

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.)

DEFENDANTS' MOTION TO DISMISS

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, defendants John Ashcroft, Attorney General of the United States, and Robert Mueller, Director of the Federal Bureau of Investigation, respectfully move this Court to dismiss this action for lack of subject matter jurisdiction or, in the alternative, for failure to state a claim on which relief can be granted. The grounds in support of this motion are set out more fully in the attached memorandum.

Dated: October 3, 2003

Respectfully submitted,

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ORDER

Upon consideration of defendants' motion to dismiss, and the memoranda filed in support thereof and in opposition thereto, it is hereby

ORDERED that defendants' motion is GRANTED, and it is

FURTHER ORDERED that this action be, and hereby is, dismissed with prejudice.

Dated: _____, 2003

DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE

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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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STATEMENT OF THE ISSUES

1. Whether plaintiffs have standing to challenge a statute authorizing issuance of an order compelling production of documents which has never been applied to them and neither prohibits them from taking any action nor compels them to take any action.

2. Whether plaintiffs' constitutional challenge to Section 215 is ripe for judicial review when resolution of their claims depends upon the scope of orders compelling production of documents that have not yet been issued.

3. Whether the Fourth Amendment requires a court to find probable cause, and to provide notice and an opportunity to be heard to the target of an investigation, before the court may order production of documents and other tangible things pertaining to the target.

4. Whether Section 215 of the Patriot Act has deprived plaintiffs of property without due process of law in violation of the Fifth Amendment notwithstanding the fact that it has never been applied and provides for judicial review before an order compelling production of documents may be issued.

5. Whether the First Amendment prevents the Government from restricting the disclosure of information that would compromise a confidential foreign intelligence investigation that was acquired by a person as a result of his or her participation in that investigation.

6. Whether the First Amendment prohibits the Government from conducting an investigation to obtain foreign intelligence information, or to prevent international terrorism or clandestine intelligence activities, based in whole or in part on information derived from speech or other activities protected by the First Amendment.

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PRELIMINARY STATEMENT

In this action six organizations challenge the constitutionality of Section 215 of the USA Patriot Act, a provision that, to date, has not been used in any investigation by the Department of Justice of plaintiffs or any other person. Section 215 authorizes the Foreign Intelligence Surveillance Court (FIS Court), upon application of the Director of the Federal Bureau of Investigation (FBI) or his designee, to enter an order requiring the production of records and other tangible items relevant to certain investigations to obtain foreign intelligence information, or to prevent international terrorism or clandestine intelligence activities. Plaintiffs challenge the facial validity of Section 215 under the First, Fourth and Fifth Amendments, alleging that they "reasonably believe" that the Government is using Section 215 to obtain "records or personal belongings" of plaintiffs and their members in violation of their rights. However, as the Attorney General recently disclosed, the Justice Department, including the FBI, recognizing the need for judicious use of its law enforcement tools, has never sought a Section 215 order -- with respect to these plaintiffs or anyone else for that matter. While the Government may use this provision under appropriate circumstances in the future, the Attorney General has not, to date, found that such measures were required in an investigation.

Consequently, plaintiffs' claims are not justiciable. Their alleged "beliefs" rest upon nothing more than unsubstantiated conjecture that: (a) the Government has used or, at some future time, might use Section 215 to obtain records and personal belongings; (b) if it does, it might seek to obtain *plaintiffs'* records, and (c) if it were to do so, an order compelling plaintiffs to produce such records would violate their constitutional rights. Such unadorned speculation fails to satisfy basic requirements of standing and ripeness that are essential prerequisites for plaintiffs to invoke the Article III jurisdiction of this Court. For that reason alone, this action must be dismissed.

Even if this Court were to exercise jurisdiction, plaintiffs' facial challenge to Section 215 is without merit. Contrary to plaintiffs' claims here, the Supreme Court has held that the Government is not required to establish probable cause to obtain enforcement of an order requiring production of documents. Similarly, the Court has specifically held that a "target" of an investigation is not entitled to notice and an opportunity to be heard before the government obtains records from a third party. For both reasons, plaintiffs' claims under the Fourth Amendment are baseless.

Similarly, notwithstanding plaintiffs' Fifth Amendment claims to the contrary, nothing in Section 215 authorizes the FBI to deprive plaintiffs of property without due process of law. Section 215 authorizes a duly constituted Article III court to issue an order requiring production of documents only if an application is submitted which specifies that the records are sought for an investigation authorized by the statute and only if the court finds that the application meets the statute's requirements. Accordingly, even assuming plaintiffs could establish a property right that might be at issue in a (purely hypothetical) Section 215 order, the courts have uniformly concluded that review procedures of this kind conform fully with due process requirements.

Plaintiffs' First Amendment challenges to Section 215 fare no better. Plaintiffs plainly have no First Amendment right to obtain access to investigative information compiled by the government. Thus, to the extent plaintiffs might suggest that they have a First Amendment right to know that they are the subject of a Section 215 order, the law simply does not support that claim. Moreover, the courts have repeatedly held that the Government may restrict the use and disclosure of information obtained in connection with judicial proceedings - and the courts regularly do so in connection with criminal investigations - without violating the First Amendment. In light of the unbroken practice of such restrictions in, for example, the grand jury context, plaintiffs' claims that the non-disclosure

requirement of Section 215 violates the First Amendment rings hollow. Finally, despite plaintiffs' empty claims to the contrary, nothing in the First Amendment prevents the Government from conducting an investigation for purposes that are otherwise appropriate on the basis of information derived in whole or in part from speech or other activities protected by the First Amendment.

For all of these reasons, this action should be dismissed for lack of subject matter jurisdiction and, in the alternative, for failure to state a claim upon which relief can be granted.

BACKGROUND

A. Foreign Intelligence Surveillance Act of 1978

Congress enacted the Foreign Intelligence Surveillance Act (FISA), Pub. L. No. 95-511, 92 Stat. 1790 (Oct. 25, 1978) (current version codified at 50 U.S.C. §§ 1801-1811) to "provide a procedure under which the Attorney General can obtain a judicial warrant authorizing the use of electronic surveillance in the United States for foreign intelligence purposes." S. Rep. No. 95-604, 95th Cong. 2d Sess. 5, *reprinted at* 1978 U.S.C.C.A.N. 3906. The Act established the Foreign Intelligence Surveillance Court (FIS Court) which is comprised of eleven district court judges appointed by the Chief Justice. 50 U.S.C. § 1803(a).

The FIS Court is vested with "jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States under the procedures set forth in [the statute]." *Id.* Upon a finding of probable cause to believe that the target of electronic surveillance is a "foreign power or an agent of a foreign power," that "each of the facilities or places at which the electronic surveillance is directed is being used . . . by a foreign power or agent of a foreign power," and that the application otherwise satisfies the Act's requirements, the Court is authorized to enter an order approving electronic surveillance. 50 U.S.C. §§ 1805(a)-(c).

The Act also incorporates provisions designed to avoid compromising sensitive foreign intelligence investigations. Specifically, an order approving electronic surveillance under FISA may require a communication or other common carrier, landlord, custodian or other specified person to furnish the government "all information, facilities, or technical assistance necessary to accomplish the electronic surveillance *in such a manner as will protect its secrecy* and produce a minimum of interference with the services that such carrier, landlord, custodian or other person is providing that target of electronic surveillance." 50 U.S.C. § 1805(b)(2)(B) (emphasis added). Notice of the electronic surveillance is provided to the target or other person who was subject to electronic surveillance only if the United States or a State or local government seeks to enter into evidence information obtained or derived from the surveillance, *id.*, § 1806(c)-(d), or in circumstances where the surveillance was conducted and an order approving the surveillance was not obtained. *Id.*, § 1806(j). As originally enacted, the FISA covered only electronic surveillance. The Act was amended in 1994 to incorporate substantially identical provisions governing physical searches. Pub. L. No. 103-359, 108 Stat. 3444 (Oct. 14, 1994) (current version codified at 50 U.S.C. §§ 1821-29).

B. Intelligence Authorization Act of 1999

The Intelligence Authorization Act of 1999 amended the FISA in two respects. Section 601(2) of the Act prescribed standards and procedures for obtaining prior judicial authorization for the use of pen registers and trap and trace devices (which trace incoming and outgoing telephone calls). Pub. L. 105-272, § 601(2), 112 Stat. 2404-2410 (Oct. 20, 1998) (current version codified at 50 U.S.C. §§ 1841-1846). In contrast to the FISA provisions governing electronic surveillance and physical searches, Congress did not impose a more stringent probable cause requirement because the Supreme Court had previously ruled that the installation and use of a pen register does not constitute

a "search" within the meaning of the Fourth Amendment. S. Rep. No. 105-185, 105th Cong. 2d Sess. 27 (May 7, 1998) (*citing Smith v. Maryland*, 442 U.S. 735 (1979)). Although federal law permitted the use of such devices in criminal investigations upon a showing of "relevance" to an ongoing investigation, Congress required that the Government demonstrate not only relevance to an investigation authorized by the FISA, but also a "reason to believe" that the telephone line has been or will be used by an individual engaged in international terrorism or clandestine intelligence activities that violate a federal criminal law or, in the case of a foreign power or foreign agent, that the communication "concerns" international terrorism or clandestine intelligence activities that may involve a violation of a criminal law. Pub. L. 105-272, § 601(2); S. Rep. 105-185, at 27-28.

Section 602 of the Act amended the FISA to authorize the FIS Court, upon application of the FBI, to enter an *ex parte* order requiring four types of entities (a common carrier, public accommodation facility, physical storage facility, or vehicle rental facility) "to release records in its possession for an investigation to gather foreign intelligence information or an investigation concerning international terrorism" Pub. L. 105-272, § 602, 112 Stat. 2410-2412 (Oct. 20, 1998) (amending §§ 502(a)-502(d) of the FISA) (current version codified at 50 U.S.C. § 1861). These four entities were covered by the statute "because of their frequent use by subjects of FBI foreign intelligence and international terrorism investigations." S. Rep. No. 105-185, at 29.

As in the case of pen register devices, Congress did not impose a probable cause requirement. *Id.* Instead, in addition to the traditional requirement that the information be "relevant" to an ongoing investigation, Congress required that the application include "specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or agent of a foreign power." Pub. L. No. 105-272, § 602, 112 Stat. 2411 (amending § 502(b)(2) of the FISA).

The Act also incorporated provisions in both sections designed to avoid compromising ongoing investigations. It requires that an order approving the use of a pen register or track and trace device shall direct that the "provider of a wire or electronic communication service, landlord, custodian, or other person shall furnish any information, facilities or technical services necessary to accomplish the installation and operation of the pen register or trap and trace device *in such a manner as will protect its secrecy.*" 50 U.S.C. § 1842(d)(2)(B)(i) (emphasis added). The Act also specifically prohibits the disclosure of "the existence of the investigation or of the pen register or trap and trace device to any person unless or until ordered by the court." *Id.*, § 1842(d)(2)(B)(ii)(I). In the case of orders compelling the release of records, the Act provided that "[n]o common carrier, public accommodation facility, physical storage facility, or vehicle rental facility, or officer, employee, or agent thereof, shall disclose to any person (other than those officers, agents, or employees . . . necessary to fulfill the requirement to disclose information to the [FBI] under this section) that the [FBI] has sought or obtained records under this section." Pub. L. No. 105-272, § 602, 112 Stat. 2412 (amending § 502(d)(2)). As the Senate Intelligence Committee's Report reflects, Congress believed that these restrictions "are necessary to protect the FBI's foreign intelligence investigations from disclosure to hostile powers or international terrorist organizations." S. Rep. No. 105-185, 105th Cong. 2d Sess. 28; *see also id.* at 29 (restriction on disclosure of fact that FBI has sought or obtained access to records under FISA "is necessary to protect the existence of the investigation from hostile foreign powers or international terrorist groups").

C. The USA Patriot Act

The USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272, 286-288 (Oct. 26, 2001), amended the provisions governing applications for orders authorizing the use of pen registers and orders

compelling production of records to permit the government to use these procedures "for any investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution" 50 U.S.C. §§ 1842(a)(1) and 1861(a)(1).² These provisions differ from those previously in effect in three respects. First, Section 215 of the Patriot Act permits the FBI to obtain an order requiring production of records for an "investigation to gather foreign intelligence information" only if the investigation does "not concern[] a United States person."³ Second, it authorizes the FBI to obtain an order requiring production of records concerning a United States person only if the investigation is "to protect against international terrorism or clandestine intelligence activities." Third, it imposes a restriction not contained in the prior statute which requires that such an "investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the United States Constitution."

Section 215 of the Act also amended section 1861(b) to require an application for an order compelling production of records to "specify that the records concerned are sought for an authorized investigation . . . to obtain foreign intelligence information not concerning a United States person

² The quoted language in the text reflects a technical amendment made by section 314(a)(6) of the Intelligence Authorization Act for Fiscal Year 2002, Pub. L. 107-108, 115 Stat. 1394, 1402 (Dec. 28, 2001) which added the words "to obtain foreign intelligence information not concerning a United States person" to 50 U.S.C. § 1861(a).

³ A "United States person" is defined to mean "a citizen of the United States, an alien lawfully admitted for permanent residence . . . , an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power" 50 U.S.C. § 1801(i).

or to protect against international terrorism or clandestine intelligence activities." 50 U.S.C. § 1861(b)(2). Congress eliminated the requirement imposed in 1998 that the government demonstrate a "reason to believe" that the person to whom the records pertain is a "foreign power or agent of a foreign power." As Senator Leahy explained, Congress granted the FBI "broader authority under FISA for . . . access to records without having to meet the statutory 'agent of a foreign power' standard, because the Fourth Amendment does not normally apply to such techniques and the FBI has comparable authority in its criminal investigations." 147 Cong. Rec. S10993 (Oct. 25, 2001).

Section 215 modified 50 U.S.C. § 1861 in three other respects. First, as amended, the statute provides that the FIS Court may enter an order requiring the production of "any tangible thing (including books, records, papers, documents, and other items)" rather than just "records." 50 U.S.C. § 1861(a). Second, the section is no longer limited to common carriers, public accommodation facilities, physical storage facilities, or vehicle rental facilities; it authorizes the FIS Court to order production of records relevant to an authorized investigation irrespective of the type of entity that possesses the records. *Id.* Finally, a corresponding change in the nondisclosure provision makes clear that "[n]o person" (not just the four entities previously identified in the statute) "shall disclose that the FBI has sought or obtained tangible things under this section." 50 U.S.C. § 1861(d).

STATEMENT OF FACTS

Plaintiffs are six non-profit organizations that provide legal, religious, social, and other services to Muslims, Arab-Americans, and other people of Arab descent. Complaint ("Compl."), ¶¶ 4-9, 40, 42-44. "Many of plaintiffs' members and clients emigrated to the United States from countries the government has accused of sponsoring terrorism, such as Syria and Iraq." *Id.*, ¶ 39.

The FBI has conducted interviews of some of plaintiffs' members and clients during which

they "were questioned about their religious and political beliefs, activities and associations." *Id.*, ¶¶ 33-35, 56-57, 92-93, 110, 117-118, 128-131, 140, 143-144.⁴ The FBI is also "currently investigating a number of charities suspected of providing material support to Terrorist Organizations," some of which had received financial contributions from plaintiffs' members and clients. *Id.*, ¶¶ 37, 129-132, 144-145. Two of the plaintiff organizations have received grand jury subpoenas, *id.*, ¶¶ 111 and 140, and three individuals who attend a mosque operated by one of the plaintiffs were indicted for conspiring to wage war against the United States and providing material support to Al Qaeda. *Id.*, ¶ 139. In addition, some of plaintiffs' members have had direct contacts with, or have sought to assist, people whom the INS detained after September 11th or that have been indicted for aiding terrorism and other offenses. *Id.*, ¶¶ 38, 46-49, 54-55, 64-65, 71, 81-82, 146.

None of the plaintiffs allege that they have received an order requiring production of tangible things under Section 215. In fact, they could not have because the Government has never sought or obtained an order requiring anyone to produce records or other tangible things under Section 215. Declaration of James Baker, ¶ 3. Nonetheless, all six organizational plaintiffs claim to "reasonably believe" that they "could be served" with a section 215 order. Compl., ¶¶ 73, 84, 95, 109, 134, 149. Plaintiffs also claim to have a "well-founded belief" that they and their members, clients, and constituents "have been or are currently the targets of investigations under Section 215." *Id.*, ¶ 30.

⁴ This Statement of Facts is based on the factual allegations in plaintiffs' Complaint which, for purposes of defendants' motion to dismiss, are accepted as true, as supplemented by the Declaration of James Baker regarding the number of times that Section 215 of the Patriot Act has been used to obtain records or other tangible things. In reviewing defendants' motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction, "the court may consider evidence outside the pleadings to resolve factual disputes concerning jurisdiction, and both parties are free to supplement the record by affidavits." *Nichols v. Muskingum College*, 318 F.3d 674, 677 (6th Cir. 2003).

Because Section 215 does not require the Government to provide notice to surveillance targets, and because it prohibits disclosure of the fact that the FBI has sought or obtained information, plaintiffs assert that they "have no way to know with certainty that their privacy has been compromised." *Id.*⁵

According to the Complaint, "[s]ection 215 has caused some of plaintiffs' members to be inhibited from publicly expressing their political views, attending mosque and practicing their religions, participating in public debate, engaging in political activity, associating with legitimate political and religious organizations, donating money to legitimate charitable organizations, exercising candor in private conversations, researching sensitive political and religious topics, visiting particular websites, and otherwise engaging in activity protected by the First Amendment to the United States Constitution." *Id.*, ¶ 41; *compare, id.*, ¶¶ 77 and 152. In addition, plaintiffs assert that Section 215 compromises their ability to maintain the confidentiality of records pertaining to their members, students, and clients, and to protect them from harassment, threats and violence if those records were to become public. *Id.*, ¶¶ 73-76, 84-85, 95, 108, 134-135, 149-151.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO CHALLENGE SECTION 215

Article III, § 2, of the Constitution "extends the 'judicial power' of the United States only to 'Cases' and 'Controversies.'" *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998). The doctrine of standing is "an essential and unchanging part of the case-or-controversy

⁵ Four of the six organizational plaintiffs purport to "reasonably believe" that the FBI has used or is currently using Section 215 to obtain records or personal belongings "about" or "pertaining to" the organizations and their members. *Id.*, ¶¶ 45, 83, 90, 137. One of the organizational plaintiffs (Council on American-Islamic Relations (CAIR)) alleges that it "reasonably believes" that the FBI is currently using section 215 to obtain "records or personal belongings of CAIR and its members." *Id.*, ¶ 123. Five of the organizations' members assert substantially the same allegations as CAIR. *Id.*, ¶ 58, 66, 72, 94, 133.

requirement," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and "the party invoking federal jurisdiction bears the burden of establishing its existence." *Steel Company*, 523 U.S. at 104. An actual case or controversy must be "extant" both when the complaint is filed and "at all stages of review." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 (1997). At the pleadings stage, "[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke . . . the exercise of the court's remedial powers." *Renne v. Geary*, 501 U.S. 312, 315 (1991), quoting *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546 n.8 (1986). The Court's "standing inquiry has been especially rigorous when reaching the merits of a dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819-820 (1997).

Three requirements must be met to satisfy the "irreducible constitutional minimum of standing." *Steel Company*, 523 U.S. at 102. "First and foremost, there must be alleged (and ultimately proved) an 'injury in fact' - - a harm suffered by the plaintiff that is 'concrete' and 'actual or imminent,' not 'conjectural' or 'hypothetical.'" *Id.* at 103, quoting in part, *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). "Second, there must be causation - - a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. . . . And third, there must be redressability - - a likelihood that the requested relief will redress the alleged injury." *Steel Company*, 523 U.S. at 103. Plaintiffs' allegations here fail to satisfy any of these requirements.

To qualify as an injury in fact, an "alleged injury must be legally and judicially cognizable." *Raines v. Byrd*, 521 U.S. at 819. "This requires, among other things, that the plaintiff have suffered 'an invasion of a legally protected interest which is . . . concrete and particularized.'" *Id.* at 818 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. at 560). In addition, the injury or threat must be

"both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (internal citations omitted).

Plaintiffs' alleged "injuries" fail to satisfy these requirements. Section 215 has never been applied to plaintiffs; indeed, it has never been applied to anyone at all. Baker Decl., ¶ 3. Plaintiffs' "injuries" (including the risk that they may have to divulge information regarding their members) stem not from any actual or threatened effort to enforce Section 215, but instead from the possibility that they "could be served" with a Section 215 order at some point in the future. However, "[a]llegations of possible future injury do not satisfy the requirements of Article III." *Whitmore v. Arkansas*, 495 U.S. at 155. "A threatened injury must be 'certainly impending' to constitute an injury in fact." *Id.* In any event, plaintiffs' generalized obligation to respond to subpoenas and other court orders requiring production of relevant information -- an obligation which plaintiffs share with every other American citizen -- is, in no sense, a "legally cognizable injury" which would afford a basis for standing. *United States v. Calandra*, 414 U.S. 338, 345 (1974) ("The 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."); *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.").

Plaintiffs' allegation that Section 215, even though it has never been used, has caused their members to be "inhibited from . . . engaging in activity protected by the First Amendment" (Compl., ¶ 45) is also an insufficient "injury" upon which to invoke the Court's jurisdiction. *Laird v. Tatum*, 408 U.S. 1 (1972). The issue in *Laird* was "whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the *mere existence*, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose." *Id.* at 10 (emphasis added). The Court had previously found that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Id.* at 11. "In none of these cases, however, did the chilling effect arise merely from the individual's knowledge that a governmental agency was engaged in certain activities or the individual's concomitant fear that . . . the agency might in the future take some other and additional action detrimental to that individual." *Id.* The Court held that an alleged "chilling effect" arising from plaintiffs' "generalized yet speculative apprehensiveness that the Army may at some future date . . . cause direct harm" was not a sufficient basis upon which to invoke the jurisdiction of the court. *Id.* As the Court explained, "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; 'the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.'" *Id.*

Following the Supreme Court's decision in *Laird*, the D.C. Circuit rejected claims closely analogous to those asserted by plaintiffs here in *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984). In *United Presbyterian*, a group of political and religious organizations

challenged Executive Order 12333 which prescribes procedures and limitations applicable to foreign intelligence and counterintelligence activities. Like plaintiffs here, they alleged two kinds of injury: "(1) the 'chilling' of constitutionally protected activities which they refrain from pursuing out of fear that such activities would cause them to be targeted for surveillance under the order; and (2) the immediate threat of being targeted for surveillance, and thereby being deprived of legal rights, especially those under the First, Fourth, and Fifth Amendments." *Id.*, at 231. The D.C. Circuit held these "alleged grievances insufficient to satisfy the injury-in-fact standing requirement imposed by Article III." *Id.* at 232. The court found that plaintiffs' allegation of "chilling effect" is "foreclosed as a basis for standing by the Supreme Court's holding in *Laird v. Tatum*." As in *Laird*, the court found that the plaintiffs had failed to establish that the challenged exercise of government power was "regulatory, proscriptive, or compulsory in nature," noting that the Executive Order "issues no commands or prohibitions to these plaintiffs, and sets forth no standards governing their conduct." *Id.* The court also concluded that the plaintiffs' allegation that "some of them have been or are currently subjected to unlawful surveillance" did not provide standing because "[t]here is no allegation or even suggestion that any unlawful action to which the appellants have been subjected was the consequence of the presidential action they challenge here." *Id.* at 234-235.

Plaintiffs' allegations here suffer from the same infirmities. As in *Laird* and *United Presbyterian*, plaintiffs allege that their First Amendment rights are "being chilled by the mere existence, without more, of a governmental investigative and data gathering activity," 408 U.S. at 10, and rest on their "generalized yet speculative apprehensiveness" that the Government may at some future date cause them direct harm. *Id.* at 13. Moreover, as in *Laird* and *United Presbyterian*, Section 215 is not "regulatory, proscriptive, or compulsory" in nature. It "issues no commands to

these plaintiffs, and sets forth no standards governing their conduct." *United Presbyterian*, 738 F.2d at 232. The fact that a Section 215 order conceivably could be issued to one of these plaintiffs is not the type of "genuine threat" of "imminent harm" that would constitute an injury in fact. *Id.* at 234.

Even if plaintiffs' allegations of a chilling effect were sufficient to establish an "injury in fact," the asserted "injury" is not "fairly traceable" to Section 215; nor would it be redressed by an order invalidating Section 215.⁶ Plaintiffs' "reasonable belief" that they may be investigated by the FBI is not based upon any action taken pursuant to Section 215, but instead on "the relationship between [plaintiffs], their members and leaders, and persons and organizations investigated, questioned, detained, or arrested since September 11th." Compl., ¶ 45; *see also id.*, ¶¶ 83, 90, 123. Similarly, plaintiffs fear that they may be investigated in the future not because the FBI has sought to obtain records under Section 215, but instead because they have been "targeted" for investigation in the past in that the FBI and the INS have conducted interviews, served grand jury subpoenas, seized charities to which plaintiffs contribute, and indicted and/or deported individuals known to plaintiffs. Thus, the gravamen of plaintiffs' complaint is that they are suffering harm resulting from investigations generally rather than from Section 215 itself. MCA's members are not attending mosque because they fear that the FBI is "surveilling MCA and intends to investigate those associated with the organization." Compl., ¶ 77. Members of the Islamic Center of Portland are allegedly "afraid to attend mosque, practice their religion, or express their opinions about religious activities" not because of any action taken under Section 215, but instead because they "believe that the FBI is currently using provisions of the Patriot Act to target ICPMA, and because the FBI has

⁶ Indeed, when and if Section 215 is ultimately used, an order invalidating the disclosure restriction in that section would likely exacerbate, rather than ameliorate, any "chilling effect" on plaintiffs' speech by drawing further attention to the Government's investigatory activities.

recorded conversations and services inside the mosque and sought records from ICPMA" through the use of a grand jury subpoena. *Id.*, ¶¶ 140, 152. Of course, none of these activities would be conducted as a result of Section 215 (which does not authorize recording conversations, makes no reference to the issuance of grand jury subpoenas, and provides only a limited authorization for the FIS Court to issue an order compelling production of tangible things). Indeed, as stated, the authority granted under Section 215 has, to date, not been exercised for any purpose. Thus, plaintiffs' fear that the FBI may investigate their activities (and the decision of their members to refrain from engaging in first amendment activity) is in no way attributable to Section 215. Nor would an order invalidating Section 215 provide any redress for those alleged injuries.

II. PLAINTIFFS' CLAIMS ARE NOT RIPE FOR JUDICIAL REVIEW

"Justiciability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention." *Renne v. Geary*, 501 U.S. at 320. "A claim is not ripe for adjudication if it rests upon '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). As Section 215 has never been used, plaintiffs' claims here necessarily rest on surmise and speculation about future events that may or may not ever occur, and certainly may not occur as plaintiffs anticipate.

For example, each of the plaintiffs alleges that Section 215 compromises its ability to maintain the confidentiality of records pertaining to its members, students, and/or clients. Compl., ¶¶ 73, 84, 95, 108, 134, 149. But such an allegation, by its very nature, rests upon the assumption that the Government may, at some time in the future, seek an order under Section 215 directing plaintiffs to produce such records. Until such an order is entered, "no concrete controversy is

presented to this Court for resolution." *California Bankers Association v. Shultz*, 416 U.S. 21, 76 (1974). As the Court explained, the First Amendment does not forbid disclosure of such information "in a situation where the government interest would override the associational interest in maintaining [its] confidentiality." *Id.* at 55-56. "[I]n the absence of a concrete fact situation in which competing associational and governmental interests can be weighed," the Court "is simply not in a position to determine whether an effort to compel disclosure . . . would or would not be barred . . .". *Id.* at 56.

Plaintiffs' First Amendment challenge to the disclosure restriction in Section 215 likewise rests upon the assumption that the government may, at some future time, seek an order under Section 215 in circumstances where such a restriction is an unwarranted and unnecessary restriction on speech. The Court's determination regarding whether such a restriction is necessary to further the Government's interests would plainly be aided by information concerning the factual context in which the restriction has been imposed. As the Supreme Court concluded in *Texas v. United States*, "[t]he operation of a statute is better grasped when viewed in the light of a particular application." 523 U.S. at 301. "Here, as is often true, [d]etermination of the scope . . . of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." *Id.*, quoting *Longshoreman v. Boyd*, 347 U.S. 222, 224 (1954). As Section 215 has never been used, the disclosure restriction challenged here is not having any "immediate adverse effect" on plaintiffs or their members, and the Court lacks jurisdiction to pursue an abstract inquiry into the circumstances in which it may be invalid. Indeed, such an inquiry would run afoul of the "oft-repeated admonition that the constitutionality of statutes ought not to be decided except in the actual factual setting that makes such a decision necessary." *Hodel v. Virginia Surface Mining & Reclam. Ass'n*, 452 U.S. 264, 294-295 (1981).

Plaintiffs' allegation that Section 215 "violates the First Amendment by authorizing the FBI to investigate individuals based on their exercise of First Amendment rights" (Compl., ¶ 157) also fails to provide a meaningful basis for judicial review in the absence of a concrete fact situation. To the degree this allegation states a claim at all, *see* Point V.B., *infra*, the Court's assessment of the claim may depend on the nature of the activity which gave rise to the investigation. *See e.g., ACLU Foundation of Southern California v. Barr*, 952 F.2d 457, 471 (D.C. Cir. 1991) (distinguishing between an investigation of an organization that "advocates terrorist acts in violation of federal law" and an investigation initiated because the government "dislikes the person's political views").

Plaintiffs' claim that Section 215 violates the Fourth Amendment is also not ripe for review. The concept of reasonableness which is central to Fourth Amendment jurisprudence is a fluid one, that acquires its meaning from a particular factual setting. *Illinois v. Gates*, 462 U.S. 213, 232 (1983). The Supreme Court has a "long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application. . . . Each case is to be decided on its own facts and circumstances." *Ornelas v. United States*, 517 U.S. 690, 696 (1996), quoting *Ker v. California*, 374 U.S. 23, 33 (1963); *Terry v. Ohio*, 392 U.S. 1, 29 (1968) (limitations imposed by Fourth Amendment "will have to be developed in the concrete factual circumstances of individual cases."). Thus, in a pre-enforcement setting, before any facts are developed, "it is difficult to determine whether Fourth Amendment rights are seriously threatened. . . ." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 504 n.22 (1982). That is particularly so in a case such as this where the validity of an order compelling production of records depends upon the relevance of the records to an authorized investigation. *See* Point III, *infra*.

For much the same reason, the Court cannot meaningfully assess what process may be due

under the Fifth Amendment for whatever deprivation plaintiffs believe they may endure without some factual context. Plaintiffs' allegation that they "would have no ability to challenge [a Section 215] order before compromising the privacy and free speech rights of [their] members" (*see, e.g.*, Compl., ¶ 73), plainly "rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. at 300. Specifically, plaintiffs would have to compromise the privacy and free speech rights of their members only if a Section 215 order were issued that required the release of such information. Moreover, plaintiffs' speculation that they "would have no ability to challenge" that order rests upon the assumption that an order (which has not yet been written) would fail to provide adequate time for such a challenge or, alternatively, upon the assumption that the FIS Court cannot adjudicate constitutional issues such as those raised by plaintiffs here, an assumption which, at the very least, is inconsistent with that Court's decisions. *In re Sealed Case*, 310 F.3d 717, 736-746 (Foreign Intel. Surv. Ct. of Rev. 2002) (determining that FISA complies with the Fourth Amendment).

In sum, plaintiffs' claims hinge upon a host of contingent future events which may or may not ever occur, and are too remote and abstract to provide an appropriate basis for adjudicating the constitutional validity of an Act of Congress. Because plaintiffs' challenge to Section 215 is not ripe for judicial review, this action should be dismissed for lack of subject matter jurisdiction.

III. SECTION 215 COMPLIES WITH THE FOURTH AMENDMENT

Plaintiffs assert that Section 215 violates the Fourth Amendment: (1) by authorizing the FBI to "execute searches without criminal or foreign intelligence probable cause" (Compl., ¶ 153); and (2) by authorizing searches without providing targeted individuals with notice and an opportunity to be heard (Compl., ¶ 154). Both claims are without merit.

First, Section 215 authorizes the FBI to apply to a court for an "order requiring the production of any tangible things . . . for an investigation to obtain foreign intelligence information" 50 U.S.C. § 1861(a). If the application meets the requirements of subsection 1861(b), the court is required to enter an "ex parte order as requested, or as modified." *Id.*, § 1861(c). The court's order, much like a subpoena *duces tecum*, commands the production of documents or other tangible things. Such orders "present no question of actual search and seizure, but raise only the question of whether orders of court for production have been validly made" *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946). Consequently, the Government is not required to "meet any standard of probable cause" to enforce a subpoena or other order requiring production of tangible things. *United States v. Powell*, 379 U.S. 48, 57 (1964); *Zurcher v. Stanford Daily*, 436 U.S. 547, 562, 563 (1978) (subpoenas, unlike search warrants, "do not require proof of probable cause").⁷ Instead, a subpoena is "analyzed only under the Fourth Amendment's general reasonableness standard," *Doe v. United States*, 253 F.3d 256, 263-264 (6th Cir. 2001), and complies with the Constitution so long as it "is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry." *Id.* at 263, quoting *Oklahoma Press*, 338 U.S. at 652-653.

Plaintiffs cannot seriously contend that Section 215 fails to meet these standards. Congress has authorized the issuance of an order compelling production of records or other tangible things, and has specifically prescribed the criteria that must be met before such an order may be entered. Moreover, Congress has required that the records sought be relevant to an inquiry undertaken for

⁷ Indeed, the Government "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States v. Powell*, 379 U.S. at 57, quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642-643 (1950); *Branzburg v. Hayes*, 408 U.S. at 701 (grand jury investigation "may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors").

unquestionably lawful purposes that are specified in the statute. Specifically, to comply with the requirements of Section 215, the application must seek production of the items sought "for an investigation to obtain foreign intelligence information . . . or to protect against international terrorism or clandestine intelligence activities." 50 U.S.C. § 1861(a).

To the extent that plaintiffs claim that a Section 215 order issued to a third party (such as a charity) might violate plaintiffs' Fourth Amendment rights, their claims are without merit for yet another reason.⁸ Plaintiffs' Fourth Amendment rights do not extend to records or personal belongings that they have provided to third parties. *United States v. Miller*, 425 U.S. 435, 443 (1976) ("The Court has repeatedly held 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 be used only for a limited purpose and the confidence placed in the third party will not be betrayed."); *Securities and Exchange Commission v. O'Brien*, 467 U.S. 735, 743 (1984) ("It is established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement

⁸ None of the six organizational plaintiffs allege that they personally have been served with an order from the FIS court; instead, each alleges that it "could be served" with a Section 215 order. Compl., ¶¶ 73, 84, 95, 109, 134, 149. If an order were served upon plaintiffs themselves rather than upon a third party, plaintiffs would receive actual notice of the demand for records, and would be in a position to contest the validity of the order before the FIS Court if they chose to do so. Therefore, plaintiffs' claim that the statute violates the Fourth Amendment by authorizing a search without notice and an opportunity to be heard is evidently directed at Section 215 orders issued to third parties. *See, e.g.*, Compl., ¶¶ 45, 83, 90, 137 (alleging that plaintiffs "reasonably believe" that the FBI has used or is currently using Section 215 to obtain records or personal belongings "about" or "pertaining to" the organizations and their members); *id.*, ¶ 123 (alleging that plaintiff CAIR "reasonably believes" that the FBI is currently using Section 215 to obtain "records or personal belongings of CAIR and its members.").

authorities."); *Reporters Committee on Freedom of the Press v. American Telephone & Telegraph Company*, 593 F.2d 1030, 1043 (D.C. Cir. 1978), *cert. denied* 440 U.S. 949 (1979) ("To the extent an individual knowingly exposes his activities to third parties, he surrenders Fourth Amendment protections, and, if the Government is subsequently called upon to investigate his activities for possible violations of law, it is free to seek out these third parties, to inspect their records, and to probe their recollections."). Thus, even if - - at some point in the future - - a Section 215 order affecting one or more of the plaintiffs' records were issued to a third party, such an order would not infringe plaintiffs' rights under the Fourth Amendment.

Second, plaintiffs are incorrect in their argument that they must be given notice and an opportunity to be heard before a Section 215 order may be issued for records in the possession of third parties that may contain information "about" one or more of the plaintiffs. Quite to the contrary, it is established that the "target" of an investigation has no right to notice of subpoenas issued to third parties. *O'Brien*, 467 U.S. at 743 (Supreme Court's holdings that a summons directed to third party does not violate Fourth Amendment "disable respondents from arguing that notice of subpoenas issued to third parties is necessary to allow a target to prevent an unconstitutional search or seizure of his papers."); *see also*, *United States v. Daccarett*, 6 F.3d 37, 50 (2d Cir. 1993), *cert. denied* 510 U.S. 1191 (1994); *Reporters Committee*, 593 F.2d at 1044. As the Supreme Court explained in *O'Brien*:

[T]he imposition of a notice requirement . . . would substantially increase the ability of persons who have something to hide to impede legitimate investigations A target given notice of every subpoena issued to third parties would be able to discourage the recipients from complying, and . . . delay disclosure of damaging information by seeking intervention in all enforcement actions More seriously, the understanding of the progress of an [agency's] inquiry that would flow from knowledge of which persons had received subpoenas would enable an unscrupulous target to destroy or alter documents, intimidate witnesses, or

transfer securities or funds so that they could not be reached by the Government.

467 U.S. at 750. Simply put, plaintiffs do *not* have a right to notice and an opportunity to be heard before the Government may obtain records from a third party, regardless of whether those records pertain to plaintiffs. Any other rule would frustrate the very purpose of Section 215 and, as a result, impede the Government's ability to conduct legitimate investigations. Accordingly, plaintiffs' claims under the Fourth Amendment are without merit, and should be dismissed for failure to state a claim.

IV. SECTION 215 COMPLIES WITH THE DUE PROCESS CLAUSE

Plaintiffs also allege that Section 215 violates the Fifth Amendment "by authorizing the FBI to deprive individuals of property without due process." Compl., ¶ 155. However, Section 215 merely authorizes the FBI to apply to a court for an order requiring the "production of any tangible things (including books, records, papers, documents and other items) 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). The court's involvement in the issuance of the order ensures compliance with the Due Process Clause.

The "deprivation" to which plaintiffs object is analogous to that imposed by a subpoena. But as the Supreme Court has emphasized, 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." *O'Brien*, 467 U.S. at 742. "The Due Process Clause is not implicated under such circumstances because an administrative investigation adjudicates no legal rights." *Id.* If an administrative agency has such power, then surely an independent Article III court has no less authority under the Fifth Amendment to issue an order allowing an investigative tool to be used by the federal government. Therefore, to the extent that

plaintiffs contend that the Fifth Amendment precludes the Government from obtaining court-ordered access to records "about" one or more of the plaintiff organizations (*see, e.g.*, Compl., ¶¶ 45, 83, 90, 137), their claims are baseless.

More generally, the Supreme Court has specifically rejected the notion that a "general fact-finding investigation" gives rise to a right to notice of specific charges and an adversary hearing:

"Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used.

Hannah v. Larche, 363 U.S. 420, 442 (1960); *accord, Setliff v. Memorial Hospital of Sheridan*, 850 F.2d 1384, 1395 n. 15 (10th Cir. 1988). Section 215 authorizes the issuance of an order to produce records solely for fact-finding investigations to obtain foreign intelligence information or to prevent international terrorism and clandestine intelligence activities. 50 U.S.C. § 1861(a). Since such fact-finding investigations do not adjudicate the rights of individuals, the Due Process Clause does not require the full panoply of rights applicable to adjudicative proceedings, such as notice of charges contemplated against the target of an investigation or an adversary hearing.

Even if the Due Process Clause were implicated by the type of order authorized here, Section 215 fully comports with Due Process requirements. An order requiring production of records under Section 215 may be issued only upon a determination by a court of competent jurisdiction that the application meets all applicable requirements of the statute. *Id.*, § 1861(c)(1). The courts have uniformly concluded that analogous provisions providing for ex parte judicial review of applications for approval of surveillance or searches under other provisions of the FISA comply with Due Process

requirements. E.g., *United States v. Belfield*, 692 F.2d 141, 148 (D.C. Cir. 1982); *United States v. Ott*, 827 F.2d 473, 476 (9th Cir. 1987); *United States v. Nicholson*, 955 F.Supp. 588, 591 (E.D. Va. 1997); *United States v. Spanjol*, 720 F. Supp. 55, 57 (E.D. Pa. 1989); *United States v. Falvey*, 540 F.Supp. 1306, 1315 (E.D.N.Y. 1982); see *In re Grand Jury Proceedings, Grand Jury No. 87-4*, 856 F.2d 685, 686 n. 3 (4th Cir. 1988) ("So far, every FISA wiretap review has been *in camera* and *ex parte*"). As the D.C. Circuit observed in *United States v. Belfield*: "A claim that disclosure and an adversary hearing are constitutionally required goes directly contrary to all pre-FISA precedent on point. In this Circuit and in others, it has constantly been held that the legality of electronic, foreign intelligence surveillance may, even should, be determined on an *in camera, ex parte* basis." 692 F.2d at 149; see *Global Relief Foundation v. O'Neill*, 315 F.3d 748, 754 (7th Cir. 2002), *pet. for cert. filed*, 72 U.S.L.W. 3092 (July 3, 2003) (No. 03-46) ("Administration of the [International Emergency Economic Powers Act] is not rendered unconstitutional because that statute authorizes the use of classified evidence that may be considered *ex parte* by the district court."); accord, *Holy Land Foundation v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003); see also *People's Mujahedin Organization of Iran v. Department of State*, 327 F.3d 1238, 1242 (D.C. Cir. 2003) (designation of entity as foreign terrorist organization based in part on classified evidence submitted *ex parte* and *in camera* complies with Due Process Clause).

Section 215 explicitly authorizes *ex parte* judicial review of an application for an order compelling production of records *before* it is issued, a procedure which provides greater protection than that traditionally afforded prior to the issuance of a grand jury subpoena, and has much in common with an application for a search warrant which likewise "involves no public or adversary proceedings: it is an *ex parte* request before a magistrate or judge." *United States v. United States*

District Court, 407 U.S. 297, 321 (1972). As such, the protections provided in Section 215 easily satisfy the requirements of the Due Process Clause.

V. SECTION 215 COMPLIES WITH THE FIRST AMENDMENT

A. The Government May Restrict Disclosure Of Information Sought Or Obtained In Connection With Foreign Intelligence And Counter-Terrorism Investigations

Plaintiffs, who describe themselves as "targets" (Compl., ¶ 30), insist that the First Amendment prohibits the Government from restricting the disclosure of information relating to confidential foreign intelligence and international terrorism investigations (specifically, that the FBI has sought or obtained records in conjunction with such investigations). Compl., ¶ 156. As we explain below, however, the Government may prohibit the disclosure of information the release of which would compromise foreign intelligence and international terrorism investigations without running afoul of the First Amendment. Moreover, nothing in the First Amendment precludes the Government from imposing restrictions on the disclosure of information gained by witnesses and others as a result of participation in a confidential investigation where, as here, such restrictions are necessary to protect the integrity and efficacy of the investigation. For both reasons, plaintiffs' claim that the disclosure restriction in Section 215 violates the First Amendment is without merit.

1. The First Amendment permits the Government to limit disclosure of information relating to foreign intelligence activities

Contrary to plaintiffs' claims here, the Constitution "does not withdraw from the Government the power to safeguard its vital interests." *United States v. Robel*, 389 U.S. 258, 267 (1967). "Congress can, of course, prescribe criminal penalties for those who engage in espionage and sabotage [and] the government can deny access to its secrets to those who would use such

information to harm the Nation." *Id.*; *Abrams v. United States*, 250 U.S. 616, 618-619 (1919) (upholding validity of Espionage Act under the First Amendment); *see Near v. Minnesota*, 283 U.S. 697, 716 (1931) ("No one would question but that a government might prevent . . . the publication of the sailing dates of transports or the number and location of troops"). Moreover, the First Amendment permits the Government to prosecute an individual for treason notwithstanding the fact that the law is violated by speech - - specifically, "telling the enemy the Nation's defense secrets." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992); *see* U.S. Const., Art. III, § 3.

The fact that the disclosure restriction here is limited in application to a particular category of speech (*i.e.*, disclosure of information that would compromise a confidential foreign intelligence investigation) does not mean that it would be subject to the exacting scrutiny applicable to "content-based" restrictions. *R.A.V.*, 505 U.S. at 389. This is not a case where "the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Turner Broadcasting System v. F.C.C.*, 512 U.S. 622, 642 (1994), *quoting Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The statute is "content-based" in that it restricts disclosure of only that information which would compromise foreign intelligence investigations which, of course, is the reason the First Amendment permits the Government to impose the restriction in the first instance. As the Supreme Court recently emphasized, "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech is proscribable, no significant danger of idea or viewpoint discrimination exists." *Virginia v. Black*, 123 S.Ct. 1536, 1549 (2003), *quoting R.A.V. v. City of St. Paul*, 505 U.S. at 388). Because the underlying rationale for subjecting "content-based" restrictions to more exacting scrutiny is inapplicable, *id.*, the statute at issue here is subject to review under the standards applied to a "content-neutral" regulation of speech. "A content-neutral

regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary." *Turner Broadcasting System v. F.C.C.*, 520 U.S. 180, 189 (1997).

There can be little question that the interest that Congress seeks to advance here is an important governmental interest that is unrelated to the suppression of free speech. "Few interests can be more compelling than a nation's need to ensure its own security." *Wayte v. United States*, 470 U.S. 598, 611 (1985). "Unless a society has the capability and will to defend itself from the aggressions of others, constitutional protections of any sort have little meaning." *Id.* at 612. Moreover, "[i]t is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence." *Webster v. Doe*, 486 U.S. 592, 615 (1988), quoting *Snepp v. United States*, 444 U.S. 507, 512 n.7 (1980) (*per curiam*). "By its very nature, foreign intelligence surveillance must be conducted in secret," S. Rep. No. 95-604 at 60, reprinted at 1978 U.S.C.C.A.N. 3962, and "[s]afeguarding national security against the intelligence activities of foreign agents remains a vitally important government purpose." *Id.* at 9, reprinted at 1978 U.S.C.C.A.N. 3910; *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (the Government has a "'compelling interest' in withholding national security information from unauthorized persons"); accord, *Snepp v. United States*, 444 U.S. at 509 n.3 ("The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."); *Holy Land Foundation v. Ashcroft*, 333 F.3d at 164 (same); see also *United States v. United States District Court*, 407 U.S. at 320 (recognizing "secrecy essential to foreign intelligence gathering").

Similarly, the statute "does not burden substantially more speech than necessary." *Turner Broadcasting System*, 520 U.S. at 189. Section 1861(d) of Title 50 provides that "No person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section." Like other provisions in FISA that are designed to prevent the compromise of foreign intelligence information, Congress concluded that this limitation on disclosure, which was enacted in its original form in 1998,⁹ is "necessary to protect the FBI's foreign intelligence investigations from disclosure to hostile powers or international terrorism organizations." S. Rep. No. 105-185, 105th Cong. 2d Sess. 28.¹⁰

As the D.C. Circuit recently explained, disclosure of this type of information would identify the targets of foreign intelligence and counter-terrorism investigations, would "inform terrorists of both the substantive and geographic focus of the investigation[,] . . . would inform terrorists which of their members were compromised by the investigation, and which were not[,] . . . could allow terrorists to better evade the ongoing investigation and more easily formulate or revise counter-

⁹ Pub. L. No. 105-272, § 602, 112 Stat. 2412 (Oct. 20, 1998) (amending § 502(d)(2)).

¹⁰ Section 1861(d) is consistent with the overall structure of the FISA which was designed to provide a "*secure framework* by which the Executive Branch may conduct legitimate electronic surveillance for foreign intelligence purposes within the context of this Nation's commitment to privacy and individual rights." S. Rep. No. 95-604 at 15, *reprinted at* 1978 U.S.C.C.A.N. 3916 (emphasis added). Congress created the Foreign Intelligence Surveillance Court, 50 U.S.C. § 1803(a), and adopted numerous special procedures to ensure that proceedings before the court may be conducted without compromising an underlying foreign intelligence investigation. *Id.*, §§ 1803(c) (security procedures for court records), 1805(a), 1824(a), 1842(d), and 1861(c)(1) (authorizing issuance of ex parte orders), 1805(b)(2)(B), 1824(c)(2)(B), 1842(d)(2)(B)(i) and (B)(ii), and 1861(d) (requiring that orders authorizing surveillance, searches, pen registers, and production of records be implemented in a manner which will protect the secrecy of the investigation). As explained above, these confidentiality measures are critical to the fundamental purpose and operation of the statutory scheme.

efforts, * * * [and] could be of great use to al Qaeda in plotting future terrorist attacks or intimidating witnesses in the present investigation." *Center for National Security Studies v. U.S. Department of Justice*, 331 F.3d 918, 928-929 (D.C. Cir. 2003). Maintaining the secrecy of such investigations is therefore centrally important to the Government's ability to gather information regarding the activities of international terrorists and hostile foreign adversaries without causing the disclosure of information that would undermine its efforts to prevent further acts of terrorism.

Contrary to plaintiffs' allegations, the disclosure restriction in section 215 is not overbroad because it "categorically and permanently" prohibits disclosure of this information. Compl., ¶ 156. As the Supreme Court and Congress have both recognized, foreign intelligence investigations differ, in significant respects, from traditional criminal investigations:

Far more than in domestic security matters, foreign counterintelligence investigations are "long range" and involve "the interrelation of various sources and types of information." Targets are often "difficult to identify," and the emphasis is primarily "on the prevention of unlawful activity." Where foreign governments and foreign-based organizations are the source of the danger, the Government clearly must prepare for a possible future crisis or emergency." When clandestine intelligence and terrorist activities are planned, directed, and supported from abroad, rather than within the United States, the investigative task is extraordinarily difficult. Therefore, the focus of surveillance of suspected foreign agents must "be less precise" if the United States is to maintain adequate security.

S. Rep. No. 95-604 at 16, *reprinted at* 1978 U.S.C.C.A.N. 3985, *quoting in part* *United States v. United States District Court*, 407 U.S. at 322. Consequently, the need for secrecy does not terminate upon the indictment of a particular individual. Disclosure of the records or information obtained by the FBI in conjunction with efforts to protect against international terrorism would continue to have all of the adverse consequences identified by the D.C. Circuit in *Center for National Security Studies* long after any given criminal investigation is concluded. The success of the investigation may be marked by the efficacy of ongoing and evolving efforts to disrupt terrorist activity by, for example,

interrupting an operation or preventing the participants from entering into the United States. Such temporary successes neither eliminate the need for further investigative activity nor make the Government's interest in maintaining the confidentiality of its investigation any less critical.

In sum, because the statute does not burden more speech than necessary to protect the confidentiality of such investigations, it is fully consistent with the requirements of the First Amendment. More generally, nothing in the Constitution prevents the government from "deny[ing] access to its secrets to those who would use such information to harm the Nation." *United States v. Robel*, 389 U.S. at 267; *accord*, *Global Relief Foundation*, 315 F.3d at 754 ("The Constitution would indeed be a suicide pact, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963), if the only way to curtail enemies' access to assets were to reveal information that might cost lives."). For this reason alone, plaintiffs' First Amendment challenge should be dismissed.

2. The First Amendment permits the Government to limit disclosure of information by participants in confidential investigations

Even outside of the context of foreign intelligence and international terrorism, the courts have upheld numerous statutory restrictions on the disclosure of information obtained as a result of a witness or other participant's involvement in a legal proceeding or confidential investigation, such as those undertaken by a grand jury. At the outset, nothing in the First Amendment confers a right upon plaintiffs to obtain investigative information compiled in connection with the Government's efforts to obtain foreign intelligence information and to protect the American people from international terrorism. "Indeed, there are no federal court precedents requiring under the First Amendment, disclosure of information compiled during an Executive Branch investigation" *Center for National Security Studies v. U.S. Department of Justice*, 331 F.3d at 935; *Los Angeles*

Police Department v. United Reporting Publishing Company, 528 U.S. 32, 40 (1999) ("California could decide not to give out arrestee information at all without violating the First Amendment"); *In re motions of Dow Jones Co.*, 142 F.3d 496, 503 (D.C. Cir. 1998), *cert. denied* 525 U.S. 820 (1998) (it is a "settled proposition" that "there is no First Amendment right of access to grand jury proceedings"); *United States v. Smith*, 123 F.3d 140, 150 (3d Cir. 1997) (there is no first amendment right of access to a grand jury matter "even if it also concerns possible improper actions by government officials"); *cf.*, *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 699-700 (6th Cir. 2002) (distinguishing "government-held *investigatory* information" from an "*adjudicatory* process").

Nor does the First Amendment prevent the Government from continuing to restrict access to investigative information when it serves an order compelling production of records on a third party. As the Supreme Court recognized, in rejecting a claim that protective orders are subject to strict scrutiny, "*continued court control* over the discovered information 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) (emphasis added). As the Court explained:

[A] protective order prevents a party from disseminating only that information obtained through use of the discovery process. Thus, the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes.

Id. at 34.

The Court emphasized this same distinction in *Los Angeles Police Department v. United Reporting Publishing Corporation* ("LAPD") in upholding a California statute which authorized public access to arrestees' addresses only if the requesting party executes a declaration under penalty of perjury that the information would not "be used directly or indirectly to sell a product or

service" 528 U.S. at 35, *quoting* Cal. Govt. Code Ann. § 6254(f)(3) (West Supp. 1999). In upholding the facial validity of the statute under the First Amendment, the Court explained that: "This is not a case in which the government is prohibiting a speaker from conveying information *that the speaker already possesses.*" *Id.* at 40 (emphasis added).

Because continuing restrictions on information obtained from the Government directly as in *LAPD*, or through participation in judicial proceedings as in *Seattle Times*, does not raise the same "specter of government censorship," *id.*, 467 U.S. at 34, such restrictions are permissible under the First Amendment if they "'further[] an important or substantial government interest unrelated to the suppression of expression' and . . . 'the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved.'" *Id.* at 32. As set out Point V.A.1. above, the Government plainly has a substantial, indeed a "'compelling interest' in withholding national security information from unauthorized persons," *e.g.*, *Department of the Navy v. Egan*, 484 U.S. at 527, and in maintaining the "secrecy essential to foreign intelligence gathering." *United States v. U.S. District Court*, 407 U.S. at 320; *Snepp*, 444 U.S. at 509 n.3.

Similarly, the challenged disclosure restriction is "no greater than is necessary or essential to the protection of the particular governmental interest involved." *Seattle Times*, 467 U.S. at 32. It does not restrict disclosure of any information *already in the possession* of a recipient of a Section 215 order, such as the contents of any documents sought; instead, it limits disclosure only of the fact that the FBI has sought or obtained those documents -- which is precisely the information the release of which would compromise a confidential investigation by revealing its direction, nature and scope.

A number of courts presented with challenges to the validity of restrictions on the disclosure of information relating to grand jury proceedings have upheld similar restrictions insofar as they

prohibit disclosure of information obtained as a result of participation in the proceedings, but invalidated them insofar as they purport to prohibit disclosure of information already in the possession of an individual. As these cases reflect, the same analysis applies in the case of a person who is compelled to participate (such as the recipient of a grand jury subpoena) as the Supreme Court applied in *Seattle Times* to a person voluntarily seeking disclosure of information in discovery.

In *Butterworth v. Smith*, 494 U.S. 624 (1990), for example, a reporter who had "obtained information relevant to alleged improprieties committed by the Charlotte County State Attorney's Office and Sheriff's Department" was called to testify before a special grand jury. The reporter subsequently set out to publish a news story or book about the matter; however, a Florida statute prohibited any person from knowingly disclosing "any testimony of a witness examined before the grand jury, or the content, gist or import thereof . . ." *Id.* at 627. The Supreme Court held the statute invalid insofar as it permanently banned the witness from disclosing his own testimony. In distinguishing its prior decision in *Seattle Times v. Rhinehart*, the Court stated as follows:

In *Rhinehart* we held that a protective order prohibiting a newspaper from publishing information that it had obtained through discovery procedures did not offend the First Amendment. Here, by contrast, we deal only with respondent's right to divulge information of which he was in possession before he testified before the grand jury, *and not information which he may have obtained as a result of his participation in the proceedings of the grand jury.*

Id. at 632 (emphasis added). In contrast to the statute at issue in *Butterworth*, Section 215 does not restrict the right of a person to divulge information already in his or her possession before an order compelling production is served; therefore, it does not raise the same concerns.

This distinction is borne out by the court's decision in *Hoffman-Pugh v. Keenan*, 338 F.3d 1136 (10th Cir. 2003), where the court upheld the validity of a Colorado statute that requires each

grand jury witness to swear or affirm that "you will keep your testimony secret, except to discuss it with your attorney, or the prosecutor, until and unless an indictment or report is issued." *Id.* at 1138, quoting Rule 6.3, Colorado Rules of Criminal Procedure. Based on prior Colorado precedent, the court concluded that the statute "is intended only to prevent disclosure of what transpires or will transpire before the grand jury." *Id.* at 1139, quoting *State v. Rickard*, 761 P.2d 188, 192 (Colo. 1988). Unlike the Florida statute at issue in *Butterworth*, the Colorado statute "does not prohibit disclosure of information the witness already had independently of the grand jury process." *Hoffman-Pugh*, 338 F.3d at 1139. The court therefore concluded that the disclosure restriction was permissible under the First Amendment, explaining that: "Reading *Butterworth* in light of *Rhinehart*, we are convinced a line should be drawn between information the witness possessed prior to becoming a witness and information the witness gained through her actual participation in the grand jury process." *Id.* at 1140. Section 215 is valid for the same reason as the Colorado statute at issue in *Hoffman-Pugh*. It restricts disclosure only of information obtained through participation in an investigation; it does not restrict disclosure of information that the participant already possessed.

In *Kamasinski v. Judicial Review Council*, 44 F.3d 106 (2d Cir. 1994), the court applied a similar analysis in upholding the validity of a Connecticut statute which provided that a complainant or witness before the Connecticut Judicial Review Council "cannot disclose the fact that the JRC investigation is under way and cannot disclose any information he or she may have gleaned through interaction with the JRC." *Id.* at 107. The court held that "the limited ban on disclosure of the fact of filing or the fact that testimony was given does not run afoul of the First Amendment." *Id.* at 111. The court also concluded that "Connecticut may, without violating the First Amendment, prohibit the disclosure of information gained through interaction with the JRC." *Id.* Again, section 215 is

fully consistent with the court's decision. It does not prevent disclosure of the substantive content of any documents or records that may be the subject of a Section 215 order. It merely prohibits disclosure of the fact that the FBI has sought or obtained such information.

Finally, in *In re Subpoena to Testify Before Grand Jury*, 864 F.2d 1559 (11th Cir. 1989), the court rejected a First Amendment challenge to a district court's closure order which "restrained counsel and parties from disclosing the content of pleadings and memoranda filed in connection with a continuing grand jury investigation." *Id.* at 1561. The court held that the district court "had the authority to prevent witnesses from disclosing materials prepared for or testimony given in the grand jury proceedings or related proceedings," but could not "prevent[] disclosure of documents prepared and assembled *independent of* the grand jury proceedings." *Id.* at 1564 (emphasis added). Accordingly, the court held that the subpoenaed party "is obligated to avoid disclosing the direction of the grand jury investigation, . . . the names of individuals being investigated, or those who might be expected to testify before the grand jury, or any other secret aspect of the grand jury investigation," and "may not respond to requests that would disclose protected information, such as requests for all documents prepared for, submitted to, or subpoenaed by the grand jury." *Id.*

The scope of the restriction imposed here is valid for analogous reasons. The subject of a Section 215 order is free to disclose information in records independently assembled, but cannot disclose what documents were sought by the FBI in its investigation. The First Amendment does not confer a right to disclose such information because to do so would undermine the investigation.¹¹

¹¹ See also *United States v. Jeter*, 775 F.2d 670, 674 n.1 (6th Cir. 1985), *cert. denied* 475 U.S. 1142 (1986) ("[N]o one would suppose that criminal punishment of a scheme to transmit secret grand jury information exclusively to suspected grand jury targets represents an unconstitutional interference with speech.").

In sum, Section 215 prohibits disclosure of only that information which the recipient of the order gained as a result of his or her interaction with the FIS Court (*i.e.*, that the FBI "has sought or obtained tangible things under this section [of the FISA]"). 50 U.S.C. § 1861(d). It does not preclude the disclosure of information already in the possession of a party that receives an order from the FIS Court compelling production of documents, including the contents of any information or records in its possession. Thus, the restriction is permissible under the First Amendment for the same reason as those upheld by the courts of appeals in *Hoffman-Pugh*, *Kamasinski*, and *In re Subpoena to Testify Before Grand Jury*, and plaintiffs' challenge to Section 215 should therefore be dismissed.

B. The Government May Consider Information Derived From Speech And Other Activities Protected By The First Amendment In Deciding Whether To Pursue An Otherwise Lawful Investigation

Under the statute, an investigation of a United States person may not be "conducted solely upon the basis of activities protected by the first amendment" 50 U.S.C. § 1861(a). Plaintiffs assert that the statute is invalid because, by negative inference, it would permit the FBI to obtain records or personal belongings of United States persons based "in part" on activities protected by the first amendment (Compl., ¶ 23) and, for those who are not United States persons, based "solely" on activities protected by the first amendment. *Id.*, ¶ 24.

The premise for this contention – that the government is foreclosed from investigating any activity that may be revealed in whole or in part through speech or other activities protected by the first amendment – is nonsensical. It is well-established that "[t]he First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993). Nor does it prohibit the admission of evidence of membership in an organization when such evidence is relevant to the matter before the

Court. *Dawson v. Delaware*, 503 U.S. 159, 163-165 (1992) ("the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.").

A fortiori, nothing in the First Amendment precludes consideration of such evidence in determining whether an *investigation* is warranted. To the extent information gleaned from speech or other activities is relevant to an investigation, nothing in the First Amendment precludes the Government from considering that evidence. As the D.C. Circuit explained in *ACLU of Southern California v. Barr* in rejecting a claim similar to that advanced by plaintiffs here:

The government is not limited to investigating crimes already fully consummated. If an organization advocates terrorist acts in violation of federal law, for example, the government surely could investigate it for that reason even if the advocacy were protected by the First Amendment because it was not directed to "producing imminent lawless action" and was not likely to do so.

952 F.2d 457, 470 (D.C. Cir. 1991). The Seventh Circuit reached the same conclusion in *Alliance to End Repression v. City of Chicago*:

The FBI always has investigated people who advocate or threaten to commit serious violations of federal law, even if the violations are not imminent; and it always will. It "has a right, indeed a duty, to keep itself informed with respect to possible commission of crimes; it is not obliged to wear blinders until it is too late for prevention." *Socialist Workers Party v. Attorney General*, 510 F.2d 253, 256 (2d Cir. 1974) (per curiam).

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The FBI cannot hope to nip terrorist conspiracies in the bud if it may not investigate proto-terrorist organizations. That is why . . . the FBI would not be violating the First Amendment . . . if it decided to investigate a threat that was not so immediate as to permit punitive measures against the utterer.

742 F.2d 1007, 1014-16 (7th Cir. 1984) (*en banc*).

Plaintiffs' contention that Section 215 is invalid merely because it *allows* consideration of

information derived from activities protected by the First Amendment is also fundamentally irreconcilable with the Supreme Court's decision in *Wayte v. United States*, 470 U.S. 598 (1985). In *Wayte*, the Court held that a "passive enforcement" policy – under which the Government would investigate and prosecute for failure to register for the draft only those individuals who report that they have violated the law, or who are reported by others – did not violate the First Amendment. The Court rejected the notion that the Government could not prosecute a self-reporter unless "it could prove that it would have prosecuted him without his letter [reporting the violation]." *Id.* at 614. As the Court explained, "such a view would allow any criminal to obtain immunity from prosecution simply by reporting himself and claiming that he did so in order to 'protest' the law." *Id.*

Plaintiffs' position here is also irreconcilable with the reasoning of the Supreme Court in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999). In that case the Immigration and Naturalization Service sought to deport several individuals for "routine status violations such as overstaying a visa," but admitted that it was "seeking respondents' deportation because of their affiliation with the [Popular Front for the Liberation of Palestine]," *id.* at 474, a group that the Government had characterized as an "international terrorist and communist organization." *Id.* at 473. In rejecting the deportees' claims under the First Amendment, the Court reasoned as follows: "When an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity." *Id.* at 491-492. If the First Amendment permits the Government to deport an individual based, in part, on his or her affiliation with a particular group, it manifestly would permit the Government to conduct a non-adjudicatory fact-finding investigation of such an individual whether

or not it is based in whole or in part on such activities.

As these decisions make clear, in the absence of the statutory restriction at issue here, the Government may choose to conduct an investigation based *solely* on activities protected by the First Amendment without running afoul of the First Amendment. Thus, far from violating the First Amendment, section 1861 confers statutory protection for activities of United States persons that are plainly in excess of what the First Amendment itself requires.

CONCLUSION

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

Dated: October 3, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on October 2, 2003, I caused a copy of the foregoing Defendants' Motion to Dismiss, Memorandum in Support of Defendants' Motion to Dismiss, Declaration of James Baker, and a proposed Order, to be served by overnight courier on plaintiffs' counsel at the offices specified below:

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