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13 UNITED STATES DISTRICT COURT
 14 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 15 SOUTHERN DIVISION

16 UNITED STATES OF AMERICA,
 Plaintiff,
 17 v.
 18 NADER SALEM ELHUZAYEL and
 MUHANAD ELFATIH M. A. BADAWI,
 19 Defendants.

No. SA CR 15-00060(A)-DOC
**GOVERNMENT'S UNCLASSIFIED
 MEMORANDUM IN OPPOSITION TO
 DEFENDANTS' MOTIONS**
 Hearing Date: April 28, 2016
 Hearing Time: 12:00 noon
 Location: Courtroom of the
 Hon. David O. Carter

21 Plaintiff United States of America, by and through its counsel
 22 of record, the United States Attorney for the Central District of
 23 California and Assistant United States Attorneys Judith A. Heinz
 24 and Deirdre Z. Eliot, hereby files its **UNCLASSIFIED MEMORANDUM IN**
 25 **OPPOSITION TO DEFENDANT ELHUZAYEL'S MOTION FOR DISCLOSURE OF FISA-**
RELATED MATERIAL AND TO SUPPRESS THE FRUITS OR DERIVATIVES OF

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7 Uniting and Strengthening America by Providing Appropriate Tools
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1 **I. INTRODUCTION**

2 The Government is filing this unclassified memorandum in
3 opposition to defendant Nader Salem Elhuzayel's ("Elhuzayel")
4 "Motion for Disclosure of [the Foreign Intelligence Surveillance
5 Act ("FISA")]-Related Material and to Suppress the Fruits or
6 Derivatives of Electronic Surveillance and Any Other Means of
7 Collection Conducted Pursuant to FISA or Other Foreign Intelligence
8 Gathering" (Docket Entry ("Doc.") 69) and defendant Muhanad Elfatih
9 M.A. Badawi's ("Badawi") "Motion to Suppress Evidence Collected
10 Pursuant to FISA Warrant; Joinder in Co-Defendant's Motions" (Doc.
11 70) (hereinafter, collectively referred to as "defendants'
12 motions"). The defendants' motions seek: (1) suppression of all
13 evidence obtained under FISA (*i.e.*, "the FISA information"); and
14 (2) disclosure of the FISA applications, orders, and related
15 materials (*i.e.*, "the FISA materials").¹

16 The defendants' motions have triggered this Court's review of
17 the materials related to the FISA-authorized² electronic
18 surveillance and physical searches to determine whether the FISA
19 information was lawfully acquired and whether the electronic
20 surveillance and physical searches were made in conformity with an
21 order of authorization or approval.³ Whenever "a motion is made

22
23 ¹ [CLASSIFIED MATERIAL REDACTED]

24 ² [CLASSIFIED MATERIAL REDACTED]

25 ³ The provisions of FISA that address the electronic surveillance at issue in this case are found at 50 U.S.C. §§ 1801-1812; those that address physical searches are found at 50 U.S.C. §§ 1821-1829. These two

1 pursuant to subsection (e)... to discover or obtain applications or
2 orders or other materials relating to electronic surveillance or to
3 discover, obtain or suppress evidence or information obtained or
4 derived from electronic surveillance under this Act, the United
5 States district court...shall...if the Attorney General files an
6 affidavit under oath that disclosure or an adversary hearing would
7 harm the national security of the United States, review *in camera*
8 and *ex parte* the application, order, and such other materials
9 relating to the surveillance as may be necessary to determine
10 whether the surveillance of the aggrieved person was lawfully
11 authorized and conducted." 50 U.S.C. §§ 1806(f), 1825(g). The
12 Government is filing herewith such an affidavit in which the
13 Attorney General claims under oath that disclosure or an adversary
14 hearing would harm the national security of the United States,
15 which is the prerequisite for the Court to review the FISA
16 materials *in camera* and *ex parte*;⁴ consequently, the Government
17 respectfully submits that, for the reasons set forth hereinafter,
18 this Court must conduct an *in camera*, *ex parte* review of the

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sets of provisions are in many respects parallel and almost identical.
Citations herein are generally to the two sets of provisions in parallel,
with the first citation being to the relevant electronic surveillance
provision, and the second citation being to the relevant physical search
provision.

24 ⁴ The Attorney General's affidavit ("Declaration and Claim of
25 Privilege") is filed both publicly and attached as part of the
Government's classified filing. See Sealed Exhibit 1.

1 documents relevant to the defendants' motions in accordance with
2 the provisions of 50 U.S.C. §§ 1806(f) and 1825(g).⁵

3 For the reasons set forth below and from the Court's *in*
4 *camera, ex parte* review of the FISA materials, it is conclusively
5 established that: (1) the electronic surveillance and physical
6 searches at issue in this case were both lawfully authorized and
7 lawfully conducted in compliance with FISA; (2) disclosure to the
8 defendants of the FISA materials and the Government's classified
9 submissions is not authorized because the Court can make an
10 accurate determination of the legality of the FISA-authorized
11 electronic surveillance and physical searches without disclosing
12 the FISA materials or portions thereof; (3) the FISA materials
13 should not be disclosed; (4) the FISA information should not be
14 suppressed; and (5) no hearing is required.

15 **A. BACKGROUND**

16 On May 21, 2015, Elhuzayel and Badawi were arrested upon
17 complaint for conspiring to provide material support to the Islamic
18 State of Iraq and the Levant ("ISIL"), in violation of 18 U.S.C.
19 § 2339B. (Doc. 1) On June 3, 2015, Elhuzayel and Badawi were
20 indicted in the Central District of California ("CDCA") for
21 conspiring to provide material support to ISIL, in violation of 18
22 U.S.C. § 2339B. Elhuzayel was additionally charged with attempting
23 to provide material support to ISIL, in violation of 18 U.S.C.

24 _____
25 ⁵ [CLASSIFIED MATERIAL REDACTED]

1 § 2339B; and Badawi was additionally charged with aiding and
2 abetting an attempt to provide material support to ISIL, in
3 violation of 18 U.S.C. §§ 2339B and 2. (Doc. 17) On October 7,
4 2015, a grand jury in the CDCA returned a superseding indictment
5 charging Elhuzayel and Badawi with conspiring to provide material
6 support to a foreign terrorist organization, in violation of 18
7 U.S.C. § 2339B. Elhuzayel was additionally charged with attempting
8 to provide material support to a foreign terrorist organization, in
9 violation of 18 U.S.C. § 2339B; and bank fraud, in violation of 18
10 U.S.C. §§ 1344 and 2. Badawi was additionally charged with aiding
11 and abetting an attempt to provide material support to a foreign
12 terrorist organization, in violation of 18 U.S.C. §§ 2339B and 2;
13 and financial aid fraud, in violation of 18 U.S.C. § 1097(a).
14 (Doc. 41)

15 **[CLASSIFIED MATERIAL REDACTED]**

16 On June 8, 2015, pursuant to 50 U.S.C. § 1806(c), the United
17 States provided notice to both Elhuzayel and Badawi that it
18 "intends to offer into evidence, or otherwise use or disclose in
19 any proceedings in [this case], information obtained or derived
20 from electronic surveillance conducted pursuant to the Foreign
21 Intelligence Surveillance Act of 1978 (FISA), as amended, 50 U.S.C.
22 §§ 1801-1812." (Doc. 23) On September 29, 2015, pursuant to 50
23 U.S.C. §§ 1806(c) and 1825(d), the United States provided an
24 updated notice to both Elhuzayel and Badawi stating that it

25

1 "intends to offer into evidence, or otherwise use or disclose in
2 any proceedings in [this case], information obtained or derived
3 from electronic surveillance and physical searches conducted
4 pursuant to the Foreign Intelligence Surveillance Act of 1978
5 (FISA), as amended, 50 U.S.C. §§ 1801-1812 and §§ 1821-1829."
6 (Doc. 38) On January 29, 2016, the defendants filed their motions.
7 (Doc. 69 and 70)

8 [CLASSIFIED MATERIAL REDACTED]⁶

9 In subsequent sections of this Memorandum, the Government
10 will: (1) present an overview of the FISA authorities at issue in
11 this case; (2) discuss the FISA process; (3) address the manner in
12 which the Court should conduct its *in camera*, *ex parte* review of
13 the FISA materials; (4) summarize the facts supporting the FISC's
14 probable cause determinations at issue (all of which information is
15 contained fully in the exhibits in the Sealed Appendix); (5)
16 discuss the relevant minimization procedures; and (6) address the
17 defendants' arguments in support of their motions. All of the
18 Government's pleadings and supporting FISA materials are being
19 submitted not only to oppose the defendants' requests, but also to
20 support the United States' request, pursuant to FISA, that this
21 Court: (1) conduct the required *in camera*, *ex parte* review of the
22 FISA materials; (2) find that the FISA information at issue was

23
24 ⁶ As a result of the redactions, the pagination and footnote
25 numbering of the classified memorandum and the unclassified memorandum
are different.

1 lawfully acquired and that the electronic surveillance and physical
2 searches were conducted in conformity with an order of
3 authorization or approval; (3) find that the FISA information
4 should be not be suppressed; and (4) order that none of the FISA
5 materials be disclosed to the defense, and instead, that they be
6 maintained by the United States under seal.

7 **B. OVERVIEW OF THE FISA AUTHORITIES**

8 [CLASSIFIED MATERIAL REDACTED]

9 1. [CLASSIFIED MATERIAL REDACTED]

10 [CLASSIFIED MATERIAL REDACTED]

11 2. [CLASSIFIED MATERIAL REDACTED]

12 [CLASSIFIED MATERIAL REDACTED]

13 3. **The FISC's Findings**

14 [CLASSIFIED MATERIAL REDACTED]

15 **II. THE FISA PROCESS**

16 **A. OVERVIEW OF FISA⁷**

17 Enacted in 1978, and subsequently amended, FISA authorizes the
18 Chief Justice of the United States to designate eleven United
19 States District Judges to sit as judges of the FISC. 50 U.S.C.
20 § 1803(a)(1). The FISC judges are empowered to consider *ex parte*
21 applications submitted by the Executive Branch for electronic
22 surveillance and physical searches when a significant purpose of
23 the application is to obtain foreign intelligence information, as

24 ⁷ This memorandum references the statutory language in effect at the
25 time relevant to this matter.

1 defined in FISA. Rulings of the FISC are subject to review by the
2 Foreign Intelligence Surveillance Court of Review ("FISC of
3 Review"), which is composed of three United States District or
4 Circuit Judges who are designated by the Chief Justice. 50 U.S.C.
5 § 1803(b).

6 As originally enacted, FISA required that a high-ranking
7 member of the Executive Branch of Government certify that "the
8 purpose" of the FISA application was to obtain foreign intelligence
9 information. In 2001, FISA was amended as part of the Uniting and
10 Strengthening America by Providing Appropriate Tools Required to
11 Intercept and Obstruct Terrorism Act ("USA PATRIOT Act").⁸ One
12 change to FISA accomplished by the USA PATRIOT Act is that a high-
13 ranking official is now required to certify that the acquisition of
14 foreign intelligence information is "a significant purpose" of the
15 requested surveillance. 50 U.S.C. § 1804(a)(6)(B).

16 FISA provides that the Attorney General may authorize the
17 emergency employment of electronic surveillance and physical
18 searches if the Attorney General

19 (A) reasonably determines that an emergency situation exists
20 with respect to the employment of electronic surveillance [or
21 physical search] to obtain foreign intelligence information
before an order authorizing such surveillance can with due
diligence be obtained;

22 (B) reasonably determines that the factual basis for the
23 issuance of an order under this title to approve such
electronic surveillance [or physical search] exists;

24

25 ⁸ Pub. L. No. 107-56, 115 Stat. 272 (2001).

1 (C) informs, either personally or through a designee, a judge
2 having jurisdiction under [50 U.S.C. § 1803] at the time of
such authorization that the decision has been made to employ
emergency electronic surveillance [or physical search]; and

3 (D) makes an application in accordance with this title to a
4 judge having jurisdiction under section 103 as soon as
practicable, but not later than seven days after the Attorney
5 General authorizes such electronic surveillance [or physical
search].

6 50 U.S.C. §§ 1805(e)(1), 1824(e)(1).⁹ Emergency electronic
7 surveillance or physical searches must comport with FISA's
8 minimization requirements, which are discussed below. See 50
9 U.S.C. §§ 1805(e)(2), 1824(e)(2).¹⁰

10 **B. THE FISA APPLICATION**

11 FISA provides a statutory procedure whereby the Executive
12 Branch may obtain a judicial order authorizing the use of
13 electronic surveillance, physical searches, or both, within the
14

15 ⁹ [CLASSIFIED MATERIAL REDACTED]

16 ¹⁰ If no FISC order authorizing the electronic surveillance or
17 physical searches is issued, emergency surveillance or searches must
18 terminate when the information sought is obtained, when the FISC denies
an application for an order, or after the expiration of seven days from
19 the time of the emergency employment, whichever is earliest. See 50
U.S.C. §§ 1805(e)(3), 1824(e)(3). Moreover, if no FISC order is issued,
20 absent a showing of good cause, the FISC shall cause to be served on any
U.S. person named in the application, and others in the FISC's
21 discretion, notice of the fact of the application, the period of the
surveillance, and the fact that during the period information was or was
22 not obtained. See 50 U.S.C. § 1806(j); see also 50 U.S.C. § 1824(j)(1)
(physical searches). In addition, if no FISC order is issued, neither
23 information obtained nor evidence derived from the emergency electronic
surveillance or physical search may be disclosed in any court or other
24 proceeding, and no information concerning a United States person acquired
from the electronic surveillance or physical search may be used in any
25 other manner by Federal officers or employees without the person's
consent, except with the approval of the Attorney General if the
information indicates a threat of death or serious bodily harm. See 50
U.S.C. §§ 1805(e)(5), 1824(e)(5).

1 United States where a significant purpose is the collection of
2 foreign intelligence information.¹¹ 50 U.S.C. §§ 1804(a)(6)(B),
3 1823(a)(6)(B). Under FISA, "[f]oreign intelligence information"
4 means:

5 (1) information that relates to, and if concerning a United
6 States person¹² is necessary to, the ability of the United
States to protect against-

7 (A) actual or potential attack or other grave hostile
8 acts of a foreign power or an agent of a foreign power;

9 (B) sabotage, international terrorism, or the
10 international proliferation of weapons of mass
destruction by a foreign power or an agent of a foreign
power; or

11 (C) clandestine intelligence activities by an
12 intelligence service or network of a foreign power or by
an agent of a foreign power; or

13 (2) information with respect to a foreign power or foreign
14 territory that relates to, and if concerning a United States
person is necessary to -

15 (A) the national defense or the security of the United
16 States; or

17 (B) the conduct of the foreign affairs of the United
States.

18 50 U.S.C. § 1801(e); see also 50 U.S.C. § 1821(1), adopting the
19 definitions from 50 U.S.C. § 1801. With the exception of emergency
20 authorizations, FISA requires that a court order be obtained before
21 any electronic surveillance or physical searches may be conducted.
22
23

24 ¹¹ [CLASSIFIED MATERIAL REDACTED]

25 ¹² [CLASSIFIED MATERIAL REDACTED]

1 An application to conduct electronic surveillance pursuant to
2 FISA must contain, among other things:

3 (1) the identity of the federal officer making the
4 application;

5 (2) the identity, if known, or a description of the specific
6 target of the electronic surveillance;

7 (3) a statement of the facts and circumstances supporting
8 probable cause to believe that the target is a foreign power
9 or an agent of a foreign power, and that each facility or
10 place at which the electronic surveillance is directed is
11 being used, or is about to be used, by a foreign power or an
12 agent of a foreign power;

13 (4) a statement of the proposed minimization procedures to be
14 followed;

15 (5) a detailed description of the nature of the information
16 sought and the type of communications or activities to be
17 subjected to the surveillance;

18 (6) a certification, discussed below, of a high-ranking
19 official;

20 (7) a summary of the manner or means by which the electronic
21 surveillance will be effected and a statement whether physical
22 entry is required to effect the electronic surveillance;

23 (8) the facts concerning and the action taken on all previous
24 FISA applications involving any of the persons, facilities, or
25 places specified in the application; and

(9) the proposed duration of the electronic surveillance.

50 U.S.C. §§ 1804(a)(1)-(9).

21 An application to conduct a physical search pursuant to FISA
22 must contain similar information as an application to conduct
23 electronic surveillance except that an application to conduct a
24 physical search must also contain a statement of the facts and
25 circumstances that justify an applicant's belief that "the premises

1 or property to be searched contains foreign intelligence
2 information" and that each "premises or property to be searched is
3 or is about to be, owned, used, possessed by, or is in transit to
4 or from" the target. 50 U.S.C. §§ 1823(a)(1)-(8), (a)(3)(B), (C).

5 **1. The Certification**

6 An application to the FISC for a FISA order must include a
7 certification from a high-ranking executive branch official with
8 national security responsibilities that:

9 (A) the certifying official deems the information sought
10 to be foreign intelligence information;

11 (B) a significant purpose of the surveillance is to
12 obtain foreign intelligence information;

13 (C) such information cannot reasonably be obtained by
14 normal investigative techniques;

15 (D) designates the type of foreign intelligence
16 information being sought according to the categories
17 described in [50 U.S.C. §] 1801(e); and

18 (E) includes a statement of the basis for the
19 certification that -

20 (i) the information sought is the type of foreign
21 intelligence information designated; and

22 (ii) such information cannot reasonably be obtained
23 by normal investigative techniques.

24 50 U.S.C. § 1804(a)(6); see also 50 U.S.C. § 1823(a)(6).

25 **2. Minimization Procedures**

The Attorney General has adopted, and the FISC has approved,
minimization procedures that regulate the acquisition, retention,
and dissemination of non-publicly available information concerning
unconsenting United States persons obtained through FISA-authorized

1 electronic surveillance or physical searches, including persons who
2 are not the targets of the FISA authorities. FISA requires that
3 such minimization procedures be:

4 reasonably designed in light of the purpose and
5 technique of the particular surveillance, to
6 minimize the acquisition and retention, and
7 prohibit the dissemination, of nonpublicly
 available information concerning unconsenting
 United States persons consistent with the need
 of the United States to obtain, produce, and
 disseminate foreign intelligence information.

8 50 U.S.C. §§ 1801(h) (1), 1821(4) (A).

9 In addition, minimization procedures also include "procedures
10 that allow for the retention and dissemination of information that
11 is evidence of a crime which has been, is being, or is about to be
12 committed and that is to be retained or disseminated for law
13 enforcement purposes." 50 U.S.C. §§ 1801(h) (3), 1821(4) (c).

14 **[CLASSIFIED MATERIAL REDACTED]**

15 **3. Attorney General's Approval**

16 FISA further requires that the Attorney General approve
17 applications for electronic surveillance, physical searches, or
18 both, before they are presented to the FISC.

19 **C. THE FISC'S ORDERS**

20 Once approved by the Attorney General, the application is
21 submitted to the FISC and assigned to one of its judges. The FISC
22 may approve the requested electronic surveillance, physical
23 searches, or both, only upon finding, among other things, that:

24 (1) the application has been made by a "Federal officer"
25 and has been approved by the Attorney General;

1 (2) there is probable cause to believe that (A) the
2 target of the electronic surveillance and/or physical
3 search is a foreign power or an agent of a foreign power,
4 and that (B) the facilities or places at which the
5 electronic surveillance is directed are being used, or
6 are about to be used, by a foreign power or an agent of a
7 foreign power (or that the premises or property to be
8 searched is, or is about to be, owned, used, possessed
9 by, or is in transit to or from, a foreign power or an
10 agent of a foreign power);

11 (3) the proposed minimization procedures meet the
12 statutory requirements set forth in 50 U.S.C. § 1801(h)
13 (electronic surveillance) and 50 U.S.C. § 1821(4)
14 (physical search);

15 (4) the application contains all of the statements and
16 certifications required by Section 1804 or Section 1823;
17 and

18 (5) if the target is a United States person, that the
19 certifications are not clearly erroneous.

20 50 U.S.C. §§ 1805(a)(1)-(4), 1824(a)(1)-(4).

21 FISA defines "foreign power" to mean -

22 (1) a foreign government or any component, thereof,
23 whether or not recognized by the United States;

24 (2) a faction of a foreign nation or nations, not
25 substantially composed of United States persons;

(3) an entity that is openly acknowledged by a foreign
government or governments to be directed and controlled
by such foreign government or governments;

(4) a group engaged in international terrorism or
activities in preparation therefor;

(5) a foreign-based political organization, not
substantially composed of United States persons;

(6) an entity that is directed and controlled by a
foreign government or governments; or

1 (7) an entity not substantially composed of United States
2 persons that is engaged in the international
proliferation of weapons of mass destruction.

3 50 U.S.C. §§ 1801(a)(1)-(7); see also 50 U.S.C. § 1821(1) (adopting
4 definitions from 50 U.S.C. § 1801).

5 "Agent of a foreign power" means -

6 (1) any person other than a United States person,
7 who-

8 (A) acts in the United States as an officer or
employee of a foreign power, or as a member of a
9 foreign power as defined in subsection (a)(4);

10 (B) acts for or on behalf of a foreign power which
engages in clandestine intelligence activities in
11 the United States contrary to the interests of the
United States, when the circumstances of such
12 person's presence in the United States indicate that
such person may engage in such activities in the
13 United States, or when such person knowingly aids or
abets any person in the conduct of such activities
14 or knowingly conspires with any person to engage in
such activities;

15 (C) engages in international terrorism or activities
in preparation therefore [sic];

16 (D) engages in the international proliferation of
17 weapons of mass destruction, or activities in
preparation therefor; or

18 (E) engages in the international proliferation of
19 weapons of mass destruction, or activities in
preparation therefor for or on behalf of a foreign
20 power; or

21 (2) any person who -

22 (A) knowingly engages in clandestine intelligence
gathering activities for or on behalf of a foreign
23 power, which activities involve or may involve a
violation of the criminal statutes of the United
24 States;

1 (B) pursuant to the direction of an intelligence
2 service or network of a foreign power, knowingly
3 engages in any other clandestine intelligence
4 activities for or on behalf of such foreign power,
5 which activities involve or are about to involve a
6 violation of the criminal statutes of the United
7 States;

8 (C) knowingly engages in sabotage or international
9 terrorism, or activities that are in preparation
10 therefor, for or on behalf of a foreign power;

11 (D) knowingly enters the United States under a false
12 or fraudulent identity for or on behalf of a foreign
13 power or, while in the United States, knowingly
14 assumes a false or fraudulent identity for or on
15 behalf of a foreign power; or

16 (E) knowingly aids or abets any person in the
17 conduct of activities described in [the
18 subparagraphs above] . . . or knowingly conspires
19 with any person to engage in activities described in
20 [the subparagraphs above.]

21 50 U.S.C. §§ 1801(b) (1) and (2); see also 50 U.S.C. § 1821(1)
22 (adopting definitions from 50 U.S.C. § 1801).

23 FISA specifies that no United States person may be considered
24 a foreign power or an agent of a foreign power solely on the basis
25 of activities protected by the First Amendment to the Constitution
of the United States. 50 U.S.C. §§ 1805(a) (2) (A), 1824(a) (2) (A).
Although protected First Amendment activities cannot form the sole
basis for FISA-authorized electronic surveillance or physical
searches, they may be considered by the FISC if there is other
activity indicative that the target is an agent of a foreign power.
United States v. Rosen, 447 F. Supp. 2d 538, 549-50 (E.D. Va.
2006); *United States v. Rahman*, 861 F. Supp. 247, 252 (S.D.N.Y.

1 1994), *aff'd*, 189 F.3d 88 (2d Cir. 1999). Additionally, FISA
2 provides that "[i]n determining whether or not probable cause
3 exists . . . a judge may consider past activities of the target, as
4 well as facts and circumstances relating to current or future
5 activities of the target." 50 U.S.C. §§ 1805(b), 1824(b).

6 If the FISC has made all of the necessary findings and is
7 satisfied that the FISA application meets the statutory provisions,
8 the FISC issues an *ex parte* order authorizing the electronic
9 surveillance, physical searches, or both, requested in the
10 application. 50 U.S.C. §§ 1805(a), 1824(a). The order must
11 specify:

12 (1) the identity, if known, or a description of the
13 specific target of the collection;

14 (2) the nature and location of each facility or place at
15 which the electronic surveillance will be directed or of
16 each of the premises or properties that will be searched;

17 (3) the type of information sought to be acquired and the
18 type of communications or activities that are to be
19 subjected to the electronic surveillance, or the type of
20 information, material, or property that is to be seized,
21 altered, or reproduced through the physical search;

22 (4) the manner and means by which electronic surveillance
23 will be effected and whether physical entry will be
24 necessary to effect that surveillance, or a statement of
25 the manner in which the physical search will be
conducted;

(5) the period of time during which electronic
surveillance is approved and/or the authorized scope of
each physical search; and

(6) the applicable minimization procedures.

50 U.S.C. §§ 1805(c)(1) and 2(A); 1824(c)(1) and 2(A).

1 Under FISA, electronic surveillance or physical searches
2 targeting a United States person may be approved for up to ninety
3 days, and those targeting a non-United States person may be
4 approved for up to one-hundred and twenty days. 50 U.S.C.
5 §§ 1805(d)(1), 1824(d)(1).¹³ Extensions may be granted, but only if
6 the United States submits another application that complies with
7 FISA's requirements. An extension for electronic surveillance or
8 physical searches targeting a United States person may be approved
9 for up to ninety days, and one targeting a non-United States person
10 may be approved for up to one year.¹⁴ 50 U.S.C. §§ 1805(d)(2),
11 1824(d)(2).

12 **III. THE DISTRICT COURT'S REVIEW OF FISC ORDERS**

13 FISA authorizes the use in a criminal prosecution of
14 information obtained or derived from any FISA-authorized electronic
15 surveillance or physical search, provided that advance
16 authorization is obtained from the Attorney General, 50 U.S.C.
17 §§ 1806(b), 1825(c), and that proper notice is subsequently given
18 to the court and to each aggrieved person against whom the
19 information is to be used.¹⁵ 50 U.S.C. §§ 1806(c)-(d), 1825(d)-(e).
20 Upon receiving notice, an aggrieved person against whom the
21

22 ¹³ [CLASSIFIED MATERIAL REDACTED]

23 ¹⁴ The FISC retains the authority to review, before the end of the
24 authorized period of electronic surveillance or physical searches, the
Government's compliance with the requisite minimization procedures. 50
U.S.C. §§ 1805(d)(3), 1824(d)(3).

25 ¹⁵ [CLASSIFIED MATERIAL REDACTED]

1 information is to be used may move to suppress the use of the FISA
2 information on two grounds: (1) that the information was unlawfully
3 acquired; or (2) that the electronic surveillance or physical
4 search was not conducted in conformity with an order of
5 authorization or approval. 50 U.S.C. §§ 1806(e), 1825(f). In
6 addition, FISA contemplates that a defendant may file a motion or
7 request under any other statute or rule of the United States to
8 discover or obtain applications, orders, or other materials
9 relating to electronic surveillance or physical searches, i.e., the
10 FISA materials, 50 U.S.C. §§ 1806(f), 1825(g). When a defendant
11 moves to suppress FISA information under 50 U.S.C. §§ 1806(e) or
12 1825(f), or seeks to discover the FISA materials under some other
13 statute or rule, the motion or request is evaluated using FISA's
14 probable cause standard, which is discussed below, and not the
15 probable cause standard applicable to criminal warrants. See,
16 e.g., *United States v. El-Mezain*, 664 F.3d 467, 564 (5th Cir.
17 2011); *United States v. Duka*, 671 F.3d 329, 336-37 (3d Cir. 2011)
18 (rejecting appellant's challenge to FISA's probable cause standard
19 because it does not require any indication that a crime has been
20 committed); *United States v. Pelton*, 835 F.2d 1067, 1075 (4th Cir.
21 1987).

22 **A. THE REVIEW IS TO BE CONDUCTED IN CAMERA AND EX PARTE**

23 In assessing the legality of FISA-authorized electronic
24 surveillance and physical searches, or both, the district court
25

1 shall, notwithstanding any other law, if the
2 Attorney General files an affidavit or
3 declaration under oath that disclosure or an
4 adversary hearing would harm the national
5 security of the United States, review *in camera*
6 and *ex parte* the application, order, and such
7 other materials relating to the surveillance as
8 may be necessary to determine whether the
9 surveillance of the aggrieved person was
10 lawfully authorized and conducted.¹⁶

11 50 U.S.C. §§ 1806(f), 1825(g). On the filing of the Attorney
12 General's affidavit or declaration, such as has been filed here,
13 the court "may disclose to the aggrieved person, under appropriate
14 security procedures and protective orders, portions of the
15 application, order, or other materials relating to the surveillance
16 [or physical search] only where such disclosure is necessary to
17 make an accurate determination of the legality of the surveillance
18 [or search]."¹⁷ 50 U.S.C. §§ 1806(f), 1825(g). Thus, the propriety
19 of the disclosure of any FISA applications or orders to a defendant
20 may not even be considered unless and until the district court has
21 first concluded that it is unable to make an accurate determination
22 of the legality of the acquired collection after reviewing the
23 Government's submissions (and any supplemental pleadings that the
24 district court may request) *in camera* and *ex parte*. See *United*
25 *States v. Nicholson*, No. 09-CR-40, 2010 WL 1641167, at *4 (D. Or.

22 ¹⁶ [CLASSIFIED MATERIAL REDACTED]

23 ¹⁷ In *United States v. Ott*, 827 F.2d 473, 476 (9th Cir. 1987), the
24 Ninth Circuit "agree[d] with the district court that there [were] 'no
25 indications of possible misrepresentation of fact, vague identification
of the persons to be surveilled, or surveillance records which include a
significant amount of non-foreign intelligence information; or any other
factors that would indicate a need for disclosure' in the case."

1 Apr. 21, 2010) ("After an *in-camera* review, the court 'has the
2 discretion to disclose portions of the documents, under appropriate
3 protective procedures, only if [the court] decides that such
4 disclosure is necessary to make an accurate determination of the
5 legality of the surveillance.'") (quoting *United States v. Duggan*,
6 743 F.2d 59, 78 (2d Cir. 1984)) (emphasis in *Nicholson*); *United*
7 *States v. Omar*, No. 13-2195, slip op. at 10-11 (2015 WL 3393825, at
8 *5-6) (8th Cir. May 27, 2015) (citing *United States v. Isa*, 923
9 F.2d 1300, 1306 (8th Cir. 1991)); *United States v. Islamic Am.*
10 *Relief Agency ("IARA")*, No. 07-00087-CR-W-NKL, 2009 WL 5169536, at
11 *3-4 (W.D. Mo. Dec. 21, 2009) ("FISA provides that Courts must
12 first review the challenged dockets *ex parte* and *in camera*"); *El-*
13 *Mezain*, 664 F.3d at 565; *United States v. Abu-Jihaad*, 630 F.3d 102,
14 129 (2d Cir. 2010); *United States v. Belfield*, 692 F.2d 141, 147
15 (D.C. Cir. 1982); *United States v. Kashmiri*, No. 09-CR-830, 2010 WL
16 4705159, at *2 (N.D. Ill. Nov. 10, 2010).

17 1. ***In Camera, Ex Parte Review is the Rule***

18 Federal courts, including the Ninth Circuit, have repeatedly
19 and consistently held that FISA anticipates that an *ex parte, in*
20 *camera* determination is to be the rule, while "[d]isclosure and an
21 adversary hearing are the exception, occurring only when
22 necessary." *United States v. Sarkissian*, 841 F.2d 959, 964 (9th
23 Cir. 1989) (quoting *Belfield*, 692 F.2d at 147); accord *Omar*, slip
24 op. at 10 (2015 WL 3393825 at *5) (quoting *Isa*, 923 F.2d at 1306)

25

1 (emphasis in original); *Nicholson*, 2010 WL 1641167 at *3-4; *El-*
2 *Mezain*, 664 F.3d at 567 (“[D]isclosure of FISA materials is the
3 exception and *ex parte*, *in camera* determination is the rule”)
4 (citing *Abu Jihaad*, 630 F.3d at 129); *Duggan*, 743 F.2d at 78;
5 *Rosen*, 447 F. Supp. 2d at 546; *United States v. Spanjol*, 720 F.
6 Supp. 55, 59 (E.D. Pa. 1989), *aff’d*, 958 F.2d 365 (3d Cir. 1992).

7 In fact, every court but one (whose decision was subsequently
8 overturned by an appellate court)¹⁸ that has addressed a motion to
9 disclose FISA materials or to suppress FISA information has been
10 able to reach a conclusion as to the legality of the FISA
11 collection at issue based on its *in camera*, *ex parte* review. *See*,
12 *e.g.*, *Omar*, slip op. at 10-11 (2015 WL 3393825 at *5-6); *Isa*, 923
13 F.2d at 1306 (“study of the materials leaves no doubt that
14 substantial national security interests required the *in camera*, *ex*
15 *parte* review, and that the district court properly conducted such a
16 review”); *El-Mezain*, 664 F.3d at 566 (quoting district court’s
17 statement that no court has ever held an adversarial hearing to
18 assist the court); *In re Grand Jury Proceedings of the Special Apr.*
19 *2002 Grand Jury* (“*In re Grand Jury Proceedings*”), 347 F.3d 197, 203
20 (7th Cir. 2003) (noting that no court has ever ordered disclosure

21 ¹⁸ The district court in *United States v. Daoud*, No. 12-CR-723 (N.D.
22 Ill. Jan. 29, 2014), ruled that it was capable of making the
23 determination, but nevertheless ordered the disclosure of FISA materials.
24 The Government appealed the *Daoud* court’s order to the U.S. Court of
25 Appeals for the Seventh Circuit, which overturned the district court’s
decision to disclose, stating, “So clear is it that the materials were
properly withheld from defense counsel that there is no need for a remand
to enable the district judge to come to the same conclusion, because she
would have to do so.” *Daoud*, 755 F.3d 479, 485 (7th Cir. 2014).

1 of FISA materials); *United States v. Stewart*, 590 F.3d 93 (2d Cir.
2 2009); *United States v. Abu-Jihaad*, 531 F. Supp. 2d 299, 310 (D.
3 Conn. 2008), *aff'd*, 630 F.3d 102, 129-30 (2d Cir. 2010); *United*
4 *States v. Jayyousi*, No. 04-60001, 2007 WL 851278, at *7-8 (S.D.
5 Fla. Mar. 15, 2007), *aff'd*, 657 F.3d 1085 (11th Cir. 2011);¹⁹ *United*
6 *States v. Badia*, 827 F.2d 1458, 1463 (11th Cir. 1987); *United*
7 *States v. Gowadia*, No. 05-00486, 2009 WL 1649714, at *2 (D. Hawaii
8 June 8, 2009); *Spanjol*, 720 F. Supp. at 58-59; *United States v.*
9 *Sattar*, No. 02-CR-395, 2003 WL 22137012, at *6 (S.D.N.Y. 2003)
10 (citing *United States v. Nicholson*, 955 F. Supp. 588, 592 & n.11
11 (E.D. Va. 1997)) (noting "this court knows of no instance in which
12 a court has required an adversary hearing or disclosure in
13 determining the legality of a FISA surveillance"); *United States v.*
14 *Thomson*, 752 F. Supp. 75, 79 (W.D.N.Y. 1990); *United States v.*
15 *Mubayyid*, 521 F. Supp. 2d 125, 130 (D. Mass. 2007); *Rosen*, 447 F.
16 Supp. 2d at 546; *Kashmiri*, 2010 WL 4705159, at *2-3; *United States*
17 *v. Hassoun*, 2007 WL 1068127, *4 (S.D. Fla. April 2, 2007).

18 As the exhibits in the Sealed Appendix make clear, there is
19 nothing extraordinary about the instant FISA-authorized electronic
20 surveillance and physical searches that would justify the
21 production and disclosure of highly sensitive and classified FISA
22 materials or the suppression of FISA-obtained or -derived evidence.

23

24 ¹⁹ All citations to *Jayyousi* herein are to the Magistrate Judge's
25 Report and Recommendation, which was adopted and incorporated into the
Court's Opinion.

1 Here, the FISA materials are well-organized and easily reviewable
2 by the Court *in camera* and *ex parte*, and they are fully and
3 facially sufficient to allow the Court to make an accurate
4 determination that the FISA information was lawfully acquired and
5 that the electronic surveillance and physical searches were made in
6 conformity with an order of authorization or approval. In other
7 words, the materials presented "are straightforward and readily
8 understood." *In re Kevork*, 634 F. Supp. 1002, 1008 (C.D. Cal.
9 1985), *aff'd*, 788 F.2d 566 (9th Cir. 1986). Moreover, as in other
10 cases, "[t]he determination of legality in this case is not
11 complex." *Belfield*, 692 F.2d at 147; *see also United States v.*
12 *Warsame*, 547 F. Supp. 2d 982, 987 (D. Minn. 2008) (finding that the
13 "issues presented by the FISA applications are straightforward and
14 uncontroversial"); *Abu-Jihaad*, 531 F. Supp. 2d at 310; *Thomson*, 752
15 F. Supp. at 79. This Court, much like the aforementioned courts,
16 is capable of reviewing the FISA materials *in camera* and *ex parte*
17 and making the requisite legal determination without an adversarial
18 hearing.

19 In addition to the specific harm that would result from the
20 disclosure of the FISA materials in this case, which is detailed in
21 the classified declaration of a high-ranking FBI official in
22 support of the Attorney General's Declaration and Claim of
23 Privilege, the underlying rationale for non-disclosure is clear:
24 "In the sensitive area of foreign intelligence gathering, the need
25

1 for extreme caution and sometimes even secrecy may not be
2 overemphasized." *Ott*, 827 F.2d at 477 ("Congress has a legitimate
3 interest in authorizing the Attorney General to invoke procedures
4 designed to ensure that sensitive security information is not
5 unnecessarily disseminated to anyone not involved in the
6 surveillance operation in question."); accord *IARA*, 2009 WL
7 5169536, at *3-4.

8 Confidentiality is critical to national security. "If
9 potentially valuable intelligence sources" believe that the United
10 States "will be unable to maintain the confidentiality of its
11 relationship to them, many [of those sources] could well refuse to
12 supply information." *CIA v. Sims*, 471 U.S. 159, 175 (1985); see
13 also *Phillippi v. CIA*, 655 F.2d 1325, 1332-33 (D.C. Cir. 1981).
14 When considering whether the disclosure of classified sources,
15 methods, techniques, or information would harm the national
16 security, federal courts have expressed a great reluctance to
17 replace the considered judgment of Executive Branch officials
18 charged with the responsibility of weighing a variety of subtle and
19 complex factors in determining whether the disclosure of
20 information may lead to an unacceptable risk of compromising the
21 intelligence gathering process, and determining whether foreign
22 agents, spies, and terrorists are capable of piecing together a
23 mosaic of information that, when revealed, could reasonably be
24 expected to harm the national security of the United States. See

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1 *Sims*, 471 U.S. at 180; *United States v. Yunis*, 867 F.2d 617, 623
2 (D.C. Cir. 1989) ("Things that did not make sense to the District
3 Judge would make all too much sense to a foreign counter-
4 intelligence specialist who could learn much about this nation's
5 intelligence-gathering capabilities from what these documents
6 revealed about sources and methods."); *Halperin v. CIA*, 629 F.2d
7 144, 150 (D.C. Cir. 1980) ("each individual piece of intelligence
8 information, much like a piece of jigsaw puzzle, may aid in piecing
9 together other bits of information even when the individual piece
10 is not of obvious importance in itself"). An adversary hearing is
11 not only unnecessary to aid the Court in the straightforward task
12 before it, but such a hearing would also create potential dangers
13 that courts have consistently sought to avoid.

14 As the *Belfield* court explained:

15 Congress recognized the need for the Executive
16 to engage in and employ the fruits of
17 clandestine surveillance without being
18 constantly hamstrung by disclosure
19 requirements. The statute is meant to
20 "reconcile national intelligence and
21 counterintelligence needs with constitutional
22 principles in a way that is consistent with
23 both national security and individual rights."
24 In FISA the privacy rights of individuals are
25 ensured not through mandatory disclosure, but
through its provisions for in-depth oversight
of FISA surveillance by all three branches of
government and by a statutory scheme that to a
large degree centers on an expanded conception
of minimization that differs from that which
governs law enforcement surveillance.

692 F.2d at 148 (footnotes and citations omitted); see also *ACLU
Found. of So. Cal. v. Barr*, 952 F.2d 457, 465 (D.C. Cir. 1991)

1 (citing *Belfield* for the proposition that Section 1806(f) "is an
2 acceptable means of adjudicating the constitutional rights of
3 persons who have been subjected to FISA surveillance").

4 2. *In Camera, Ex Parte Review is Constitutional*

5 The constitutionality of FISA's *in camera, ex parte* review
6 provisions has been affirmed by every federal court that has
7 considered the matter, including the Ninth Circuit. See, e.g.,
8 *Ott*, 827 F.2d at 476-77 (FISA's review procedures do not deprive a
9 defendant of due process); *Gowadia*, 2009 WL 1649714, at *2;
10 *Nicholson*, 2010 WL 1641167, at *3-4; *Isa*, 923 F.2d at 1306
11 (upholding the district court's *in camera, ex parte* review as
12 constitutional and stating that the process delineated under FISA
13 "provides even more protection" than defendants receive in other
14 contexts); *El-Mezain*, 664 F.3d at 567; *Abu-Jihaad*, 630 F.3d at 117;
15 *Spanjol*, 720 F. Supp. at 58-59; *United States v. Damrah*, 412 F.3d
16 618, 624 (6th Cir. 2005) ("FISA's requirement that the district
17 court conduct an *ex parte, in camera* review of FISA materials does
18 not deprive a defendant of due process."); *Jayyousi*, 2007 WL
19 851278, at *7-8; *United States v. Benkahla*, 437 F. Supp. 2d 541,
20 554 (E.D. Va. 2006); *ACLU Foundation*, 952 F.2d at 465; *United*
21 *States v. Megahey*, 553 F. Supp. 1180, 1194 (E.D.N.Y. 1982) ("ex
22 *parte, in camera* procedures provided in 50 U.S.C. § 1806(f) are
23 constitutionally sufficient to determine the lawfulness of the
24 electronic surveillance at issue while safeguarding defendant's
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1 fourth amendment rights"); *United States v. Falvey*, 540 F. Supp.
2 1306, 1315-16 (E.D.N.Y. 1982) (a "massive body of pre-FISA case law
3 of the Supreme Court, [the Second] Circuit and others" supports the
4 conclusion that the legality of electronic surveillance should be
5 determined on an *in camera, ex parte* basis); *Belfield*, 692 F.2d at
6 148-49.

7 In summary, FISA mandates a process by which the district
8 court must conduct an initial *in camera, ex parte* review of FISA
9 applications, orders, and related materials in order to determine
10 whether the FISA information was lawfully acquired and whether the
11 electronic surveillance and physical searches were made in
12 conformity with an order of authorization or approval. Such *in*
13 *camera, ex parte* review is the rule in such cases and that
14 procedure is constitutional. In this case, the Attorney General
15 has filed the required declaration invoking that procedure, and has
16 declared that disclosure or an adversary hearing would harm
17 national security. Accordingly, an *in camera, ex parte* review by
18 this Court is the appropriate venue in which to determine whether
19 the FISA information was lawfully acquired and whether the
20 electronic surveillance and physical searches were made in
21 conformity with an order of authorization or approval.

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1 **B. THE DISTRICT COURT'S SUBSTANTIVE REVIEW**

2 1. **Standard of Review of Probable Cause**

3 In evaluating the legality of the FISA collection, the
4 district court's review should determine: (1) whether the
5 certification submitted by the Executive Branch in support of a
6 FISA application was properly made; (2) whether the application
7 established the probable cause showing required by FISA; and (3)
8 whether the collection was properly minimized. *See Abu-Jihaad*, 630
9 F.3d at 130-31; *see also* 50 U.S.C. §§ 1806(f), 1825(g).

10 Although federal courts are not in agreement as to whether the
11 probable cause determinations of the FISC should be reviewed *de*
12 *novo* or accorded due deference, the material under review here
13 satisfies either standard of review. *See United States v.*
14 *Gartenlaub*, 8:14-CR-00173-CAS, Doc. No. 114, at 8 (C.D. Cal. Aug.
15 6, 2015) ([T]he Court finds that the materials that it has reviewed
16 in camera, ex parte satisfy either standard); *see also Omar*, slip
17 op. at 12 (2015 WL 3393825 at *7) ("[W]e have no hesitation in
18 concluding that probable cause under FISA existed under any
19 standard of review"); *Abu-Jihaad*, 630 F.3d at 130 ("Although the
20 established standard of judicial review applicable to FISA warrants
21 is deferential, the government's detailed and complete submissions
22 in this case would easily allow it to clear a higher standard of
23 review."). The Government respectfully submits that it is
24 appropriate to accord due deference to the findings of the FISC,

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1 but notes that a number of courts (including a judge in this
2 District), citing the *ex parte* nature of the proceedings, have also
3 reviewed the FISC's probable cause determination *de novo*.²⁰ While
4 in the minority, other courts have afforded due deference to the
5 findings of the FISC. *Abu-Jihaad*, 630 F.3d at 130; accord *United*
6 *States v. Ahmed*, No. 1:06-CR-147, 2009 U.S. Dist. Lexis 120007 at
7 *21-22 (N.D. Ga. Mar. 19, 2009) (FISC's "determination of probable
8 cause should be given 'great deference' by the reviewing court")
9 (citing *Illinois v. Gates*, 462 U.S. at 236).

10 In the analogous area of criminal searches and surveillance,
11 the law in the Ninth Circuit, as well as that in other federal
12 circuits, accords great deference to a magistrate judge's probable
13 cause determinations. See, e.g., *United States v. Krupa*, 658 F.3d
14 1174, 1177 (9th Cir. 2011); see also *United States v. Smith*, 581
15 F.3d 692, 694 (8th Cir. 2009); *United States v. Joseph*, 709 F.3d
16 1082, 1093 (11th Cir. 2013) (citing *Illinois v. Gates*, 462 U.S. at
17 236); *United States v. Robinson*, 724 F.3d 878, 884 (7th Cir. 2013).
18 It would thus be consistent for a court that is reviewing FISA-
19 authorized electronic surveillance and physical searches to adopt
20 the same posture it would when reviewing the probable cause
21 determination of a criminal search warrant issued pursuant to Rule
22 41 of the Federal Rules of Criminal Procedure. See *Ahmed*, 2009
23 U.S. Dist. LEXIS 120007, at *21-22 (according FISC's probable cause

24 ²⁰ [CLASSIFIED MATERIAL REDACTED]
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1 determinations the same deference as a magistrate's criminal
2 probable cause determination); *cf. United States v. Cavanagh*, 807
3 F.2d 787, 790 (9th Cir. 1987) (concluding that FISA order can be
4 considered a warrant since it is issued by a detached judicial
5 officer and is based on a reasonable showing of probable cause).²¹

6 2. Probable Cause Standard

7 FISA requires a finding of probable cause that the target is a
8 foreign power or an agent of a foreign power and that each facility
9 or place at which the electronic surveillance is directed is being
10 used, or is about to be used, or that the property or premises to
11 be searched is, or is about to be, owned, used, possessed by, or is
12 in transit to or from, a foreign power or an agent of a foreign
13 power. It is this standard – not the standard applicable to
14 criminal search warrants – that this Court must apply. See
15 *Cavanagh*, 807 F.2d. at 790 (citing *United States v. United States*
16 *District Court (Keith)*, 407 U.S. 297, 322 (1972)); *Omar*, slip op.
17 at 12 (2015 WL 3393825 at *6) (“[R]ather than focusing on probable
18 cause to believe that a person has committed a crime, the FISA
19 standard focuses on the status of the target as a foreign power or
20 an agent of a foreign power.”) (quoting *El-Mezain*, 664 F.3d at
21 564); *Abu-Jihaad*, 630 F.3d at 130-31; *Duka*, 671 F.3d at 338. This

22 ²¹ *Ahmed* is not alone in analogizing FISA orders to search warrants.
23 See, e.g., *In re Sealed Case*, 310 F.3d 717, 774 (declining to decide
24 whether a FISA order constitutes a warrant, but noting “that to the
25 extent a FISA order comes close to meeting Title III, that certainly
bears on its reasonableness under the Fourth Amendment”); but see
Warsame, 547 F. Supp. 2d at 992 n.10 (noting that the need for foreign
intelligence justifies an exception to the warrant requirement).

1 "different, and arguably lower, probable cause standard . . .
2 reflects the purpose for which FISA search orders are issued."

3 *Ahmed*, 2009 U.S. Dist. LEXIS 120007, at *22.

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5 The probable cause threshold which the Government must satisfy
6 before receiving authorization to conduct electronic surveillance
7 or a physical search under FISA complies with the Fourth
8 Amendment's reasonableness standard. The argument that FISA's
9 different, and arguably lower, probable cause standard violates the
10 Fourth Amendment's reasonableness requirement has been uniformly
11 rejected by federal courts. See, e.g., *Abu-Jihaad*, 630 F.3d at 120
12 (listing sixteen cases that have ruled FISA does not violate the
13 Fourth Amendment).

14 The Supreme Court has stated that "[d]ifferent standards may
15 be compatible with the Fourth Amendment if they are reasonable both
16 in relation to the legitimate need of the Government for
17 intelligence information and the protected rights of our citizens."
18 *Keith*, 407 U.S. at 322-23 (recognizing that domestic security
19 surveillance "may involve different policy and practical
20 considerations than the surveillance of 'ordinary crime'"). In
21 *Keith*, the Supreme Court acknowledged that: (1) the "focus of . . .
22 surveillance [in domestic security investigations] may be less
23 precise than that directed against more conventional types of
24 crime;" (2) unlike ordinary criminal investigations, "[t]he

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1 gathering of security intelligence is often long range and involves
2 the interrelation of various sources and types of information;" and
3 (3) the "exact targets of such surveillance may be more difficult
4 to identify" than in surveillance operations of ordinary crimes
5 under Title III. *Id.* Although *Keith* was decided before FISA's
6 enactment and addressed purely domestic security surveillance, the
7 rationale underlying *Keith* applies *a fortiori* to foreign
8 intelligence surveillance, where the Government's interest, at
9 least from a national security perspective, would typically be more
10 pronounced.

11 FISA was enacted partly in response to *Keith*. In constructing
12 FISA's framework, Congress addressed *Keith's* question of whether
13 departures from traditional Fourth Amendment procedures "are
14 reasonable, both in relation to the legitimate need of Government
15 for intelligence information and the protected rights of our
16 citizens," and "concluded that such departures are reasonable."
17 See S. Rep. No. 95-701, 95th Cong., 2d Sess., at 11. (1978)
18 ("Senate Report"). Similarly, many courts—including the Ninth
19 Circuit and the FISC of Review—have relied on *Keith* in holding that
20 FISA collection conducted pursuant to a FISC order is reasonable
21 under the Fourth Amendment. See *Cavanagh*, 807 F.2d at 790-91
22 (holding that FISA satisfies the Fourth Amendment requirements of
23 probable cause and particularity); *In re Sealed Case*, 310 F.3d at
24 738, 746 (finding that while many of FISA's requirements differ

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1 from those in Title III, few of those differences have
2 constitutional relevance); *Duggan*, 743 F.2d at 74 (holding that
3 FISA does not violate the Fourth Amendment); see also *Warsame*, 547
4 F. Supp. 2d at 993-94; *Ning Wen*, 477 F.3d 896, 898 (7th Cir. 2007)
5 (holding that FISA is constitutional despite using "a definition of
6 'probable cause' that does not depend on whether a domestic crime
7 has been committed"); *Damrah*, 412 F.3d at 625 (denying the
8 defendant's claim that FISA's procedures violate the Fourth
9 Amendment); *Pelton*, 835 F.2d at 1075 (finding FISA's procedures
10 compatible with the Fourth Amendment); *Mubayyid*, 521 F. Supp. 2d at
11 135-41 (rejecting claim that FISA violates the Fourth Amendment's
12 judicial review, probable cause, notice, and particularity
13 requirements); *Falvey*, 540 F. Supp. at 1311-14 (finding that FISA
14 procedures satisfy the Fourth Amendment's warrant requirement).

15 3. Standard of Review of Certifications

16 Certifications submitted in support of a FISA application
17 should be "subject only to minimal scrutiny by the courts," *Badia*,
18 827 F.2d at 1463, and are "presumed valid." *Duggan*, 743 F.2d at 77
19 & n.6 (citing *Franks v. Delaware*, 438 U.S. 154, 171 (1978)); see
20 also *Nicholson*, 2010 WL 1641167, at *5 (quoting *Rosen*, 447 F. Supp.
21 2d at 545); *United States v. Campa*, 529 F.3d 980, 993 (11th Cir.
22 2008); *United States v. Omar*, Cr. No. 09-242, 2012 WL 2357734, at
23 *3 (D. Minn. June 20, 2012) ("FISA warrants are subject to 'minimal
24 scrutiny by the courts,' both upon initial presentation and
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1 subsequent challenge" and that "the reviewing court must presume as
2 valid 'the representations and certifications'..."); *Warsame*, 547
3 F. Supp. 2d at 990 ("a presumption of validity [is] accorded to the
4 certifications"); *United States v. Sherifi*, 793 F. Supp. 2d 751,
5 760 (E.D.N.C. 2011). When a FISA application is presented to the
6 FISC, "[t]he FISA Judge, in reviewing the application, is not to
7 second-guess the executive branch official's certification that the
8 objective of the surveillance is foreign intelligence information."
9 *Duggan*, 743 F.2d at 77. Likewise, Congress intended that the
10 reviewing district court should "have no greater authority to
11 second-guess the executive branch's certifications than has the
12 FISA judge." *Id.*; see also *In re Grand Jury Proceedings*, 347 F.3d
13 at 204-05; *Badia*, 827 F.2d at 1463; *Rahman*, 861 F. Supp. at 250;
14 *IARA*, 2009 WL 5169536, at *4; *Kashmiri*, 2010 WL 4705159, at *1.

15 The district court's review should determine whether the
16 certifications were made in accordance with FISA's requirements.
17 See *Omar*, 2012 WL 2357734, at *3 ("the reviewing court must presume
18 as valid 'the representations and certifications submitted in
19 support of an application for FISA surveillance' . . . absent a
20 showing sufficient to trigger a *Franks* hearing"); see also *United*
21 *States v. Alwan*, No. 1:11-CR-13, 2012 WL 399154, at *7 (W.D. Ky.
22 Feb. 7, 2012) ("the [c]ourt is not to second-guess whether the
23 certifications were correct, but merely to ensure they were
24 properly made") (quoting *Ahmed*, 2009 U.S. Dist. LEXIS 120007, at
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1 *20); *Campa*, 529 F.3d at 993 ("in the absence of a *prima facie*
2 showing of a fraudulent statement by the certifying officer,
3 procedural regularity is the only determination to be made if a
4 non-United States person is the target") (quoting *Badia*, 827 F.2d
5 at 1463). When the target is a United States person, then the
6 district court should also ensure that each certification is not
7 "clearly erroneous."²² *Campa*, 529 F.3d at 994; *Duggan*, 743 F.2d at
8 77; *Kashmiri*, 2010 WL 4705159, at *2. A "clearly erroneous"
9 finding is established only when "although there is evidence to
10 support it, the reviewing court on the [basis of the] entire
11 evidence is left with the definite and firm conviction that a
12 mistake has been committed." *United States v. U.S. Gypsum Co.*, 333
13 U.S. 364, 395 (1948); *United States v. Garcia*, 413 F.3d 201, 222
14 (2d Cir. 2005); *IARA*, 2009 WL 5169536, at *4 (identifying "clearly
15 erroneous" standard of review for FISA certifications).

16 4. FISA is Subject to the "Good-Faith" Exception

17 Even assuming *arguendo* that this Court determines that a
18 particular FISC order was not supported by probable cause, or that
19 one or more of the FISA certification requirements were not in fact
20 met, the evidence obtained or derived from the FISA-authorized
21 electronic surveillance and physical searches is, nonetheless,
22 admissible under the "good faith" exception to the exclusionary
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25 ²² [CLASSIFIED MATERIAL REDACTED]

1 rule articulated in *United States v. Leon*, 468 U.S. 897 (1984).²³
2 The Seventh Circuit, relying on *Leon*, held that federal officers
3 were entitled to rely in good faith on a FISA warrant. *Ning Wen*,
4 477 F.3d, at 897. As the court noted:

5 [T]he exclusionary rule must not be applied to evidence
6 seized on the authority of a warrant, even if the warrant
7 turns out to be defective, unless the affidavit
8 supporting the warrant was false or misleading, or
9 probable cause was so transparently missing that "no
10 reasonably well trained officer [would] rely on the
11 warrant."

12 *Id.* (quoting *Leon*) (alteration in original); see also *Ahmed*, 2009
13 U.S. Dist. LEXIS 120007, at *25 n.8, 26-27 ("[t]he FISA evidence
14 obtained . . . would be admissible under *Leon*'s 'good faith'
15 exception to the exclusionary rule were it not otherwise admissible
16 under a valid warrant"); *Mubayyid*, 521 F. Supp. 2d at 140 n.12
17 (applying the exception because "there appears to be no issue as to
18 whether the government proceeded in good faith and in reasonable
19 reliance on the FISA orders"); *United States v. Marzook*, 435 F.
20 Supp. 2d 778, 790-91 (N.D. Ill. 2006) (holding, in an analogous
21 context, that "the FBI's reliance on the Attorney General's
22 approval under Executive Order No. 12333 - an order that no court
23 has found unconstitutional - was [] objectively reasonable because
24 that order pertains to foreign intelligence gathering.").

25 ²³ "[E]ven if we were to conclude that amended FISA is
unconstitutional, evidence derived from it would nevertheless have been
admissible in the government's case. . . . The exclusionary rule
precludes the admission of evidence tainted by a Fourth Amendment
violation" only in those cases where its application will deter police
misconduct. *Duka*, 671 F.3d at 346 (citing *Leon*, 468 U.S. at 918).

1 The FISA-authorized electronic surveillance and physical
2 searches at issue in this case, authorized by a duly enacted
3 statute and an order issued by a neutral judicial officer, would
4 fall squarely within this "good faith exception." There is no
5 basis to find that any declarations or certifications at issue in
6 this case were deliberately or recklessly false. See *Leon*, 468
7 U.S. at 914-15; see also *Massachusetts v. Sheppard*, 468 U.S. 981
8 (1984); *United States v. Canfield*, 212 F.3d 713, 717-18 (2d Cir.
9 2000). Further, there are no facts indicating that the FISC failed
10 to act in a neutral and detached manner in authorizing the
11 electronic surveillance and physical searches at issue. *Leon*, 468
12 U.S. at 914-15. Moreover, as the Court will see from its *in*
13 *camera*, *ex parte* review of the FISA materials, facts establishing
14 the requisite probable cause were submitted to the FISC, the FISC's
15 orders contained all of the requisite findings, and "well-trained
16 officers" reasonably relied on those orders. Therefore, in the
17 event that the Court questions whether a particular FISC order was
18 supported by sufficient probable cause, the information obtained
19 pursuant to those orders would be admissible under *Leon*'s "good
20 faith" exception to the exclusionary rule.

21 **IV. THE FISA INFORMATION WAS LAWFULLY ACQUIRED AND THE ELECTRONIC**
22 **SURVEILLANCE AND PHYSICAL SEARCHES WERE MADE IN CONFORMITY**
WITH AN ORDER OF AUTHORIZATION OR APPROVAL

23 [CLASSIFIED MATERIAL REDACTED]

24 **A. THE INSTANT FISA APPLICATIONS MET FISA'S PROBABLE**
25 **CAUSE STANDARD**

1 [CLASSIFIED MATERIAL REDACTED]

2 1. [CLASSIFIED MATERIAL REDACTED]

3 [CLASSIFIED MATERIAL REDACTED]

4 2. [CLASSIFIED MATERIAL REDACTED]

5 [CLASSIFIED MATERIAL REDACTED]

6 a. [CLASSIFIED MATERIAL REDACTED]

7 [CLASSIFIED MATERIAL REDACTED]

8 i. [CLASSIFIED MATERIAL REDACTED]

9 [CLASSIFIED MATERIAL REDACTED]

10 ii. [CLASSIFIED MATERIAL REDACTED]

11 [CLASSIFIED MATERIAL REDACTED]

12 iii. [CLASSIFIED MATERIAL REDACTED]

13 [CLASSIFIED MATERIAL REDACTED]

14 iv. [CLASSIFIED MATERIAL REDACTED]

15 [CLASSIFIED MATERIAL REDACTED]

16 v. [CLASSIFIED MATERIAL REDACTED]

17 [CLASSIFIED MATERIAL REDACTED]

18 b. [CLASSIFIED MATERIAL REDACTED]

19 [CLASSIFIED MATERIAL REDACTED]

20 i. [CLASSIFIED MATERIAL REDACTED]

21 [CLASSIFIED MATERIAL REDACTED]

22 ii. [CLASSIFIED MATERIAL REDACTED]

23 [CLASSIFIED MATERIAL REDACTED]

24 iii. [CLASSIFIED MATERIAL REDACTED]

25 [CLASSIFIED MATERIAL REDACTED]

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iv. [CLASSIFIED MATERIAL REDACTED]

[CLASSIFIED MATERIAL REDACTED]

v. [CLASSIFIED MATERIAL REDACTED]

[CLASSIFIED MATERIAL REDACTED]

3. The FISC Correctly Concluded that the Targeted Facilities or Places Were Being Used, or Were About to Be Used, by the Targets of the Electronic Surveillance and that the Targeted Premises or Property Were, or Were About to Be Owned, Used, Possessed by or in Transit to or from, the Targets of the Physical Searches

[CLASSIFIED MATERIAL REDACTED]

a. [CLASSIFIED MATERIAL REDACTED]

[CLASSIFIED MATERIAL REDACTED]

i. [CLASSIFIED MATERIAL REDACTED]

[CLASSIFIED MATERIAL REDACTED]

ii. [CLASSIFIED MATERIAL REDACTED]

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iii. [CLASSIFIED MATERIAL REDACTED]

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v. [CLASSIFIED MATERIAL REDACTED]

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b. [CLASSIFIED MATERIAL REDACTED]

i. [CLASSIFIED MATERIAL REDACTED]

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4 iii. [CLASSIFIED MATERIAL REDACTED]

5 [CLASSIFIED MATERIAL REDACTED]

6 iv. [CLASSIFIED MATERIAL REDACTED]

7 [CLASSIFIED MATERIAL REDACTED]

8 c. Conclusion: There Was Sufficient Probable
9 Cause to Establish that the Information
10 Acquired from the Targeted Facilities,
Places, Property, or Premises Was Lawfully
Acquired

11 [CLASSIFIED MATERIAL REDACTED]

12 B. THE CERTIFICATIONS COMPLIED WITH FISA

13 [CLASSIFIED MATERIAL REDACTED]

14 1. Foreign Intelligence Information

15 [CLASSIFIED MATERIAL REDACTED]

16 2. "A Significant Purpose"

17 [CLASSIFIED MATERIAL REDACTED]

18 3. Information Not Reasonably Obtainable Through
19 Normal Investigative Techniques

20 [CLASSIFIED MATERIAL REDACTED]

21 C. ELECTRONIC SURVEILLANCE AND PHYSICAL SEARCHES WERE
22 CONDUCTED IN CONFORMITY WITH AN ORDER OF
AUTHORIZATION OR APPROVAL

23 [CLASSIFIED MATERIAL REDACTED]

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1 1. The Standard Minimization Procedures

2 Once a reviewing court is satisfied that the electronic
3 surveillance or physical searches were properly certified and the
4 information was lawfully acquired pursuant to FISA, it must then
5 examine whether the electronic surveillance or physical searches
6 were lawfully conducted. See 50 U.S.C. §§ 1806(e)(2),
7 1825(f)(1)(B). In order to examine whether the electronic
8 surveillance or physical searches were lawfully conducted, the
9 reviewing court must determine whether the Government followed the
10 relevant minimization procedures to appropriately minimize the
11 information acquired pursuant to FISA.

12 **[CLASSIFIED MATERIAL REDACTED]**

13 FISA's legislative history and the applicable case law
14 demonstrate that the definitions of "minimization procedures" and
15 "foreign intelligence information" were intended to take into
16 account the realities of collecting foreign intelligence because
17 the activities of persons engaged in clandestine intelligence
18 gathering or international terrorism are often not obvious on their
19 face. See *Rahman*, 861 F. Supp. at 252-53. The degree to which
20 information is required to be minimized varies somewhat given the
21 specifics of a particular investigation, such that less
22 minimization at acquisition is justified when "the investigation is
23 focusing on what is thought to be a widespread conspiracy" and more
24 extensive surveillance is necessary "to determine the precise scope

1 of the enterprise." *In re Sealed Case*, 310 F.3d at 741; see also
2 *United States v. Bin Laden*, 126 F. Supp. 2d 264, 286 (S.D.N.Y.
3 2000) ("more extensive monitoring and greater leeway in
4 minimization efforts are permitted in a case like this given the
5 world-wide, covert and diffuse nature of the international
6 terrorist group(s) targeted" [internal quotation marks omitted]).
7 Furthermore, the activities of foreign powers and their agents are
8 often not obvious from an initial or cursory overhear of
9 conversations. To the contrary, agents of foreign powers
10 frequently engage in coded communications, compartmentalized
11 operations, the use of false identities and other practices
12 designed to conceal the breadth and aim of their operations,
13 organization, activities and plans. See, e.g., *United States v.*
14 *Salameh*, 152 F.3d 88, 154 (2d Cir. 1998) (noting that two
15 conspirators involved in the 1993 bombing of the World Trade Center
16 in New York referred to the bomb plot as the "study" and to
17 terrorist materials as "university papers"). As one court
18 explained, "[i]nnocuous-sounding conversations may in fact be
19 signals of important activity; information on its face innocent
20 when analyzed or considered with other information may become
21 critical." *Kevork*, 634 F. Supp. at 1017 (quoting H.R. Rep. No. 95-
22 1283, 95th Cong., 2d Sess., Pt. 1, at 55 (1978) (hereinafter "House
23 Report")); see also *Hammoud*, 381 F.3d at 334 (citing *Salameh*, 152
24 F.3d at 154); *In re Sealed Case*, 310 F.3d at 740-41; *Thomson*, 752

25

1 F. Supp. at 81 (noting that it is permissible to retain and
2 disseminate "bits and pieces" of information until the
3 information's "full significance becomes apparent") (citing House
4 Report, part 1, at 58); *Bin Laden*, 126 F. Supp. 2d at 286.
5 Likewise, "individual items of information, not apparently
6 significant when taken in isolation, may become highly significant
7 when considered together over time." *Rahman*, 861 F. Supp. at 252-
8 53 (citing House Report, part 1, at 55, 59). The Government must
9 be given flexibility where the conversations are carried out in a
10 foreign language. *Mubayyid*, 521 F. Supp. 2d at 134; *Rahman*, 861 F.
11 Supp. at 252. As a result, "courts have construed 'foreign
12 intelligence information' broadly and sensibly allowed the
13 government some latitude in its determination of what is foreign
14 intelligence information." *Rosen*, 447 F. Supp. 2d at 551.

15 The nature of the foreign intelligence information sought also
16 impacts implementation of the minimization procedures at the
17 retention and dissemination stages. There is a legitimate need to
18 conduct a thorough post-acquisition review of FISA information that
19 involves a United States person who is acting as an agent of a
20 foreign power. As Congress explained:

21 It is "necessary" to identify anyone working
22 with him in this network, feeding him
23 information, or to whom he reports. Therefore,
24 it is necessary to acquire, retain and
25 disseminate information concerning all his
contacts and acquaintances and his movements.
Among his contacts and acquaintances, however,
there are likely to be a large number of
innocent persons. Yet, information concerning
these persons must be retained at least until

1 it is determined that they are not involved in
2 the clandestine intelligence activities and may
3 have to be disseminated in order to determine
4 their innocence.

5 House Report, part 1, at 58. Indeed, at least one court has
6 cautioned that, when a U.S. person communicates with an agent of a
7 foreign power, the Government would be "remiss in meeting its
8 foreign counterintelligence responsibilities" if it did not
9 thoroughly "investigate such contacts and gather information to
10 determine the nature of those activities." *Thomson*, 752 F. Supp.
11 at 82.

12 Congress also recognized that agents of a foreign power are
13 often very sophisticated and skilled at hiding their activities.
14 *Cf. id.* at 81 (quoting House Report part 1, at 58). Accordingly,
15 to pursue leads, Congress intended that the Government be given "a
16 significant degree of latitude" with respect to the "retention of
17 information and the dissemination of information between and among
18 counterintelligence components of the Government." *Cf. id.*

19 In light of these realities, Congress recognized that "no
20 electronic surveillance can be so conducted that innocent
21 conversations can be totally eliminated." See S. Rep. No. 95-701,
22 95th Cong., 2d Sess., 39 (quoting *United States v. Bynum*, 485 F.2d
23 490, 500 (2d Cir. 1973)) ("Senate Report"). The Fourth Circuit
24 reached the same conclusion in *Hammoud*, stating that the "mere fact
25 that innocent conversations were recorded, without more, does not

1 establish that the government failed to appropriately minimize
2 surveillance." 381 F.3d at 334.

3 Accordingly, in reviewing the adequacy of minimization
4 efforts, the test to be applied is neither whether innocent
5 conversations were intercepted, nor whether mistakes were made with
6 respect to particular communications. Rather, as the United States
7 Supreme Court stated in the context of Title III surveillance,
8 there should be an "objective assessment of the [agents'] actions
9 in light of the facts and circumstances confronting [them] at the
10 time." *Scott v. United States*, 436 U.S. 128, 136 (1978). "The
11 test of compliance is 'whether a good-faith effort to minimize was
12 made.'" *Mubayyid*, 521 F. Supp. 2d at 135; see also *Hammoud*, 381
13 F.3d at 334 ("[t]he minimization requirement obligates the
14 Government to make a good faith effort to minimize the acquisition
15 and retention of irrelevant information"); Senate Report at 39-40
16 (stating that the court's role is to determine whether "on the
17 whole, the agents have shown a high regard for the right of privacy
18 and have done all they reasonably could do to avoid unnecessary
19 intrusion"); *IARA*, 2009 WL 5169536, at *6 (quoting Senate Report at
20 39-40).

21 Moreover, as noted above, FISA expressly states that the
22 Government is not required to minimize information that is
23 "evidence of a crime," whether or not it is also foreign
24 intelligence information. 50 U.S.C. §§ 1801(h)(3), 1821(4)(c); see
25

1 also *Isa*, 923 F.2d at 1304 (noting that "[t]here is no requirement
2 that the 'crime' be related to foreign intelligence"). As a
3 result, to the extent that certain communications of a United
4 States person may be evidence of a crime or otherwise may establish
5 an element of a substantive or conspiratorial offense, such
6 communications need not be minimized. See *id.* at 1305.

7 Even in the limited occasions described herein, when certain
8 communications were not properly minimized, suppression would not
9 be the appropriate remedy with respect to those communications that
10 met the standard. Cf. *United States v. Falcone*, 364 F. Supp. 877,
11 886-87 (D.N.J. 1973), *aff'd*, 500 F.2d 1401 (3d Cir. 1974) (Title
12 III). As discussed above, absent evidence that "on the whole"
13 there has been a "complete" disregard for the minimization
14 procedures, the fact that some communications should have been
15 minimized does not affect the admissibility of others that were
16 properly acquired and retained. Indeed, Congress specifically
17 intended that the only evidence that should be suppressed is the
18 "evidence which was obtained unlawfully." House Report at 93.
19 FISA's legislative history reflects that Congress intended only a
20 limited sanction for errors of minimization:

21 As the language of the bill makes clear, only
22 that evidence which was obtained unlawfully or
23 derived from information obtained unlawfully
24 would be suppressed. If, for example, some
information should have been minimized but was
not, only that information should be
suppressed; the other information obtained
lawfully should not be suppressed.

1 *Id.*; see also *Falcone*, 364 F. Supp. at 886-87; accord *United States*
2 *v. Medunjanin*, No. 10-CR-19-1, 2012 WL 526428, at *12 (E.D.N.Y.
3 Feb. 16, 2012) (disclosure and suppression not warranted where
4 "failure to adhere to [the minimization] protocol was *de minimis*").

5 2. **The FISA Information Was Appropriately**
6 **Minimized**

7 [CLASSIFIED MATERIAL REDACTED]

8 Based upon this information, we respectfully submit that the
9 Government lawfully conducted the FISA collections discussed
10 herein. Consequently, for the reasons stated above, the Court
11 should find that the FISA collections discussed herein were
12 lawfully conducted under the minimization procedures approved by
13 the FISC and applicable to the FISA collections discussed herein.

14 **V. THE COURT SHOULD REJECT THE DEFENDANTS' LEGAL ARGUMENTS**

15 In their motions, the defendants present numerous arguments in
16 support of their request for the suppression of FISA-obtained or -
17 derived evidence and the disclosure of the FISA materials. Their
18 arguments essentially fall into two categories: (1) that the FISA-
19 obtained or -derived evidence should be suppressed for several
20 reasons, including because the applications "may" have contained
21 intentional or reckless material falsehoods or omissions and "may"
22 not have established probable cause, and the FISA procedural
23 requirements "may" not have been met; and (2) that disclosure of
24 the FISA materials is both necessary for them to litigate
25 suppression issues, and is required by due process considerations.

1 (Doc. 69, at 1-3; Doc. 70, at 5-6) For the reasons set forth below
2 and as the Court will see in its *ex parte*, *in camera* review of the
3 FISA materials, these arguments are without merit.

4 **A. THE DEFENDANTS HAVE NOT ESTABLISHED ANY BASIS FOR**
5 **THE COURT TO SUPPRESS THE FISA INFORMATION**

6 In support of their request for suppression, the defendants
7 claim that the FISA applications "may" have: (1) failed to
8 establish probable cause;²⁴ (2) contained intentional or reckless
9 falsehoods or omissions; (3) not included the required
10 certifications, including that a significant purpose was the
11 collection of foreign intelligence information; and (4) not
12 contained or implemented the requisite minimization procedures.²⁵

13 (Doc. 69, at 10-16; Doc. 70, at 17-22) This Court should deny each
14 of these arguments, for the reasons discussed below.

15 **1. The Government Satisfied the Probable Cause**
16 **Requirements of FISA**

17 [CLASSIFIED MATERIAL REDACTED]²⁶

18 ²⁴ [CLASSIFIED MATERIAL REDACTED]

19 ²⁵ At the outset, the defendants argue that their burden in seeking
20 suppression of FISA information "must be relaxed," based on a case,
21 *United States v. Moussaoui*, addressing neither suppression nor FISA. 382
F.3d 453, 472 (4th Cir. 2004). *Moussaoui*, in which the Fourth Circuit
addressed the defendant's Sixth Amendment right to compulsory process, is
simply inapplicable to the standard for suppression under FISA.

22 ²⁶ Defendant Elhuzayel argues for *de novo* review by this Court of
23 the FISA materials, or even a review "more exacting than the FISC's
24 review," (Doc. 70, at p. 27), a position that has no basis in the law.
25 However, the Government respectfully submits that the Court will find
that the FISA information was lawfully acquired and that the electronic
surveillance and physical searches were made in conformity with an order
of authorization or approval, under either *de novo* review or a due
deference review.

1 Third, the defendants suggest that the FISA applications may
2 have contained "raw intelligence," which may not have been
3 "reliable and/or had a verifiable track record, or was [not]
4 independently corroborated." (Doc. 69, at 12-13; Doc. 70, at 18-
5 19) The defendants do not define "raw intelligence," and the only
6 case they cite - a dissenting opinion in an appeal from a
7 Guantanamo *habeas* proceeding - does not support their position.
8 See *Latif v. Obama*, 666 F.3d 746, 755-56 (D.C. Cir. 2011) (Tatel,
9 J., dissenting) (noting that intelligence reports are not
10 "necessarily unreliable. Perhaps after careful scrutiny district
11 courts will conclude that many are reliable.") In a similar case,
12 the D.C. Circuit found no basis for "a per se rule that information
13 contained in an intelligence report is inherently unreliable."
14 *Barhoumi v. Obama*, 609 F.3d 416, 429 (D.C. Cir. 2010). To the
15 contrary, such information need only "be presented in a form, or
16 with sufficient additional information, that permits . . . [the]
17 court to assess its reliability." *Id.* (quoting *Parhat v. Gates*,
18 532 F.3d 834, 847, 849 (D.C. Cir. 2008)) ("[W]e do not suggest that
19 hearsay evidence is never reliable."). The same is true in the
20 more analogous context of criminal search warrants. In making
21 probable cause determinations based on a totality of the
22 circumstances, courts routinely review information presented in
23 search warrant affidavits for indicia of reliability or independent
24 corroboration. See *Illinois v. Gates*, 462 U.S. 213, 238 (1983)

25

1 (probable cause sufficient, based on totality of the circumstances,
2 where anonymous informant's recitation of detailed facts was
3 corroborated by police observation); *Draper v. United States*, 358
4 U.S. 307, 313 (1959) (probable cause sufficient where hearsay
5 information from previously reliable source was corroborated by
6 independent police investigation); *United States v. Martinez-*
7 *Garcia*, 397 F.3d 1205, 1216-17 (9th Cir. 2005) (probable cause
8 sufficient where reliable informant told police he had purchased
9 drugs from defendant, and police observed three controlled drug
10 buys).

11 [CLASSIFIED MATERIAL REDACTED]

12 2. *Franks v. Delaware Does Not Require Suppression*
13 *of FISA Materials*

14 The defendants allege that the FISA applications "may" contain
15 intentional or reckless falsehoods or omissions, in contravention
16 of *Franks v. Delaware*, 438 U.S. 154 (1978), and requests that the
17 Court conduct a *Franks* hearing. (Doc. 69, at 16-19; Doc. 70, at
18 22-25) Based on the relevant case law, this Court should decline
19 to hold such a hearing. To merit a *Franks* hearing, a defendant
20 must make a "concrete and substantial preliminary showing" that the
21 affiant deliberately or recklessly included false statements, or
22 failed to include material information, in the affidavit, and that
23 the resulting misrepresentation was essential to the finding of
24 probable cause. *Franks*, 438 U.S. at 155-56. Courts apply the same
25 standard when a defendant seeks a *Franks* hearing as part of a

1 challenge to FISA collection; to obtain a hearing, a defendant must
2 "make 'a substantial preliminary showing that a false statement
3 knowingly or intentionally, or with reckless disregard for the
4 truth, was included' in the application and that the allegedly
5 false statement was 'necessary' to the FISA Judge's approval of the
6 application." *Duggan*, 743 F.2d at 77 n.6 (quoting *Franks*, 438 U.S.
7 at 155-56). A defendant must show that the agent lied or
8 recklessly disregarded the truth with specific evidence in the form
9 of "[a]ffidavits or sworn or otherwise reliable statements of
10 witnesses." *Franks*, 438 U.S. at 171. The *Franks* threshold is not
11 met even by an offer of proof of an impropriety that might have
12 affected the outcome of the probable cause determination, but
13 rather requires one that was "necessary to the finding of probable
14 cause." *United States v. Colkley*, 899 F.2d 297, 301-02 (4th Cir.
15 1990); see also *United States v. Shnewer*, 2008 U.S. Dist. LEXIS
16 112001, at 38 (D. N.J. Dec. 29, 2009) ("[E]ven if the Court were to
17 determine there existed a reckless or intentional falsehood or
18 omission in the FISA application materials, the evidence obtained
19 still should not be suppressed unless the Court makes the further
20 finding that the falsehood or omission was material to the probable
21 cause determination.").

22 [CLASSIFIED MATERIAL REDACTED]²⁷

23
24 ²⁷ Indeed, even if a defendant offers sufficient proof to show that
25 an affidavit involved false statements or omissions, a hearing should not
be held where the affidavit would still provide probable cause if the
allegedly false material were eliminated, or if the allegedly omitted

1 Nonetheless, the defendants claim that a *Franks* hearing and
2 disclosure to them of the FISA materials "are necessary in order to
3 permit [the defendants] the opportunity to prove that the affiants
4 before the FISC intentionally or recklessly made materially false
5 statements and omitted material information from the FISA
6 applications," (Doc. 69, at 18-19; Doc. 70, at 25), an approach
7 which would allow them, and defendants in every case, to obtain the
8 FISA materials by merely alleging some impropriety.²⁸ Disclosing
9 FISA materials to defendants would then become the rule, violating
10 Congress' clear intention, set forth in 50 U.S.C. §§ 1806(f) and
11 1825(g), that the FISA materials be reviewed *in camera* and *ex parte*
12 in a manner consistent with the realities of modern intelligence
13 needs and investigative techniques. Courts have acknowledged that
14 the FISA statute does not envision such disclosure without
15 establishing a basis for it. For instance, the *Daoud* court noted
16 that it was "hard" for a defendant to make the *Franks* showing
17 "without access to the classified [FISA] materials," but the
18 "drafters of [FISA] devised a solution: the judge makes the initial
19 determination, based on full access to all classified materials. .
20 . ." *Daoud*, 755 F.3d at 483-84. Similarly, in *Belfield*, the court

21 information were included. *Franks*, 438 U.S. at 171; *Colkley*, 899 F.2d at
22 300; *United States v. Ketzbeck*, 358 F.3d 987, 990 (8th Cir. 2004);
United States v. Martin, 615 F.2d 318, 328 (5th Cir. 1980).

23 ²⁸ A judge in this District referred to this as "backwards
24 reasoning" in denying a defendant's motion to suppress FISA-derived
25 evidence. *United States v. Mihalik*, 11-CR-833(A), Doc. No. 108, at 2
(C.D. Cal., Oct. 3, 2012) (Minute Order Denying Defendant's Motion to
Suppress FISA-Derived Evidence).

1 noted that "Congress was also aware of these difficulties [faced by
2 defense counsel without access to FISA materials and] chose to
3 resolve them through means other than mandatory disclosure."
4 *Belfield*, 692 F.2d at 148. Judge Leinenweber framed the difficulty
5 facing defense counsel:

6 Nevertheless, to challenge the veracity of the FISA
7 application, Defendant must offer substantial proof that the
8 FISC relied on an intentional or reckless misrepresentation by
9 the government to grant the FISA order. The quest to satisfy
10 the *Franks* requirement might feel like a wild-goose chase, as
11 Defendant lacks access to the materials that would provide
12 this proof. This perceived practical impossibility to obtain
13 a hearing, however, does not constitute a legal impossibility.

14 *Kashmiri*, 2010 U.S. Dist. LEXIS 119470, at *17.

15 Courts have rejected other defendants' attempts to force a
16 *Franks* hearing by positing unsupported speculation to challenge the
17 validity of FISC orders, and this Court should do so here. See
18 *Abu-Jihaad*, 531 F. Supp. 2d at 309; *Hassoun*, 2007 WL 1068127 at *4;
19 *Mubayyid*, 521 F. Supp. 2d at 130-31; *Kashmiri*, 2010 U.S. Dist.
20 LEXIS 119470, at *17 (noting that the court "has already undertaken
21 a process akin to a *Franks* hearing through its *ex parte*, *in camera*
22 review"); *Shnewer*, 2008 U.S. Dist. LEXIS 112001, at 37 ("This
23 catch-22 has not troubled courts, however, and they defer to FISA's
24 statutory scheme."); *Mubayyid*, 521 F. Supp. 2d at 131 ("The balance
25 struck under FISA – which is intended to permit the gathering of
foreign intelligence under conditions of strict secrecy, while
providing for judicial review and other appropriate safeguards –

1 would be substantially undermined if criminal defendants were
2 granted a right of disclosure simply to ensure against the
3 possibility of a *Franks* violation.").

4 The defendants have failed to carry the burden of establishing
5 the prerequisites for a *Franks* hearing, and their attempt to obtain
6 disclosure of the FISA materials to meet that burden is
7 unprecedented and runs counter to FISA, *Franks*, and the intent of
8 Congress. For these reasons, the Court should therefore deny the
9 defendants' request for a *Franks* hearing and his request for
10 suppression of the FISA information.

11 **3. The Certifications Complied with FISA**

12 The defendants submit that the certifications "may" not have
13 included the required certifications, such as that foreign
14 intelligence information was a significant purpose of the
15 collection, that the information sought was foreign intelligence
16 information, and that the information cannot reasonably be obtained
17 by normal investigative techniques. (Doc. 69, at 19-20; Doc. 70,
18 at 25-26) This claim has also been consistently denied by the
19 courts. See, e.g., *Hammoud*, 381 F.3d at 333.

20 **[CLASSIFIED MATERIAL REDACTED]²⁹**

21
22 ²⁹ FISA's "significant purpose" standard was held unconstitutional
23 in *Mayfield*, a civil case, which was eventually vacated by the Ninth
24 Circuit on the ground that the plaintiff lacked standing. See *Mayfield*
25 *v. United States*, 588 F.3d 1252 (9th Cir. 2009). And, as is the case for
the lower court's decision in *Mayfield*, when a judgment is vacated by a
higher court "it deprives the [lower] court's opinion of precedential
effect." *Los Angeles County v. Davis*, 440 U.S. 625, 634 n. 6 (1979).

1 4. The Government Complied with the Minimization
2 Procedures

3 [CLASSIFIED MATERIAL REDACTED]³⁰

4 As the Court will see from its *ex parte*, *in camera* review of
5 the FISA materials, the Government complied with all of FISA's
6 statutory requirements. Accordingly, the Government submits that
7 there is no basis to suppress the FISA information in the present
8 case.

9 B. THE DEFENDANTS HAVE NOT ESTABLISHED ANY BASIS FOR
10 THE COURT TO DISCLOSE FISA MATERIALS

11 In support of their argument for disclosure of the FISA
12 materials, the defendants claim that disclosure: (1) "may be
13 'necessary' under § 1806(f);" (2) is required under § 1806(g) and
14 due process; and (3) required by the adversary system of justice.

15 _____
16 ³⁰ In their motions, the defendants incorrectly paraphrase Section
17 1801(h). (Doc. 69, at 20-21; Doc. 70, at 26-27) First, the defendants
18 state that the procedures "ensure that surveillance is reasonably
19 designed to minimize the acquisition and retention of private information
20 regarding people who are being wiretapped;" instead, Section 1801(h)(1)
21 defines procedures (instead of the surveillance) "that are reasonably
22 designed in light of the purpose and technique of the particular
23 surveillance, to minimize the acquisition and retention, and prohibit the
24 dissemination, of nonpublicly available information concerning
25 unconsenting United States persons consistent with the need of the United
States to obtain, produce, and disseminate foreign intelligence
information." 50 U.S.C. § 1801(h)(1).

21 Second, the defendants state that the procedures "prevent
22 dissemination of non-foreign intelligence information," whereas the
23 statute requires that "nonpublicly available information, which is not
24 foreign intelligence information, . . . shall not be disseminated in a
25 manner that identifies any United States person, without such person's
consent, unless such person's identity is necessary to understand foreign
intelligence information or assess its importance." 50 U.S.C.
§ 1801(h)(2).

25 [CLASSIFIED MATERIAL REDACTED]

1 (Doc. 69, at 21-26; Doc. 70, at 27-33) For the following reasons,
2 the Court should deny the request for disclosure.

3 **1. Disclosure is Not "Necessary" under FISA**

4 The defendants assert that "there are ample justifications for
5 disclosure of the FISA applications," which would permit defense
6 counsel an opportunity to identify procedural irregularities and to
7 demonstrate that the defendants' knowledge was lacking, the
8 defendants' activities fell within the protection of the First
9 Amendment, and the information in the applications was unreliable
10 or obtained via illegal means.³¹ (Doc. 69, at 22; Doc. 70, at 28)

11
12 ³¹ Defendant Badawi notes that "although [he] does not currently
13 possess security clearance . . . counsel is certain that the government
14 could assist in that process. (Doc. 70, at 28) Federal courts have
15 consistently rejected such arguments when ruling on defense requests for
16 disclosure of FISA materials. For example, in *Ott*, the Ninth Circuit
17 found a similar argument unpersuasive, stating that "Congress has a
18 legitimate interest in authorizing the Attorney General to invoke
19 procedures designed to ensure that sensitive security information is not
20 unnecessarily disseminated to anyone not involved in the surveillance
21 operation in question, whether or not she happens for unrelated reasons
22 to enjoy security clearance." *Ott*, 827 F.2d at 477 (emphasis in
23 original); accord *El-Mezain*, 664 F.3d at 568; *Warsame*, 547 F. Supp. 2d at
24 989 n.5.

18 The defendants also note that the Court could "issue an appropriate
19 Protective Order . . . that would provide elaborate protection for
20 CLASSIFIED information, and which would permit CLASSIFIED materials to be
21 disclosed to defense counsel but not to the [defendants]." (Doc. 69, at
22 22; Doc. 70, at 28) If this Court concludes from its *in camera*, *ex parte*
23 review of the FISA materials that it is capable of accurately determining
24 the legality of the FISA collection at issue, then no defense attorney,
25 even one with an otherwise appropriate security clearance, would have a
"need to know" any of the FISA materials, and no defense attorney would
be entitled to see them. See Executive Order 13526, §§ 4.1(a), 6.1(dd),
75 Fed.Reg. 707, 720, 729 (Jan. 5, 2010), which requires that a "need to
know" determination be made prior to the disclosure of classified
information to anyone, including those who possess an appropriate
security clearance. In *Baldrawi v. Dep't of Homeland Security*, 596 F.
Supp. 2d 389, 400 (D. Conn. 2009), the court determined that even counsel
who held a top secret security clearance did not have a "need to know,"

1 As the Court is aware, these claims are not unique to this case,
2 and, as detailed above, each of the claims was raised in support of
3 suppression. The defendants, then, are seeking disclosure to
4 bolster their arguments for suppression, which is not permissible
5 under the statute.

6 There is only one reason to disclose the FISA materials to
7 defense counsel. The Court must conduct its review of those
8 materials *in camera* and *ex parte*, and disclosure is within the
9 Court's discretion only following that review and only if the Court
10 is unable to determine the legality of the electronic surveillance,
11 physical searches, or both, without the assistance of defense
12 counsel. 50 U.S.C. §§ 1806(f), 1825(g); *Rosen*, 447 F. Supp. 2d at
13 546; *Daoud*, 755 F.3d at 482; *Duggan*, 743 F.2d at 78. This holding
14 is fully supported by the legislative history of Section 1806(f),
15 which states: "The court may order disclosure to [the defense] only
16 if it finds that such disclosure is necessary to make an accurate
17 determination of the legality of the surveillance . . . Once a
18 judicial determination is made that the surveillance was lawful, a
19 motion for discovery . . . must be denied." Senate Report at 64-
20 65; *see also Hassan*, 742 F.3d at 138 (where the court "emphasized
21 that, where the documents 'submitted by the government [are]
22 sufficient' to 'determine the legality of the surveillance,' the
23 FISA materials should not be disclosed.") (quoting *Squillacote*, 221
24 and therefore denied him access to classified documents. *Accord United*
25 *States v. Amawi*, 2009 WL 961143, at *1 (N.D. Ohio, Apr. 7, 2009).

1 F.3d at 554). As this Court will see from its review, the FISA
2 materials are presented in a well-organized and straightforward
3 manner that will allow the Court to make its determination of the
4 lawfulness of the FISA collection without input from defense
5 counsel.

6 The defendants' request, which effectively calls for
7 disclosure where defense counsel could provide assistance, instead
8 of where necessary, is merely an attempt to circumvent the clear
9 language of the statute. See 50 U.S.C. §§ 1806(f), 1825(g). As
10 the *Belfield* court stated: "Congress was adamant, in enacting FISA,
11 that [its] 'carefully drawn procedure[s]' are not to be bypassed."
12 692 F.2d at 146 (citing Senate Report at 63); see also *United*
13 *States v. Mohamud*, 2014 WL 2866749, *32 (D. Or., June 24, 2014)
14 ("Obviously it would be helpful to the court to have defense
15 counsel review the materials prior to making arguments. Congress,
16 however, did not put 'helpful' in the statute; it chose
17 'necessary.'"). As the *Daoud* Court stated, "the defendant's
18 misreading of the statute" would circumvent the required *in camera*,
19 *ex parte* review whenever a defense counsel "believed disclosure
20 necessary, since if the judge does not conduct the *ex parte* review,
21 she will have no basis for doubting the lawyer's claim of
22 necessity." 755 F.3d at 842.

23 The defendants are not entitled to the FISA materials for the
24 purpose of challenging the lawfulness of the FISA authorities, as
25

1 FISA's plain language precludes defense counsel from accessing the
2 classified FISA materials to conduct a fishing expedition. In
3 *Medunjanin*, the court noted that "[d]efense counsel . . . may not
4 inspect the FISA dockets to construct a better argument for
5 inspecting the FISA dockets. Such a circular exercise would be
6 patently inconsistent with FISA" 2012 WL 526428 at *10.
7 *See Badia*, 827 F.2d at 1462 (rejecting the defendant's request for
8 "disclosure of the FISA application, ostensibly so that he may
9 review it for errors"); *Mubayyid*, 521 F. Supp. 2d at 131.

10 The defendants have failed to present any colorable basis for
11 disclosure, as this Court is able to review and make a
12 determination as to the legality of the FISA collection without the
13 assistance of defense counsel. Where, as here, defense
14 participation is not necessary, FISA requires that the FISA
15 materials remain protected from disclosure. Congress' clear
16 intention is that FISA materials should be reviewed *in camera* and
17 *ex parte* and in a manner consistent with the realities of modern
18 intelligence needs and investigative techniques. There is simply
19 nothing extraordinary about this case that would prompt this Court
20 to order the disclosure of highly sensitive and classified FISA
21 materials. *See Rosen*, 447 F. Supp. 2d at 546 ("exceptional nature
22 of disclosure of FISA material is especially appropriate in light
23 of the possibility that such disclosure might compromise the

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1 ability of the United States to gather foreign intelligence
2 information effectively") (citing *Belfield*, 692 F.2d at 147).

3 2. Due Process Does Not Require Disclosure

4 The defendants also claim that they are entitled to disclosure
5 of the FISA materials under 50 U.S.C. § 1806(g) and the Due Process
6 Clause of the Fifth Amendment. (Doc. 69, at 23; Doc. 70, at 29)
7 Courts are in agreement, however, that FISA's *in camera*, *ex parte*
8 review does not violate the due process clause of the Fifth
9 Amendment, nor does due process require that defendants be granted
10 access to the FISA materials except as provided for in 50 U.S.C.
11 §§ 1806(f), (g) and 1825(g), (h). See, e.g., *Ott*, 827 F.2d at 476-
12 77; *Gowadia*, 2009 WL 1649714, at *2; *ACLU Foundation*, 952 F.2d at
13 465; *Nicholson*, 955 F. Supp. at 592 (The court found that based on
14 "the unanimous holdings of prior case law, . . . that FISA does not
15 violate the Fifth or Sixth Amendments by authorizing *ex parte in*
16 *camera* review."); *Benkahla*, 437 F. Supp. 2d at 554; *El-Mezain*, 664
17 F.3d at 567; *Abu-Jihaad*, 630 F.3d at 117; *Spanjol*, 720 F. Supp. at
18 58-59; *Damrah*, 412 F.3d at 624; *Jayyousi*, 2007 WL 851278, at *7-8;
19 *Megahey*, 553 F. Supp. at 1194; *Falvey*, 540 F. Supp. at 1315-16;
20 *Belfield*, 692 F.2d at 148-49; *Nicholson*, 2010 WL 1641167, at *3-4.

21 The plain intention of § 1806(g) – allowing the Court to order
22 disclosure of material to which the defendants would be entitled
23 under the Due Process Clause, such as material that had not been
24 previously disclosed under *Brady*, even while ruling against the
25 defendants' motions generally – cannot be interpreted to support

1 the defendants' demand for access to all of the FISA materials in
2 advance of the Court's *in camera*, *ex parte* review and determination
3 of the legality of the collection. The necessity of disclosing
4 FISA materials is a factual, not a legal, question.³² With respect
5 to any claim that the FISA materials contain information that due
6 process requires be disclosed to the defense, the request is
7 premature since the Court will make that factual determination for
8 itself during its *in camera*, *ex parte* review. The Government is
9 confident that the Court's review of the challenged FISA materials
10 will not reveal any material that due process requires be disclosed
11 to the defendants, such as *Brady* material, as provided for in
12 § 1806(g). Accordingly, the defendants' claim that they are
13 entitled to the disclosure of the FISA material under Section
14 1806(g) and due process should be rejected.

15 **3. The Adversary System Does Not Require**
16 **Disclosure**

17 Finally, the defendants claim that they are entitled to
18 disclosure because the lack thereof "would render the
19 proceedings . . . *ex parte*," and thus "antithetical to the
20 adversary system that is the hallmark of American criminal
21 justice." (Doc. 69, at 23; Doc. 70, at 29) This claim is contrary
22 to all of the relevant case law (as opposed to the case law cited

23 ³² "If the court determines that the surveillance was lawfully
24 authorized and conducted, it shall deny the motion of the aggrieved
25 person except to the extent that due process requires discovery or
disclosure." 50 U.S.C. §§ 1806(g) and 1825(h).

1 by the defense, all of which predates FISA or does not address
2 FISA). Several courts, including District Courts in the Ninth
3 Circuit, have addressed the right to confrontation in this context
4 and found that "FISA's *in camera* review provisions have been held
5 to be constitutional." *Nicholson*, 2010 U.S. Dist. LEXIS 45126
6 (citing *Isa*, 923 F.2d at 1307-08 (Sixth Amendment right of
7 confrontation is not violated by FISA's *in camera* review
8 procedure)); see also *United States v. Lahiji*, 2013 WL 550492 (D.
9 Or. Feb. 12, 2013), *4 (Court found no violation of defendants'
10 Fourth, Fifth, or Sixth Amendment rights); *United States v. Jamal*,
11 2011 U.S. Dist. LEXIS 12224 (D. Az. Feb. 11, 2011), *5 (movant's
12 Sixth Amendment rights were not violated by trial counsel's
13 inability to discuss FISA materials); *United States v. Hussein*,
14 2014 U.S. Dist. LEXIS 59400 (S.D. Cal. Apr. 29, 2014), *3 (The "*in*
15 *camera, ex parte* review process under FISA satisfies due process
16 under the United States Constitution."); *Falvey*, 540 F. Supp. at
17 1315-16 (rejecting First, Fifth, and Sixth Amendment challenges and
18 noting that a "massive body of pre-FISA case law of the Supreme
19 Court, Circuit and others" supports the conclusion that the
20 legality of electronic surveillance should be determined on an *in*
21 *camera, ex parte* basis); *Nicholson*, 955 F. Supp. at 592 ("Based on
22 the unanimous holdings of prior case law, . . . FISA does not
23 violate . . . the Sixth Amendment[] by authorizing *ex parte in*
24 *camera* review."); *Benkahla*, 437 F. Supp. 2d at 554.

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1 Courts have also consistently rejected similar arguments
2 challenging FISA under the Sixth Amendment. See *Lahiji*, 2013 WL
3 550492, *4; *Warsame*, 547 F. Supp. 2d at 988 n.4 (finding argument
4 "without merit") (citing *Nicholson*, 955 F. Supp. at 592); *Belfield*,
5 692 F.2d at 148; *Isa*, 923 F.2d at 1306-07; *Megahey*, 553 F. Supp. at
6 1193. In overturning a district court's order to disclose FISA
7 materials to the defense, the *Daoud* Court described the belief that
8 "adversary procedure is always essential to resolve contested
9 issues of fact" as "an incomplete description of the American legal
10 system in general and the federal judicial system in particular."
11 755 F.3d at 482.

12 The defendant's arguments in support of disclosure of the FISA
13 materials have no basis in the law, and disclosure of the FISA
14 materials would cause exceptionally grave damage to the national
15 security. The Government respectfully submits that, contrary to
16 the defendants' assertions, there is nothing extraordinary about
17 this case to justify an order to disclose the highly sensitive and
18 classified FISA materials in this case under the applicable FISA
19 standard. See *Rosen*, 477 F. Supp. 2d at 546 ("Review of the FISA
20 applications, orders and other materials in this case presented
21 none of the concerns that might warrant disclosure to the
22 defense."). Accordingly, the defendants' motions for disclosure of
23 the FISA materials should be denied.

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1 **VI. CONCLUSION: THERE IS NO BASIS FOR THE COURT TO DISCLOSE**
2 **THE FISA MATERIALS OR TO SUPPRESS THE FISA INFORMATION**

3 The defendants' motions should be denied. FISA's provisions
4 for *in camera*, *ex parte* review comport with the due process
5 requirements of the United States Constitution. See, e.g., *El-*
6 *Mezain*, 664 F.3d at 567; *Abu-Jihaad*, 630 F.3d at 117; *Spanjol*, 720
7 F. Supp. at 58-59; *United States v. Damrah*, 412 F.3d at 624. The
8 defendants advance no argument to justify any deviation from these
9 well-established precedents.

10 The Attorney General has filed a declaration in this case
11 stating that disclosure or an adversary hearing would harm the
12 national security of the United States. Therefore, FISA mandates
13 that this Court conduct an *in camera*, *ex parte* review of the
14 challenged FISA materials to determine whether the information was
15 lawfully acquired and whether the electronic surveillance and
16 physical searches were made in conformity with an order of
17 authorization or approval. In conducting that review, the Court
18 may disclose the FISA materials "only where such disclosure is
19 necessary to make an accurate determination of the legality of the
20 surveillance [or search]." 50 U.S.C. §§ 1806(f), 1825(g).

21 Congress, in enacting FISA's procedures for *in camera*, *ex parte*
22 judicial review, has balanced and accommodated the competing
23 interests of the Government and criminal defendants, and has
24 articulated the standard for disclosure; that is, only where the
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1 Court finds that disclosure is necessary to the Court's accurate
2 determination of the legality of the FISA collection.

3 The Government respectfully submits that the Court can make
4 this determination without disclosing the classified and highly
5 sensitive FISA materials to the defendants. The FISA materials at
6 issue here are organized and readily understood, and an overview of
7 them has been presented herein as a frame of reference. This Court
8 will be able to render a determination based on its *in camera*, *ex*
9 *parte* review, and the defendants have failed to present any
10 colorable basis for supplanting Congress' reasoned judgment with a
11 different proposed standard of review.

12 Furthermore, the Court's examination of the FISA materials in
13 the Sealed Appendix will demonstrate that the Government satisfied
14 FISA's requirements to obtain orders for electronic surveillance
15 and physical searches, that the information obtained pursuant to
16 FISA was lawfully acquired, and that the electronic surveillance
17 and physical searches were made in conformity with an order of
18 authorization or approval.

19 Even if this Court were to determine that the acquisition of
20 the FISA information had not been lawfully acquired or that the
21 electronic surveillance and physical searches were not made in
22 conformity with an order of authorization or approval, the FISA
23 evidence would nevertheless be admissible under the "good faith"
24 exception to the exclusionary rule articulated in *Leon*, 468 U.S.

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1 897 (1984). See also *Ning Wen*, 477 F.3d at 897 (holding that the
2 Leon good-faith exception applies to FISA orders); *Ahmed*, 2009 U.S.
3 Dist. LEXIS 120007, at *25 n. 8.

4 Based on the foregoing analysis, the Government respectfully
5 submits that the Court must conduct an *in camera*, *ex parte* review
6 of the FISA materials and the Government's classified submission,
7 and should: (1) find that the electronic surveillance and physical
8 searches at issue in this case were both lawfully authorized and
9 lawfully conducted; (2) hold that disclosure of the FISA materials
10 and the Government's classified submissions to the defendants is
11 not authorized because the Court is able to make an accurate
12 determination of the legality of the surveillance without
13 disclosing the FISA materials or any portions thereof; (3) hold
14 that the fruits of electronic surveillance and physical searches
15 should not be suppressed; (4) deny the defendants' motions without
16 an evidentiary hearing; and (5) order that the FISA materials and
17 the Government's classified submissions be maintained under seal by

1 the Classified Information Security Officer or his or her
2 designee.³³

3 DATED: March 10, 2016

4 Respectfully submitted,

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18 UNITED STATES OF AMERICA

19 _____
20 ³³ A district court order granting motions or requests under 50
21 U.S.C. § 1806(g), a decision that electronic surveillance was not
22 lawfully authorized or conducted, and an order requiring the disclosure
of FISA materials is a final order for purposes of appeal. 50 U.S.C.
23 § 1806(h). Should the Court conclude that disclosure of any item within
any of the FISA materials or suppression of any FISA-obtained or -derived
24 information may be required, given the significant national security
consequences that would result from such disclosure or suppression, the
Government would expect to pursue an appeal. Accordingly, the Government
25 respectfully requests that the Court indicate its intent to do so before
issuing any order, and that the Court stay any such order pending an
appeal by the United States of that order.