search warrants under Rule 41(d)(1), Fed. R. Crim. P., is, at best, implausible. If the Government's objective were merely to compel production of records in a criminal proceeding without satisfying probable cause, it could simply issue a subpoena pursuant to Rule 17, Fed. R. Crim. P.

Plaintiffs also dispute the Supreme Court's observation in *United States v. Miller* that "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will only be used for a limited purpose and the confidence placed in the third party will not be betrayed." 425 U.S. 435, 443 (1976); *accord, S.E.C. v. O'Brien*, 467 U.S. 735,

C. Section 215 Satisfies The Fourth Amendment Standards Applicable To Orders Compelling Production Of Documents

As we explain in Point IV below, plaintiffs' contention that Section 215 fails to provide adequate safeguards is without merit. Nothing in Section 215 authorizes the FIS Court to close the courthouse door to appropriate pre-production motions (*e.g.*, a motion to quash), or to impose a penalty for noncompliance with a Section 215 order without notice and an opportunity to be heard.

Plaintiffs' contention that Section 215 authorizes the FBI to obtain records that have no "meaningful nexus" to an investigation is a product of phantasm that cannot be reconciled with the statute. Contrary to plaintiffs' allegations (at 30-31), the statute authorizes the FIS Court to order production of records only if "*the judge* finds that the application meets the requirements of this section." 50 U.S.C. § 1861(c) (emphasis added). The court can make such a finding only if it determines that the application was made for an order requiring production of records or other tangible things "for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities," *id.*, §1861(a)(1), which necessarily prevents the court from approving an application that was made for some other purpose. If the court finds no "meaningful nexus" between the documents sought and an authorized investigation, the court would plainly be unable to find that the application

743 (1984). They insist that the Supreme Court "recently recognized that the Fourth Amendment protects the privacy of medical records held by a third party." Pl. Mem. at 27 (citing *Ferguson v. City of Charleston*, 532 U.S. 67 (2001)). However, *Ferguson* involved a claim that "warrantless and nonconsensual drug tests" conducted by a state hospital "for criminal law enforcement purposes were unconstitutional searches." *Id.* at 73. The Supreme Court specifically distinguished laws that impose a "duty to provide law enforcement officials with evidence of criminal conduct acquired in the course of routine treatment." *Id.* at 78 n.13. Therefore, the Court's opinion provides no support for plaintiffs' contention that the Fourth Amendment renders such records immune from judicial process. *E.g.*, *In re Administrative Subpoena*, 289 F.3d 843 (6th Cir. 2001) (ordering production of "patient files" relevant to health care fraud investigation).

was made for an authorized investigation (rather than some other purpose) and, thus, would be unable to conclude that the application "meets the requirements of [section 1861]." *Id.*, § 1861.

The "relevance" requirement imposed by the Fourth Amendment – which a Section 215 application would separately need to satisfy in any event – is not a demanding one. The Supreme Court has held that a challenge to a grand jury subpoena on relevancy grounds "must be denied unless the district court determines that 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 investigation." *United States v. R. Enterprises*, 498 U.S. 292, 301 (1991); compare *Doe v. United States*, 253 F.3d 256, 266 (6th Cir. 2001) (EEOC's authority to issue subpoenas had been broadly construed to allow access to "virtually any material that might cast light on the allegations against the employer"). Section 215 requires the court to find that the FBI's application seeks records for an authorized investigation and, thus, is coextensive with the Fourth Amendment's standards.

IV. SECTION 215 COMPLIES WITH THE DUE PROCESS CLAUSE

Plaintiffs assert that Section 215 is invalid because it fails to provide "targets" with notice and an opportunity to be heard before a Section 215 order is issued. Pl. Mem. at 32. However, they cite no authority in support of this proposition, and the Supreme Court has specifically rejected it. *S.E.C. v. O'Brien*, 467 U.S. at 742 (the Due Process Clause is "not offended when a federal administrative agency, without notifying a person under investigation, uses its subpoena power to gather evidence adverse to him."); *Hannah v. Larche*, 363 U.S. 420, 442 (1960) ("when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used."). Indeed, telephone companies may be ordered to assist with the installation of pen registers because it is the only means by which the FBI *can avoid* "tipping off the targets of

the investigation." *United States v. New York Telephone Company*, 434 U.S. 159, 175 (1977).

Plaintiffs acknowledge that organizations served with a Section 215 order "receive notice by virtue of being served." Pl. Mem. at 32. Yet they insist that the organization would not have "an opportunity to challenge the demand before complying with it" and the "failure immediately to comply with a Section 215 order would constitute contempt." *Id.* at 33. This claim stems from the premise that the FIS Court, an Article III court, lacks the authority to determine whether its own order is constitutional, and would refuse to consider a pre-production motion to quash or modify its order. However, when Congress conferred jurisdiction on the court to issue an order requiring production of documents, it explicitly authorized that court to determine whether the order complies with the statute (50 U.S.C. § 1861(c)(1)) and implicitly authorized the court to ensure that its order is constitutional. Plaintiffs' crabbed interpretation of the statute directly conflicts with the legislative history of the Patriot Act, and has been rejected by the FIS Court of Review which held that it was "obliged to consider whether the statute as amended is consistent with the Fourth Amendment":

The government . . . has affirmatively argued that FISA is constitutional. And some of the very senators who fashioned the Patriot Act amendments expected that the federal courts, including presumably the FISA court, would carefully consider that question. Senator Leahy believed that "[n]o matter what statutory change is made . . . the court may impose a constitutional requirement of 'primary purpose' based on appellate court decisions upholding FISA against constitutional challenges over the past 20 years." 147 Cong. Rec. S11003 (October 25, 2001). Senator Edwards stated that "the FISA Court will still need to be careful to enter FISA orders only when the requirements of the Constitution as well as the statute are satisfied." 147 Cong. Rec. S10589 (Oct. 11, 2001).

In re Sealed Case, 310 F.3d 717, 737 (FIS Ct. of Rev. 2002).

Moreover, contrary to plaintiffs' allegations here, nothing in Section 215 authorizes the FIS Court to impose any sanction for contempt without affording the subpoenaed party notice and an opportunity to be heard. The FIS Court, like all courts, undoubtedly has inherent power to punish

for contempt the disobedience of its orders. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991); *Young v. United States ex rel. Vuitton Et Fils*, 481 U.S. 787, 795 (1987). However, a court "must exercise caution in invoking its inherent power, and it must comply with the mandates of due process" *First Bank of Marietta v. Hartford Underwriters Insurance Co.*, 307 F.3d 501, 511 (6th Cir. 2002) (*quoting Chambers*, 501 U.S. at 50). In criminal contempt proceedings, defendants must "be advised of charges, have a reasonable opportunity to respond to them, and be permitted the assistance of counsel and the right to call witnesses." *Young*, 481 U.S. at 798-99. A civil contemner is entitled to "proper notice and an impartial hearing with an opportunity to present a defense." *National Labor Relations Board v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 589 (6th Cir. 1987).

Even if the FIS Court does not rule on a pre-production challenge to a Section 215 order, if the recipient of the order claims that it "is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him." *United States v. Ryan*, 402 U.S. 530, 532 (1971). "[T]he procedure described in *Ryan* seems an eminently reasonable method to allow precompliance review." *Maness v. Meyers*, 419 U.S. 449, 460 (1975).⁹ For all of these reasons, Section 215 conforms with the Due Process Clause.

V. SECTION 215 COMPLIES WITH THE FIRST AMENDMENT

Plaintiffs assert that Section 215 is facially invalid because an order issued pursuant to the statute could potentially require production of documents containing information protected by the

⁹ Plaintiffs suggest that the "very filing of a challenge to a Section 215 order" in the FIS Court would violate the disclosure restriction. Pl. Mem. at 30. However, a "disclosure" is "the act or process of making known something that was previously unknown." Black's Law Dictionary, at 477 (7th ed. 1999). Because the FIS Court already had knowledge of both its order and the FBI's application, and the because records of the FIS Court are maintained under appropriate security measures (*see* 50 U.S.C. § 1803(c)), the filing of a motion to quash with the FIS Court would not "disclose" any information covered by the statute.

First Amendment.¹⁰ Pl. Mem. at 35-37. As explained in Point II above, the Supreme Court previously rejected an identical claim, finding that it is not ripe. *California Bankers Association v. Shultz*, 416 U.S. at 55. But even if plaintiffs' claim were ripe for review, it is wholly without merit.

"[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge" under the First Amendment. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984); *New York v. Ferber*, 458 U.S. 747, 772 (1982); *Hutchins v. District of Columbia*, 188 F.3d 531, 548 (1999) ("we cannot hold a statute facially unconstitutional . . . based on a mere possibility that the statute might be unconstitutional in particular applications."). That is particularly true where, as here, plaintiffs challenge a law authorizing a court to subpoena documents that is "not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)." *Virginia v. Hicks*, 123 S.Ct. 2191, 2199 (2003). In such cases, the courts have consistently refused to entertain a facial challenge on the theory that it is conceivable that the law may be applied in an unconstitutional manner. *Id.*; *Hutchins v. District of Columbia*, 188 F.3d at 548.¹¹

¹⁰ Plaintiffs and amici overstate the degree to which the courts have applied a "heightened standard" to subpoenas implicating First Amendment activity. *See, e.g., University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182, 201-202 (1990) (rejecting heightened standard based on alleged chilling effect); *Branzburg v. Hayes*, 408 U.S. 665, 701-706 (1972); *In re Grand Jury 87-3 Subpoena Duces Tecum*, 955 F.2d 229, 232 (4th Cir. 1992); *see also, Cohen v. Cowles Media Company*, 501 U.S. 663, 670 (1991) ("enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations"). But, for the reasons discussed in the text, this Court need not determine what standard would be applied to such hypothetical subpoenas.

¹¹ To the extent that plaintiffs maintain that Section 215 is invalid because it "fails to provide any mechanism" for an as-applied challenge to a specific order requiring production of documents (Pl. Mem at 37), they are simply in error. As we explained in Point IV, *supra*, the FIS Court has ample authority to consider such a challenge.

Plaintiffs' contention that the disclosure restriction is a "prior restraint" (Pl. Mem at 38-39) is also erroneous. "The doctrine of prior restraint originated in the common law of England, where prior restraints of the press were not permitted, but punishment after publication was." *Alexander v. United States*, 509 U.S. 544, 553 (1993). It "has its roots in the 16th- and 17th-century system of censorship" under which "nothing could lawfully be published without the prior approval of a government or church." *Id.* at 554 n. 2. As the Sixth Circuit recently emphasized, a "prior restraint" exists when speech is conditioned upon the prior approval of public officials." *Nightclubs, Inc. v. Paducah*, 202 F.3d at 889. The distinction between a "prior restraint" and "limits on expression imposed by criminal penalties" is "a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-559 (1975).

Section 1861(d) plainly does not condition speech on the prior approval of the government. Plaintiffs' contrary arguments are foreclosed by the Supreme Court's decision in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). *Landmark* involved a challenge to a Virginia statute which provided, in part, that all papers filed with and proceedings before a Judicial Review Commission "shall not be divulged by any person to anyone except the Commission" *Id.* at 830 n.1. Although the statute imposed criminal sanctions for violation of this restriction, *id.*, the Supreme Court found that "the challenged statute does not constitute a prior restraint or attempt by the State to censor the news media." *Id.* at 838. Section 1861(d) is a far less onerous restriction than the statute at issue in *Landmark* as it does not prescribe any criminal penalty for its violation.¹²

¹² Even if section 1861(d) were implemented by an order by the FIS Court directed to the subject of an order compelling production, it still would not trigger the stringent standards applicable to "prior restraints." As the Supreme Court explained when it determined that

Plaintiffs' evident contention that Congress lacks authority to prohibit disclosure of "categories" of information (Pl. Mem. at 39) would draw into question not only the FISA, but also Rule 6(e), Fed. R. Crim. P., and countless state and federal statutes, including the nation's espionage laws. *See, e.g.*, 18 U.S.C. §§ 793-794. In addition, it is wholly irreconcilable with numerous decisions upholding restrictions on disclosure of grand jury information. *See* Def. Mem. at 31-37.¹³

Plaintiffs' claim that the disclosure restriction is invalid because its duration is indefinite is also erroneous and would draw into question most protective orders entered in civil litigation. Contrary to plaintiffs' assertions, the Supreme Court's decision in *Butterworth v. Smith*, 494 U.S. 624 (1990), provides no support for the notion that a permanent restriction on disclosure is *per se* invalid. While the Court found no justification for a permanent ban on a grand jury's witness's "right to divulge information of which he was already in possession before he testified before the grand jury," *id.* at 632, the Court also concluded that the "part of the Florida statute which prohibits the witness from disclosing the testimony of *another* witness remains enforceable under the ruling of the Court of Appeals." *Id.* at 633. The permanent, categorical ban on disclosure was warranted in the latter instance because "some witnesses will be deterred from presenting testimony due to fears of

protective orders entered in civil litigation are not subject to strict scrutiny, "continued court control" over information obtained in connection with judicial proceedings "does not raise the same specter of government censorship that such control might suggest in other situations." *Seattle Times Company v. Rhinehart*, 467 U.S. 20, 32 (1984).

¹³ Plaintiffs' reliance on *Florida Star v. B.L.F.*, 491 U.S. 524 (1989), is misplaced. In *Florida Star*, the Court held that Florida cannot apply a negligence *per se* standard in a civil action for damages for disclosure of a rape victim's name as "individualized adjudication" is indispensable. *Id.* at 539-540. Section 215 imposes no such categorical penalty for violation of the disclosure restriction. The only other authority cited by plaintiff was an opinion by a single circuit justice in *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303 (1983) (opinion of Brennan, J.). However, unlike this case, *Capital Cities* involved a "categorical, permanent prohibition against publishing information *already in the public record.*" *Id.* at 1305 (emphasis added).

retribution." *Id.* The validity of a permanent restriction thus turns on the nature of the underlying justification. As we previously explained (Def. Mem. at 30-31), foreign intelligence investigations differ, in significant respects, from traditional criminal investigations. *See generally* S. Rep. No. 95-701 at 16, *reprinted at* 1978 U.S.C.C.A.N. 3985; *United States v. United States District Court*, 407 U.S. 297, 322-323 (1972). Because foreign intelligence and counterterrorism investigations are focused "on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency," rather than solving a particular crime, the need for confidentiality does not cease to exist upon an indictment or conviction in a single case.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss should be granted.

Dated: November 20, 2003

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

JEFFREY G. COLLINS
United States Attorney

SHANNEN W. COFFIN
Deputy Assistant Attorney General

L. MICHAEL WICKS
Assistant United States Attorney

SANDRA M. SCHRAIBMAN, D.C. Bar # 188599
JOSEPH W. LOBUE, D.C. Bar # 293514
U.S. Department of Justice
20 Massachusetts Avenue, N.W., Room 7300
Washington, D.C. 20530
Telephone: (202) 514-4640
Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that, on November 20, 2003, I caused a copy of the foregoing Reply Brief in Support of Defendants' Motion to Dismiss to be served by overnight courier on plaintiffs' counsel at the offices specified below:

Ann Beeson, Esq.
Jameel Jaffer, Esq.
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004-2400

Michael J. Steinberg, Esq.
Noel Saleh, Esq.
Kary L. Moss, Esq.
American Civil Liberties Union Fund of Michigan
60 West Hancock Street
Detroit, MI 48201-1343

JOSEPH W. LOBUE