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

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

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

**GOVERNMENT DEFENDANTS’
 OPPOSITION TO PLAINTIFFS’
 MOTION TO STRIKE THE
 DECLARATIONS OF TERESA H.
 SHEA AND JOSHUA SKULE**

Date: April 25, 2014
 Time: 9:00 a.m.
 Courtroom 11, 19th Floor
 The Honorable Jeffrey S. White

1 On December 6, 2013, the Government Defendants filed a motion to dismiss and
2 opposition to Plaintiffs' motion for partial summary judgment, with supporting declarations from
3 two agency officials: Teresa H. Shea, Signals Intelligence Director, National Security Agency,
4 and Joshua Skule, Acting Assistant Director of the Counterterrorism Division, Federal Bureau of
5 Investigation. Gov't Mot./Opp. (ECF No. 66) & Exhs. A-B. As explained therein, these
6 declarations are pertinent to Plaintiffs' motion for summary judgment, *see id.* at 10-11, and they
7 provide "extrinsic evidence for purposes of resolving Defendants' Rule 12(b)(1) motion" to
8 dismiss for lack of jurisdiction. *Id.* In their opposition to the Government Defendants' motion,
9 and reply in support of their motion for partial summary judgment, Plaintiffs "move" to strike the
10 aforementioned declarations, "in their entirety," "to the extent the government has offered them
11 in support of its motion to dismiss." Pls.' Opp./Reply (ECF No. 72) at 2. They also "move" to
12 strike portions of the declarations as "irrelevant" to the claims on which they seek summary
13 judgment. Plaintiffs have not met the high standard for so "drastic" a remedy as striking a
14 declaration. *Freeman v. ABC Legal Servs., Inc.*, 877 F. Supp. 2d 919, 923 (N.D. Cal. 2012);
15 *Albizo v. Wachovia Mortg.*, 2012 WL 1413996, at *17 (E.D. Cal. Apr. 20, 2012).¹

16 The challenged declarations were properly submitted on the issue of subject-matter
17 jurisdiction, because when, as here, a motion to dismiss attacks "the substance of the complaint's
18 jurisdictional allegations, . . . the court may expand its review and rely on affidavits or any other
19 evidence properly before the court." *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir.
20 2007). *See also Sonoma Cnty. Ass'n of Retired Emps. v. Sonoma Cnty.*, 708 F.3d 1109, 1120 n.8
21 (9th Cir. 2013); *Harris v. Cnty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012). Furthermore, it
22 was proper for the Government Defendants to cite "documents" and "declarations" to establish a
23 genuine issue of material fact precluding summary judgment as to Plaintiffs' statutory and First
24 Amendment claims, and to show that Plaintiffs have failed to establish an element essential to
25 their case (such as Article III standing) on which they bear the burden of proof at trial. Fed. R.

26 ¹ "Motions to strike are regarded with disfavor," *Benham v. American Serv. Co.*, 2009
27 WL 4456386, at *8 (N.D. Cal. Nov. 30, 2009) (White, J.), "and are infrequently granted."
28 *Freeman*, 877 F. Supp. 2d at 923 (internal quotation omitted). "[I]n most cases, a motion to
strike should not be granted unless 'the matter to be stricken clearly could have no possible
bearing on the subject of the litigation.'" *J & J Sports Prods., Inc. v. Nguyen*, 2014 WL 60014,
at *2-3 (N.D. Cal. Jan. 7, 2014) (citation omitted).

1 Civ. P. 56(c)(1)(A). *Accord Thompson v. Donahoe*, --- F. Supp. 2d. ---, 2013 WL 3286196, at
2 *3 (N.D. Cal. June 27, 2013) (“A party asserting that a fact is genuinely disputed” for purposes
3 of summary judgment “must support the assertion by citing specific admissible evidence,
4 including depositions, documents, or declarations.”).

5 Insofar as Plaintiffs raise a relevance objection, is improper as “duplicative of the
6 summary judgment standard itself.” *See Burch*, 433 F. Supp. 2d at 1119; *see also Hollis v.*
7 *Sloan*, 2012 WL 5304756, at *1 (E.D. Cal. 2012). Furthermore, in the midst of raising that
8 objection—located within Plaintiffs’ reply *in support of summary judgment* on their statutory
9 claim—Plaintiffs themselves rely on extrinsic evidence to dispute the very facts, concerning the
10 benefits of the telephony metadata program, that they insist are not relevant. *See* Pls. Opp. at 27
11 n.29. (Plaintiffs themselves opened the door to this inquiry in their motion for partial summary
12 judgment. *See, e.g.*, ECF No. 24 at 8-9.) Plaintiffs have every right to present to the Court the
13 facts of their choosing, *see* Fed. R. Civ. P. 56(a), (c)(1); Local Civil Rule 7-5. What they may
14 not do is insist at the same time that the Government Defendants be denied the same right.

15 Plaintiffs’ “motion” to strike should be denied.

16 Dated: February 21, 2014

18 Respectfully Submitted,

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