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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KEVIN GALLAGHER, et al.,
Plaintiffs,
v.
UNITED STATES, et al.,
Defendants.

Case No. [17-cv-00586-MEJ](#)
ORDER RE: MOTION TO DISMISS
Re: Dkt. Nos. 32, 34

INTRODUCTION

Plaintiffs Kevin Gallagher and Donor No. 1 filed this putative class action asserting claims for violations of the First Amendment of the United States Constitution; the federal Stored Communications Act, 18 U.S.C. §§ 2701-12; and the right to privacy afforded by the California Constitution. *See* First Am. Compl. (“FAC”), Dkt. No. 29. Pending before the Court are two Motions to Dismiss. Individual Defendants (“ID”) Candina Heath and Robert Smith move to dismiss the claims asserted against them in their individual capacity pursuant to Federal Rule of Civil Procedure (“Rule”) 12(b)(2) and 12(b)(6). *See* ID Mot., Dkt. No. 32. The United States moves to dismiss the claims asserted against it directly and against Heath and Smith in their official capacity pursuant to Rule 12(b)(1) and Rule 12(b)(6). *See* US Mot., Dkt. No. 34. Plaintiffs filed Oppositions (Pls.’ ID Opp’n, Dkt. No. 35; Pls.’ US Opp’n, Dkt. No. 36) and Defendants filed Replies (ID Reply, Dkt. No. 38; US Reply, Dkt. No. 39).

The Court heard oral argument on September 28, 2017. Having considered the parties’ positions, the relevant legal authority, and the record in this case, the Court **GRANTS IN PART** the United States’ Motion and **GRANTS** the Individual Defendants’ Motion for the following reasons.

1 **ALLEGATIONS OF THE FAC**

2 Donor No. 1 donated to a crowd-funding campaign to support the legal defense of Barrett
3 Brown, a jailed journalist, because he believed the journalist was imprisoned because of the views
4 the journalist espoused, rather than the conduct the journalist engaged in. FAC ¶ 2. Mr. Brown
5 had “reported extensively on the links between the United States government and private
6 intelligence contractors.” *Id.* ¶ 19. Gallagher used a website operated by WePay to organize the
7 crowd-funding campaign. *Id.* ¶ 25. The WePay donation page through which Donor No. 1
8 contributed to Mr. Brown’s legal defense fund stated “[e]ach dollar raised is your vote in this
9 important campaign for free speech and transparency on the internet – and around the world.” *Id.* ¶
10 27; Donation Page, Dkt. No. 29-3. The donation page also informed the donors that the
11 information they provided would be “kept strictly confidential.” FAC ¶ 28.

12 Hundreds of individuals from across the country also contributed to Mr. Brown’s legal
13 defense fund. *Id.* ¶ 2. Many included messages such as “prosecutorial bludgeoning must end” and
14 “I think it is imperative that everyone who cares about free speech, a free internet, or is horrified
15 by prosecutorial overreach, donate to Barrett Brown’s legal defense.” *Id.* ¶ 26.

16 The crowd-funding campaign attracted Defendants’ attention. *Id.* ¶ 30. During the
17 relevant period, Heath was an Assistant United States Attorney in the Northern District of Texas.
18 *Id.* ¶ 15. Smith was a special agent in the Dallas office of the Federal Bureau of Investigations.
19 *Id.* ¶ 16. Heath and Smith are both citizens of Texas. *Id.* ¶¶ 15-16. Smith enlisted Heath’s help
20 and the two of them began efforts to identify and surveil Mr. Brown’s supporters. *Id.* ¶ 29. “On
21 information and belief, Defendants conspired to draft and serve the WePay Subpoena” directing
22 WePay to produce “any and all records and information” associated with the crowd-funding
23 campaign, including the sources of the funds donated (i.e., “the financial institution, credit card
24 company, account holder at financial institution or of the credit card account”); the location of the
25 funds; a “[c]omplete transaction history, including invoices and sending account numbers and
26 receiving account numbers[;]” and “[a]ll records and information obtained from any verification
27 checks on purchasers.” *See id.* ¶¶ 30, 32; *see also* Subpoena at 5, Dkt. No. 33-1. The WePay
28 Subpoena was signed by Heath and required WePay to send its response to Smith. *Id.* ¶ 33 &

1 Subpoena at 4. WePay produced documents in response. *Id.* ¶ 32. At a minimum, this response
2 included donors’ identities, donors’ sensitive financial information, and the amounts of each
3 donation. *Id.* ¶ 51; Resp., Dkt. No. 33-2.

4 Defendants contend they issued the Subpoena “to determine if Brown, who was previously
5 appointed a public defender [in the underlying criminal proceedings], could afford his own
6 attorney.” FAC ¶ 46 (internal quotation marks and citation omitted). But the Subpoena was
7 unnecessary to achieve this stated purpose: “WePay . . . tracked the total amount raised and made
8 that amount publicly visible on the donation page.” *Id.* ¶ 47. Nor was this information relevant to
9 the government’s motion to seize the funds in the WePay account. *See id.* ¶¶ 48-50 (identities of,
10 and amounts donated by, individual donors completely unjustified and irrelevant to Defendants’
11 motion to seize the funds in the WePay account).

12 WePay produced a transaction history reflecting the donations the Brown campaign had
13 received; among other information, the transaction history included the date and amount of
14 donations, as well as the donors’ names and payment method. *See Resp.*; *see also* US Mot. at 4.
15 WePay also maintained “the addresses, phone numbers, email addresses, and the text of messages
16 sent by donors.” FAC ¶ 53. This is more information than WePay provided in the response
17 Defendants attach to the RJN. *See Resp.* WePay also represented it produced all information
18 responsive to the Subpoena and did not withhold any documents. *Id.*

19 Donor No. 1 believes Defendants still maintain the information produced in WePay’s
20 response and use it to unlawfully surveil him and the other donors to the crowd-funding campaign.
21 *Id.* ¶ 55. Donor No. 1 believes that the WePay subpoena was part of a larger effort on the part of
22 Defendants to identify and surveil Mr. Brown’s supporters. *Id.* ¶ 30. He knows Defendants’
23 illegal surveillance scheme extended to at least one other internet service provider, CloudFlare,
24 Inc., and believes it has affected others. *Id.* In light of the complete irrelevance of the information
25 sought by the WePay subpoena to the crimes with which Mr. Brown was charged, Donor No. 1
26 believes Defendants perpetrated their illegal surveillance scheme to chill protected expression. *Id.*
27 The scheme has had the intended effect. *Id.*

28 Based on these facts, Plaintiffs assert an SCA claim against the United States; Donor No. 1

1 asserts a First Amendment claim against Heath and Smith in both their individual and official
2 capacities; and Donor No. 1 asserts a claim for violation of the right to privacy provided in Article
3 I § 1 of the California Constitution against Heath, Smith, and/or the United States. Plaintiffs
4 contend the Court has original subject matter jurisdiction over the SCA and First Amendment
5 claims pursuant to 28 U.S.C. § 1331; against Heath and Smith in their individual capacities
6 pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388
7 (1971); and over Heath and Smith in their official capacities pursuant to the Administrative
8 Procedure Act. FAC ¶¶ 6-8. Gallagher and Donor No. 1 each filed administrative claims
9 asserting violations of the SCA on or about March 30, 2016. FAC ¶ 13 & Exs. A-B.

10 **REQUEST FOR JUDICIAL NOTICE**

11 Defendants ask the Court to take judicial notice of the subpoena they issued to WePay;
12 WePay’s response thereto; court filings in *United States v. Brown*, No. 12-cr-317 (N.D. Tex.), the
13 underlying criminal proceeding against non-party Barrett Brown; and the transcript from a
14 September 2014 hearing held in connection with those proceedings. *See* RJN, Exs. A-H, Dkt. No.
15 33.

16 Defendants contend the WePay subpoena, the WePay response thereto, and the transcript
17 of the September 2014 hearing are referenced in the FAC and thus may be taken into consideration
18 by the Court pursuant to the incorporation by reference doctrine. *See* RJN at 2 (citing FAC ¶¶ 3-5,
19 30, 32-34, 44, 46-55, 73, 79). Indeed, the FAC specifically references these documents, which
20 Defendants have asked the Court to judicially notice in connection with their Motions to Dismiss
21 the original complaint. FAC ¶¶ 3, 25, 44, 48-53, 73 (citing First RJN, Dkt. No. 26). Defendants
22 also ask the Court to take judicial notice of documents filed in *United States v. Brown* pursuant to
23 Federal Rule of Evidence 201, as these court filings are not subject to reasonable dispute. RJN at
24 3.

25 Plaintiffs object only to the request to judicially notice WePay’s response to the subpoena.
26 Pls.’ US Opp’n at 3-4. They contend the document Defendants attached to the RJN was redacted
27 in this action, and does not reflect the document that was produced to Defendants in the
28 underlying criminal proceedings. *Id.* at 3. They further argue the Court cannot take judicial notice

1 of the document without giving Plaintiffs the opportunity to conduct discovery on the contents of
2 the response, especially on whether WePay’s response – as shown in the RJN – is complete. *Id.* at
3 3-4 (explaining the subpoena sought “any and all records and information” and that WePay
4 responded it had not withheld any documents responsive to the subpoena).

5 The Court will take judicial notice of the documents Defendants attach to their RJN, but it
6 will not take judicial notice of the disputed facts recited therein, i.e., the Court takes notice that
7 WePay responded to the subpoena, but not as to whether the WePay response attached to the RJN
8 is complete. *See Lee v. City of L.A.*, 250 F.3d 668, 689-90 (9th Cir. 2001) (courts may take
9 judicial notice of existence of a document, but not for the truth of the facts recited therein).

10 **DISCUSSION—SUBJECT MATTER JURISDICTION**

11 **A. Legal Standard**

12 Federal district courts are courts of limited jurisdiction; “[t]hey possess only that power
13 authorized by Constitution and statute, which is not to be expanded by judicial decree.” *Kokkonen*
14 *v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citation omitted). Accordingly, “[i]t
15 is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing
16 the contrary rests upon the party asserting jurisdiction.” *Id.*; *Chandler v. State Farm Mut. Auto.*
17 *Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010).

18 Rule 12(b)(1) authorizes a party to move to dismiss a lawsuit for lack of subject matter
19 jurisdiction. A jurisdictional challenge may be facial or factual. *Safe Air for Everyone v. Meyer*,
20 373 F.3d 1035, 1039 (9th Cir. 2004). Where the attack is facial, the court determines whether the
21 allegations contained in the complaint are sufficient on their face to invoke federal jurisdiction,
22 accepting all material allegations in the complaint as true and construing them in favor of the party
23 asserting jurisdiction. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Where the attack is factual,
24 however, “the court need not presume the truthfulness of the plaintiff’s allegations.” *Safe Air for*
25 *Everyone*, 373 F.3d at 1039. In resolving a factual dispute as to the existence of subject matter
26 jurisdiction, a court may review extrinsic evidence beyond the complaint without converting a
27 motion to dismiss into one for summary judgment. *Id.*; *McCarthy v. United States*, 850 F.2d 558,
28 560 (9th Cir. 1988) (holding that a court “may review any evidence, such as affidavits and

1 testimony, to resolve factual disputes concerning the existence of jurisdiction”).

2 **B. California Constitution**

3 The United States is immune from liability unless it has explicitly waived its sovereign
4 immunity. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980); *see also South Delta Water*
5 *Agency v. DOI*, 767 F.2d 531, 536 (9th Cir. 1985) (sovereign immunity extends to federal
6 employees acting in their official capacities and federal agencies). The United States originally
7 argued the Court lacked subject matter jurisdiction on a number of bases. *See* US Mot. at 21-32.
8 After Donor No. 1 confirmed Plaintiffs did not seek monetary damages in connection with this
9 claim (Pls.’ US Opp’n at 18 n.3), the only remaining argument this Court must address is whether
10 Section 702 of the APA, 5 U.S.C. § 702, waives the United States’ sovereign immunity for
11 violations of the right to privacy created by the California Constitution. *See* Pls.’ US Opp’n at 18;
12 US Reply at 12-14. It does not:

13 [D]espite the broad language of the [APA], it is well settled that the
14 APA does not independently confer jurisdiction on the district
15 courts. . . . Rather, the APA prescribes standards for judicial review
16 of an agency action, once jurisdiction is otherwise established. . . .
17 Nonetheless, . . . a federal court has jurisdiction pursuant to 28
18 U.S.C. § 1331 over challenges to federal agency action as claims
arising under federal law, unless a statute expressly precludes
review. . . . Thus, while the APA does not confer a district court
with jurisdiction, it does provide a waiver of sovereign immunity in
suits seeking judicial review of a federal agency action under §
1331.

19 *Gallo Cattle Co. v. U.S. Dep’t of Ag.*, 159 F.3d 1194, 1198 (9th Cir. 1998); *see also United States*
20 *v. Park Place Ass’n, Ltd*, 563 F.3d 907, 929 n.15 (9th Cir. 2009) (“Section 702 waives sovereign
21 immunity; however, it does not confer federal jurisdiction.” (citing cases)).

22 Donor No. 1 is not seeking review of a federal agency action under Section 1331; Donor
23 No. 1 instead seeks an order declaring that Heath and Smith violated Donor No. 1’s rights arising
24 under the California Constitution. Donor No. 1 does not identify any authority supporting the
25 contention that the APA divests the United States of sovereign immunity in connection with such
26 state law claims. *See* Pls.’ US Opp’n at 18 (relying on *Solida v. McKelvey*, 820 F.3d 1090, 1096
27 (9th Cir. 2016) (“*McKelvey*”) & *Citizens Legal Enforcement & Restoration v. Connor*, 762 F.
28 Supp. 2d 1214, 1232 (S.D. Cal. 2011)). The petitioner in *McKelvey* asserted claims based on

1 several violations of the U.S. Constitution and also under the Federal Tort Claims Act. 820 F.3d
2 at 1092. In finding the trial court should have dismissed the individual capacity claim against one
3 of the defendants, the Ninth Circuit observed the individual defendant had no authority to provide
4 the equitable relief the petitioner sought, but that the petitioner “may yet be able to obtain” this
5 relief under Section 702 of the APA. *Id.* at 1096. The Ninth Circuit quoted Section 702, but did
6 not suggest in any way that Section 702 applied in such a manner as to create a waiver of the
7 United States’ sovereign immunity with respect to state law claims—both claims at issue in
8 *McKelvey* raised a federal question. Donor No. 1 cites *Citizens Legal* for the proposition that “the
9 APA can be used to hold the federal government accountable for violations of California
10 constitutional requirements.” Pls.’ US Opp’n at 18. But Donor No. 1 fails to acknowledge the
11 *Citizens Legal* Court found the APA could be used to enforce the California Constitution because
12 the federal Reclamation Act specifically imposes upon federal agencies “a mandatory and
13 continuing obligation” to comply with state laws governing the management of water. 762 F.
14 Supp. 2d at 1228, 1231 (citing 43 U.S.C. § 383¹). Thus, while the plaintiff in *Citizens Legal* sued
15 the federal government under Section 706(1) of the APA to enforce a duty imposed by the
16 California Constitution, a federal statute required the government to follow that particular section
17 of the California Constitution. Donor No. 1 has identified no federal statute requiring the United
18 States to adhere to Article I section 1 of the California Constitution.

19 During the September 28, 2017 hearing, defense counsel argued there was no jurisdictional
20 basis for pursuing this declaratory relief claim: “I don’t know what their jurisdictional basis to do
21 that is. I’m not sure how they sue the government through a California state tort to seek
22 declaratory relief, and I’ve yet to see in this amended complaint what the jurisdictional hook is for
23 that.” Sept. 28, 2017 FTR at 10:52. The Court asked counsel for Donor No. 1 whether he had an

24 _____
25 ¹ “Nothing in this Act shall be construed as affecting or intended to affect or to in any way
26 interfere with the laws of any State or Territory relating to the control, appropriation, use, or
27 distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary
28 of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such
laws, and nothing herein shall in any way affect any right of any State or of the Federal
Government or of any landowner, appropriator, or user of water in, to, or from any interstate
stream or the waters thereof.” 43 U.S.C. § 383.

1 answer, and noted the Court was “having somewhat the same difficulty” finding jurisdictional
2 grounds to consider this claim. *Id.* Counsel for Donor No. 1 responded, “I think that’s probably
3 fair, your Honor.” *Id.* at 10:53.

4 Because the United States has not waived its sovereign immunity, including as it extends
5 to Heath and Smith acting in their official capacities, the Court GRANTS the Motion to Dismiss
6 the Privacy Right claim. As Donor No. 1 cannot cure this jurisdictional defect, the dismissal shall
7 be without leave to amend.

8 DISCUSSION—PERSONAL JURISDICTION

9 Heath and Smith argue they did not purposefully direct their activities at California, and
10 thus are not subject to specific personal jurisdiction in their individual capacities here. *See ID*
11 *Mot.* at 19-25.²

12 “Due process requires that a defendant be haled into court in a forum State based on his
13 own affiliation with the State, not based on the ‘random, fortuitous, or attenuated’ contacts he
14 makes by interacting with other persons affiliated with the State.” *Walden v. Fiore*, 134 S. Ct.
15 1115, 1123 (2014) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).³ The
16 existence of personal jurisdiction is based on a defendant’s contacts with the forum state itself,
17 rather than simply on that defendant’s contact with a plaintiff who resides in a forum, or on the
18 defendant’s understanding that his conduct would affect persons in the forum. *Id.* at 1122-26 (no
19 personal jurisdiction in Nevada over out-of-state defendant where defendant “never traveled to,
20 conducted activities within, contacted anyone in, or sent anything or anyone to Nevada”).
21 Plaintiffs bear the burden of establishing that Heath and Smith “purposefully directed” their
22 activities towards California and that the claim arises out of or relates to the Individual

23 _____
24 ² There appears to be no dispute that there is no basis for exercising general jurisdiction over the
25 Individual Defendants, who are both residents of Texas and are not alleged to have extensive
contacts with California. *See* FAC.

26 ³ Generally, personal jurisdiction exists if it is permitted by the forum state’s long-arm statute and
27 the exercise of personal jurisdiction would not violate federal due process. *Pebble Beach Co. v.*
28 *Caddy*, 453 F.3d 1151, 1154-44 (9th Cir. 2006). Because California’s long-arm jurisdictional
statute is coextensive with federal due process requirements, the analysis under California and
federal due process is the same. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800-01
(9th Cir. 2004).

1 Defendants’ forum-related activities. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797,
2 802 (9th Cir. 2004). If they fail to meet that burden, personal jurisdiction is not established. *Id.*
3 To establish purposeful direction, Plaintiffs must show the Individual Defendants “whose only
4 contact with [California] is the purposeful direction of a foreign act having effect in the forum
5 state . . . (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm
6 that the defendant knows is likely to be suffered in the forum state.” *Id.* at 803 (applying *Calder v.*
7 *Jones*, 465 U.S. 783, 803 (1984)).

8 In determining personal jurisdiction, the Court must evaluate each defendant’s contacts
9 with California individually, even when defendants are alleged to have acted in concert. *Calder*,
10 465 U.S. at 790; *see also CenterPoint Energy, Inc. v. Superior Court*, 157 Cal. App. 4th 1101,
11 1118 (2007) (“Where conspiracy is alleged, an exercise of personal jurisdiction must be based on
12 forum-related acts that were personally committed by each nonresident defendant.”).

13 Plaintiffs allege WePay is located in Palo Alto, California, and that “Defendants” expressly
14 aimed at, and caused harm in, California when they “conspired to draft and serve” the subpoena to
15 WePay and caused WePay to disclose information about California residents such as Donor No. 1.
16 *See* FAC ¶¶ 6, 30. The subpoena is signed by Heath, addressed to WePay in California, and
17 directs WePay to appear in a Texas court to testify in the *Brown* criminal action, and to bring
18 records; WePay’s response to the subpoena is addressed to Smith in Texas. *See* Subpoena; Resp.
19 The FAC alleges no facts showing Donor No. 1’s “information and belief” that Smith was
20 involved in the drafting or serving of the subpoena to WePay is “based upon information that
21 makes the inference of culpability plausible.” *Soo Park v. Thompson*, 851 F.3d 910, 928 (9th Cir.
22 2017) (internal quotation marks and citation omitted). Absent such facts, the allegations
23 concerning Smith’s involvement with the subpoena are merely conclusory. Thus, the only
24 “intentional act” upon which Donor No. 1 relies is Heath sending the Subpoena to WePay, a
25 company located in California. The FAC also alleges no facts showing Heath or Smith knew or
26 should have known that the donors were California residents. *See* FAC.

27 Moreover, the FAC does not allege any facts showing Smith committed any intentional act
28 towards California: he did not sign the subpoena, and the FAC does not plausibly allege he drafted

1 or sent the subpoena to WePay. The Court also finds that the FAC does not allege any facts
2 sufficient to show Smith or Heath knew any harm was likely to be suffered in California because it
3 does not allege they knew or should have known any of the donors whose identity they sought
4 were California residents. The fact California is the most populous state (Pls.' ID Opp'n at 24) is
5 insufficient to show the Individual Defendants should have known that California residents were
6 donating funds to a support an individual being tried in Texas. But without more, issuing a
7 subpoena to a third party that happens to be located in California is not sufficient to establish
8 personal jurisdiction. *See Walden*, 134 S. Ct. at 1122-23 (defendant's conduct with forum, not
9 "random, fortuitous, or attenuated contacts" with a plaintiff or third party, justifies personal
10 jurisdiction in forum); *Klayman v. Deluca*, 2015 WL 427907, at *4 (N.D. Cal. Jan. 30, 2015) (no
11 personal jurisdiction in California based on serving a subpoena to third party in California because
12 no indication defendant expressly aimed act towards California: "Serving a subpoena alone would
13 not have a devastating impact upon Plaintiff in California since Plaintiff neither lives nor works in
14 California. . .").

15 Finally, the Court does not have personal jurisdiction over the Individual Defendants
16 simply because they are also sued in their official capacity. *See Stafford v. Briggs*, 444 U.S. 527,
17 544 (1980); *Gilbert v. DaGrossa*, 756 F.2d 1455, 1460-61 (9th Cir. 1985) (venue statute "does not
18 provide a district court with venue and nationwide in personam jurisdiction in a personal damage
19 action against a United States official in his individual capacity for allegedly illegal and
20 unconstitutional acts committed during the course of employment"). Plaintiffs argue "[o]nly one
21 basis for personal jurisdiction is required." Pls.' ID Opp'n at 22 (quoting *Graphics Props.*
22 *Holdings v. Asus Comput. Int'l, Inc.*, 964 F. Supp. 2d 320, 326 (D. Del. 2013)). Plaintiffs
23 misrepresent the applicability of *Graphics Properties*: that case has nothing to do with establishing
24 personal jurisdiction over defendants sued in both their individual and personal capacities simply
25 because the defendants are United States officials. *See* 960 F. Supp. 2d at 326 (listing five
26 potential bases for personal jurisdiction under Delaware Long Arm statute, "stream of commerce"
27 theory, and pendent jurisdiction, and analyzing why jurisdiction is proper under at least one of
28 these theories).

1 For these reasons, the Court GRANTS Heath and Smith’s Motion to Dismiss claims stated
2 against them in their individual capacities based on lack of personal jurisdiction. During oral
3 argument, counsel for Plaintiffs did not suggest the pleadings could be amended to state facts
4 sufficient to show personal jurisdiction existed over the Individual Defendants in their individual
5 capacities. *See* Sept. 28, 2017 FTR at 10:50-51 (“Is there any point in me granting leave to amend
6 to allow you to state additional allegations?” “No your honor, the way we read *Walden* is that it’s
7 about the Defendant’s contact with the forum. By sending a subpoena to California, they invoked
8 California law.”). Nor do Plaintiffs request an opportunity to conduct jurisdictional discovery.
9 The Motion accordingly is GRANTED, without leave to amend.

10 **DISCUSSION – FAILURE TO STATE A CLAIM**

11 **A. Legal Standard**

12 Rule 8(a) requires that a complaint contain a “short and plain statement of the claim
13 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A complaint must therefore
14 provide a defendant with “fair notice” of the claims against it and the grounds for relief. *Bell Atl.*
15 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations and citation omitted).

16 A court may dismiss a complaint under Rule 12(b)(6) when it does not contain enough
17 facts to state a claim to relief that is plausible on its face. *Id.* at 570. “A claim has facial
18 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
19 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662,
20 678 (2009). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for
21 more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550
22 U.S. at 557). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need
23 detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to
24 relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a
25 cause of action will not do. Factual allegations must be enough to raise a right to relief above the
26 speculative level.” *Twombly*, 550 U.S. at 555 (internal citations and parentheticals omitted).

27 In considering a motion to dismiss, a court must accept all of the plaintiff’s allegations as
28 true and construe them in the light most favorable to the plaintiff. *Id.* at 550; *Erickson v. Pardus*,

1 551 U.S. 89, 93-94 (2007); *Vasquez v. L.A. Cty.*, 487 F.3d 1246, 1249 (9th Cir. 2007). In addition,
2 courts may consider documents attached to the complaint. *Parks Sch. of Bus., Inc. v. Symington*,
3 51 F.3d 1480, 1484 (9th Cir. 1995) (citation omitted).

4 If a Rule 12(b)(6) motion is granted, the “court should grant leave to amend even if no
5 request to amend the pleading was made, unless it determines that the pleading could not possibly
6 be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en
7 banc) (internal quotation marks and citations omitted). However, the Court may deny leave to
8 amend for a number of reasons, including “undue delay, bad faith or dilatory motive on the part of
9 the movant, repeated failure to cure deficiencies by amendments previously allowed, undue
10 prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of
11 amendment.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (citing
12 *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

13 **B. SCA**

14 The United States argues Plaintiffs fail to state a claim under the SCA. For the most part,
15 the United States asks the Court to find the factual details behind Plaintiffs’ allegations do not
16 meet the requirements of the SCA. This is improper on a Rule 12(b)(6) motion to dismiss.

17 1. Applicable Law

18 Subject to certain exceptions, the SCA prohibits:

19 (1) a person or entity providing an electronic communication service
20 to the public [to] knowingly divulge to any person or entity the
21 contents of a communication while in electronic storage by that
22 service; and

22 (2) a person or entity providing remote computing service to the
23 public [to] knowingly divulge to any person or entity the contents of
24 any communication which is carried or maintained on that service—

24 (A) on behalf of, and received by means of electronic
25 transmission from (or created by means of computer processing of
26 communications received by means of electronic transmission
27 from), a subscriber or customer of such service;

26 (B) solely for the purpose of providing storage or computer
27 processing services to such subscriber or customer, if the provider is
28 not authorized to access the contents of any such communications
for purposes of providing any services other than storage or
computer processing; and

1 (3) a provider of remote computing service or electronic
2 communication service to the public [to] knowingly divulge a record
3 or other information pertaining to a subscriber to or customer of
such service (not including the contents of communications covered
by paragraph (1) or (2)) to any governmental entity.

4 18 U.S.C. § 2702(a); *see also Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1022 (N.D. Cal.
5 2012) (“The SCA only creates liability for a provider that is an [electronic communication service
6 (‘ECS’) or remote computing service (‘RCS’)]. A provider of email services is an ECS. . . . [T]he
7 term ‘remote computing service’ means ‘the provision to the public of computer storage or
8 processing services by means of an electronic communications system [and] refers to ‘the
9 processing or storage of data by an offsite third party.’”).

10 Depending on whether the information is stored in an ECS or RCS and the length of time
11 the information has been in storage, a governmental entity may compel disclosure of the contents
12 of an electronic communication by obtaining a warrant or using a subpoena after providing notice
13 to the consumer. 18 U.S.C. § 2703(a)-(b). A governmental entity may use an administrative
14 subpoena without prior notice to the consumer in order to obtain disclosure of “records” such as
15 the consumer’s name, address, telephone connection records; the length of service and type of
16 service utilized; the subscriber number or identity; and the means and source of payment for the
17 service. *Id.* § 2703(c); *see also In re Zynga Privacy Litig.*, 750 F.3d 1098, 1104 (9th Cir. 2014)
18 (“[T]he [SCA] generally precludes a covered entity from disclosing the contents of a
19 communication, but permits disclosure of record information like the name, address, or client ID
20 number of the entity’s customers in certain circumstances. . . .”). “[C]ontents’ refers to the
21 intended message conveyed by the communication, and does not include record information
22 regarding the characteristics of the message that is generated in the course of the communication. .
23 . . .” *Id.* at 1106. For example, “contents” does not include header information showing a user’s
24 Facebook ID along with the webpage address the user viewed. *Id.*

25 “Any person who is aggrieved by any willful violation” of the SCA “may commence an
26 action . . . against the United States to recover money damages” and may recover “(1) actual
27 damages, but not less than \$10,000, whichever amount is greater; and (2) litigation costs,
28 reasonably incurred.” 18 U.S.C. § 2712(a); *cf.* 18 U.S.C. § 2707 (damages for violation of SCA

1 from any person or entity “other than the United States” include “actual damages suffered by the
2 plaintiff and any profits made by violator . . . but in no case shall a person entitled to recover
3 receive less than the sum of \$1,000”).

4 2. Analysis

5 The United States moves to dismiss the SCA claim on numerous grounds. The Court
6 addresses each in turn.

7 i. *ECS or RCS*

8 The FAC alleges WePay provided either an ECS or RCS. FAC ¶ 67. More specifically,
9 the FAC alleges Gallagher used WePay to communicate electronically with potential and actual
10 donors and process donations by electronic means; that WePay’s “integrated processing allowed
11 Mr. Gallagher to track and thank donors”; and that Gallagher used WePay’s service to send thank
12 you notes to each donor. *Id.* ¶ 66; *id.* ¶ 25 (“WePay helped users like Mr. Gallagher accept
13 donations and publicize their causes. . . . It also provided a record keeping service that helped
14 users thank donors.”). Anonymous donors used WePay’s services to donate money and send
15 messages of support to Mr. Brown. *Id.* ¶ 68; *id.* ¶ 26 (donors provided WePay with their bank
16 account or credit card information; WePay offered donors the option to include a message; many
17 donors sent Mr. Brown messages of support). The donations and messages of support ostensibly
18 encompass the contents of electronic communications as defined by the SCA. *Id.* ¶ 69. While the
19 FAC does not allege Donor No. 1 sent a message of support to Mr. Brown, it does allege he used
20 WePay to send a donation to Mr. Brown’s legal fund (*id.* ¶¶ 12, 14, 26), which was processed
21 electronically by WePay; as a donor, he also would have received a thank you note via WePay
22 from Gallagher (*id.* ¶ 66). The FAC thus alleges that WePay functions to provide, inter alia, web-
23 based messaging services.

24 The United States nonetheless argues WePay is neither an ECS nor an RCS. *See* US Mot.
25 at 8-12. The United States contends WePay is not an ECS because it is a user of electronic
26 services, not a provider. *Id.* at 10 (“WePay’s customers do not depend on WePay’s website for
27 their ‘ability to send or receive electronic communications,’ . . . they get that capability from their
28 own ISPs.”). First, these facts are not before the Court on a motion to dismiss. Second, the

1 United States seeks to impose too narrow a definition of ECS, which is defined as “any service
2 which provides to users thereof the ability to send or receive . . . electronic communications.” 18
3 U.S.C. § 2510(15). “Electronic communications” in turn include “any transfer of signs, signals,
4 writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a
5 wire, radio, electromagnetic, photoelectronic, or photooptical system that affects interstate or
6 foreign commerce[.]” 18 U.S.C. § 2510(12). None of the cases cited by the United States suggest
7 only an ISP can be a “provider” of electronic communications under the SCA, or that users must
8 be completely dependent on a website for their ability to send or receive communications. *See US*
9 *Mot.* at 8-10. That is not the law. For example, social networking sites can be considered ECS
10 providers if they offer private messaging functionality or allow users to post messages on another
11 user’s profile page. *See, e.g., Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 981-82 &
12 n.35 (C.D. Cal. 2010) (rejecting characterization of such social networking sites as “services
13 which utilize ECS to permit networking” and reasoning that the “goal” of these sites is “not to buy
14 or sell books, gold, or travel services[, but] to provide web-based email services, thus enabling
15 communication[, or] an electronic venue to communicate, either one-to-one by private messaging
16 or with a large group of friends through wall postings and comments.”).

17 The United States also argues that whether WePay acted as an ECS with respect to the
18 messages is irrelevant because WePay did not disclose donor messages in its response—it only
19 disclosed transaction history. *US Mot.* at 10-11. The United States may reassert this argument on
20 summary judgment, but once again, at this stage in the litigation, that fact is not before the Court.
21 *See infra.* The FAC therefore sufficiently alleges WePay is an ECS.

22 The FAC also alleges WePay is a company that provided sophisticated processing services
23 to donors by electronic means. FAC ¶¶ 66-67. An RCS is defined as “the provision to the public
24 of computer storage or processing services by means of an electronic communications system.”
25 18 U.S.C. § 2711(2). The United States again asks the Court to engage in fact-finding at this stage
26 to find that the type of processing services WePay offers do not qualify it as an RCS. This
27 argument may be raised again at summary judgment, but the Court will not consider it now.
28

1 ii. *Electronic storage*

2 The United States next argues the information they subpoenaed was not “in electronic
3 storage.” US Mot. at 14-16. WePay allowed Gallagher to manually review donations after they
4 occurred; on information and belief, the FAC alleges WePay therefore used its servers to store
5 electronic information for back-up purposes, and accordingly, the information was in “electronic
6 storage” within the meaning of the SCA. FAC ¶ 71; *see also id.* ¶ 53 (WePay maintained
7 information about donors, donations, and text of messages sent by donors). Under Ninth Circuit
8 precedent, messages that remain on WePay’s server after delivery “fit comfortably within” the
9 definition of “any storage of [electronic] communication by an electronic communication service
10 for purposes of backup protection of such communication.” *Theofel v. Farey-Jones*, 359 F.3d
11 1066, 1075 (9th Cir. 2004). Defendants may be able to establish, through discovery, that WePay
12 did not mean to allow users to retrieve information (US Reply at 7), but this evidence is not
13 presently before the Court. The FAC sufficiently alleges the information subpoenaed was in
14 electronic storage.

15 iii. *Content of Communications*

16 Defendants subpoenaed “any and all information regarding the campaign, including
17 sensitive personal and financial information of the donors and the complete transaction history. . .
18 The WePay Subpoena’s broad scope also encompassed the messages the donors sent to Mr.
19 Brown.” FAC ¶ 32; *see also* Subpoena. WePay maintained the addresses, phone numbers, email
20 addresses, and the text of messages sent by donors. FAC ¶ 53.

21 Whatever the scope of the Subpoena is alleged to have been, the United States argues
22 WePay did not disclose the “content” of any communications. *See* US Mot. at 12-14. It argues
23 WePay only disclosed “record” information such as the name of the donor, the amount and date of
24 the donation, and how the donation was made. *Id.* at 13 (citing Resp.). But this argument would
25 require the Court to evaluate the scope of WePay’s response and conclude whether the extra-
26 pleading materials Defendants have inserted into these proceedings represent WePay’s final
27 production. The Court will not take such steps when ruling on a motion to dismiss.
28

1 iv. *Knowingly and Intentionally*

2 The United States argues Plaintiffs do not plausibly allege willful conduct by Heath and
 3 Smith. *See* US Mot. at 16-17. The FAC alleges in considerable detail why the United States’
 4 proffered explanation for the WePay subpoena is pretextual, and that the WePay subpoena was
 5 designed to identify and surveil Mr. Brown’s supporters and chill their freedom of expression.
 6 *See, e.g.*, FAC ¶ 53 (the United States “knowingly and intentionally accessed” the contents of
 7 electronic communications via the WePay subpoena, and the violation was willful within the
 8 meaning of the SCA); *id.* ¶ 70 (Defendants not authorized to obtain information); *id.* ¶ 72 (each
 9 Defendant acted willfully, intentionally, and knowingly in accessing the information); *id.* ¶ 3
 10 (information Defendants requested from WePay was “completely irrelevant to the charges levied
 11 against the journalist” but “was part of a larger scheme by Defendants to unlawfully surveil the
 12 donors in violation of the First Amendment”); *id.* ¶ 29 (upon learning of the campaign, Heath and
 13 Smith “began efforts to identify and surveil Mr. Brown’s financial supporters”); *id.* ¶ 30 (the
 14 WePay subpoena “was part of a larger scheme to unlawfully identify, target, and surveil
 15 supporters of Mr. Brown . . . Donor No. 1 believes this scheme was initiated to harass the donors,
 16 to retaliate against them . . . and to chill the future expression of such protected conduct”); *id.* ¶ 33
 17 (the “claimed purpose of using the information produced in response to the WePay Subpoena at
 18 Barrett Brown’s trial was purely pretextual. The true goal of the WePay Subpoena, rather, was to
 19 facilitate the unlawful surveillance of the anonymous donors to the crowd-funding campaign.”);
 20 *id.* ¶¶ 47, 55 (because subpoena sought information that was irrelevant to the charges brought
 21 against Mr. Brown, and because Defendants could have obtained the information they contend
 22 they needed (i.e., the total funds raised for Mr. Brown’s defense) by looking at the public donation
 23 page, the subpoena was sent to retaliate against exercise of free speech rights and deter further
 24 expression). The FAC plausibly alleges that Defendants issued the subpoena willfully in order to
 25 obtain information for unlawful purposes. Defendants may be able to defeat these allegations at
 26 the summary judgment stage, but the FAC sufficiently pleads this element of the claim.

27 v. *Damages*

28 The United States argues Plaintiffs have not alleged they suffered actual damages, and thus

1 do not state a claim. US Mot. at 18-19. Plaintiffs argue they do not need to allege actual damages
2 to establish a violation of the SCA under 18 U.S.C. § 2712, but that if they do, the allegation their
3 civil rights were violated is sufficient. Pls.’ US Opp’n at 10.

4 Neither party has directed the Court to any opinions analyzing the need to prove actual
5 damages under Section 2712. In its opening brief, the United States relies upon *Ruiz v. Gap, Inc.*,
6 622 F. Supp. 2d 908, 917 (N.D. Cal. 2009) (US Mot. at 19), but that case addresses the need to
7 allege actual damages on a breach of contract claim, not the SCA. *Doe v. Chao*, 540 U.S. 614,
8 620-25 (2004), although not squarely on point, is more analogous. In *Doe*, the plaintiff
9 established the Labor Department violated the Privacy Act, 5 U.S.C. § 552a(g)(1)(D), by
10 disseminating his social security number, and the trial court awarded him the minimum statutory
11 damages based upon his allegation of distress about the disclosure. 540 U.S. at 615-18. The
12 Fourth Circuit reversed, finding the statutory minimum was only available upon a showing of
13 actual damages, and that the plaintiff had not created a triable issue of fact as to his damages on
14 summary judgment. *Id.* The plaintiff had offered no evidence corroborating his emotional
15 distress, such as evidence of physical symptoms, medical treatment, loss of income, or impact on
16 his behavior—“the only indication of emotional affliction was Doe’s conclusory allegations that
17 he was torn . . . all to pieces and greatly concerned and worried [about the] potentially devastating
18 consequences” of the disclosure. *Id.* at 617-18 (internal quotation marks omitted). The Supreme
19 Court affirmed, holding plaintiffs must prove actual damages to recover statutory damages under
20 the Privacy Act, and that his conclusory allegations were insufficient to do so. *Id.* The Supreme
21 Court did “not suggest that out-of-pocket expenses are necessary” to recover the statutory
22 minimum; only that such expenses “suffice to qualify under any view of actual damages.” *Id.* at
23 627 n.12.

24 Here, the FAC alleges the unlawful surveillance scheme has had its intended effect to chill
25 First Amendment activity (FAC ¶ 30), and “caused the donors actual damages in the form of a
26 cognizable First Amendment injury – the veil of their anonymity was unlawfully pierced” (*id.* ¶
27 69). If Plaintiffs must plead actual damages to state a claim for violating Section 2712 of the
28

1 SCA, the Court finds these allegations are sufficient to do so.⁴ Whether Plaintiffs can offer
2 evidence of these actual damages on summary judgment or at trial is not an issue to be resolved on
3 a motion to dismiss.

4 c. Article III Standing

5 Defendants argue Gallagher lacks Article III standing to pursue an SCA claim against the
6 United States because he has not alleged a concrete injury traceable to the challenged action. *See*
7 US Mot. at 19-20. A plaintiff suing under the SCA “demonstrates an injury sufficient to satisfy
8 Article III when bringing a claim under a statute that prohibits the defendant’s conduct and grants
9 persons in the plaintiff’s position a right to judicial relief.” *In re Zynga*, 750 F.3d at 1105 n.5; *see*
10 *also Theofel*, 359 F.3d at 1074 (plaintiff whose information was wrongfully disclosed has standing
11 under SCA). Gallagher replies he has standing by virtue of the fact he used WePay to send thank
12 you notes to each donor, and that the WePay Subpoena requested production of these messages.
13 Pl.’s US Opp’n at 10 (citing FAC ¶¶ 3, 32, 66). The United States responds the argument fails
14 because WePay did not produce the messages. US Reply at 11. But the scope of WePay’s
15 production is not before the Court, and the FAC alleges the Subpoena requested production of the
16 messages. FAC ¶ 32. On a motion to dismiss, these allegations suffice to confer Article III
17 standing on Gallagher because they show Gallagher suffered concrete harm. *See Spokeo, Inc. v.*
18 *Robins*, 136 S.Ct. 1540, 1549-50 (2016) (“Article III standing requires a concrete injury even in
19

20 ⁴ Whereas Section 2712 provides a cause of action for the United States’ violations of the SCA,
21 Section 2707 provides a cause of action for violations of the SCA by a person or entity “other than
22 the United States.” Both sections utilize the same “any person aggrieved” language when
23 discussing entitlement to statutory damages. Courts in the Ninth Circuit have held plaintiffs
24 aggrieved by a violation of Section 2707(c) can obtain minimum statutory damages without
25 proving actual damages. *See Aguiar v. MySpace LLC*, 2017 WL 1856229, at *9 (C.D. Cal. May 5,
26 2017) (citing *In re Haw. Airlines, Inc.*, 355 B.R. 225, 230-31 (D. Haw. 2006)); *Chavan v. Cohen*,
27 2015 WL 4077323, at *4 (W.D. Wash. July 6, 2015); *Hahn v. Rothman*, 2010 WL 11507395, at
28 *4 (C.D. Cal. Oct. 8, 2010) (by specifying that “any person aggrieved may recover relief . . . [and]
in no case shall a person entitled to recover receive less than the sum of \$1,000” Section 2707(c)
does not require plaintiffs to prove actual damages); *see also Doe*, 540 U.S. at 640 (noting that
SCA Section 2707(c) has “been understood to permit recovery of the \$1,000 statutory minimum
despite the absence of proven actual damages.” (J. Ginsburg, dissenting)). Other circuits disagree.
See Van Alstyne v. Elec. Scriptorium, Ltd., 560 F.3d 199, 204-08 (4th Cir. 2009) (statutory
damages cannot be awarded absent proof of actual damages); *Vista Mktg., LLC v. Burkett*, 812
F.3d 954, 965-67 (11th Cir. 2016) (same).

1 the context of a statutory violation”); *Matera v. Google Inc.*, 2016 WL 5339806, at *8-14 (N.D.
2 Cal. Sept. 23, 2016) (applying *Spokeo* standing requirements to standing to pursue claim for
3 violation of Wiretap Act and concluding that alleged violations of statutory rights under the
4 Wiretap Act constitute concrete injury in fact for purposes of standing and finding the “conclusion
5 is supported by the historical practice of course recognizing that the unauthorized inception of
6 communication constitutes cognizable injury.”).

7 Defendants also argue Donor No. 1 lacks Article III standing to pursue the SCA claim
8 because he filed his administrative claim anonymously. US Mot. at 20, 23-24; FAC, Ex. B (Donor
9 No. 1’s FTCA claim). They argue an FTCA claim must contain a written statement sufficiently
10 describing the injury to enable the agency to begin its own investigation and a sum certain
11 damages claim, and that Donor No. 1’s claim is defective because it did not “adequately identify
12 the claimant.” *Id.* at 24-25 (citing cases). Defendants argue the failure to identify Donor No. 1
13 “precluded the agency from investigating such critical facts as whether Donor No. 1 actually
14 donated to the Fund or, if so, whether his donation was made after the subpoena was issued. . . .
15 [and] whether or to what extent he was harmed.” US Mot. at 25. None of the cases Defendants
16 cite actually address the issue presented here: whether a claimant may proceed anonymously and
17 still satisfy the procedural requirements of the FTCA. The Ninth Circuit has interpreted the “plain
18 language of” the FTCA presentation requirements as requiring “the claimant or his legal
19 representative to file (1) a written statement sufficiently describing the injury to enable the agency
20 to begin its own investigation, and (2) a sum certain damages claim.” *Cadwalder v. United States*,
21 45 F.3d 297, 301 (9th Cir. 1995) (internal quotation marks and citations omitted). Donor No. 1’s
22 FTCA claim, attached as Exhibit B to the Complaint, contains a written statement sufficiently
23 describing the injury to enable the agency to begin its own investigation and a sum certain
24 damages claim.⁵ Absent case law directly on point, Defendants’ argument that the information

25

26 ⁵ Defendants argued the claim failed to state a sum certain because the FAC seeks damages for
27 both the SCA and also the Privacy Act claim. US Mot. at 27. As noted earlier, Plaintiffs have
28 clarified they are not seeking damages in connection with the Privacy Act claim. *See also* FAC,
Prayer for Relief, Third Cause of Action. Defendants appear to have abandoned this argument on
reply. *See* US Reply at 11.

1 was insufficient to investigate the claim is insufficient to warrant dismissal on this basis.

2 d. Summary

3 The FAC sufficiently alleges the United States violated the SCA, and that Plaintiffs have
4 Article III standing to bring this claim. The Motion to Dismiss this claim is DENIED.

5 **C. First Amendment**

6 Donor No. 1 asserts this claim against Heath and Smith in their individual and official
7 capacities and seeks only equitable remedies against them. See FAC ¶¶ 7-8, 15-16, 43-55.

8 1. Individual Capacity⁶

9 Donor No. 1 brings these claims against Heath and Smith in their individual capacity under
10 *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971),
11 and brings the official capacity claims under the APA. FAC ¶¶ 7-8. Donor No. 1 asks the Court
12 to issue declaratory relief and award costs and fees; in addition, for the official capacity claim
13 only, Donor No. 1 asks the Court to direct any agencies or entities that received donor information
14 to destroy it, and to enjoin Defendants from engaging in similarly unlawful surveillance. Prayer
15 for Relief, First Cause of Action B-C. Defendants argue Donor No. 1 does not state a *Bivens*
16 claim against Heath and Smith and cannot state a claim against them in their official capacity.

17 Plaintiffs can obtain money damages for constitutional violations by federal officers
18 through the remedy created by *Bivens*, but “relief under *Bivens* does not encompass injunctive and
19 declaratory relief where . . . the equitable relief sought requires official government action.”
20 *McKelvey*, 820 F.3d at 1093-94. “*Bivens* is both inappropriate and unnecessary for claims seeking
21 solely equitable relief against actions by the federal government. By definition, *Bivens* suits are
22 individual capacity suits and thus cannot enjoin government action.” *Id.* at 1094; *see also*
23 *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (“core purpose” of *Bivens* is to
24 “deter[] individual officers from engaging in constitutional wrongdoing” – it is not a proper
25 vehicle for altering an entity’s policy).

26
27 _____
28 ⁶ The Court dismissed Donor No. 1’s claims against Heath and Smith in their individual capacities
because the FAC did not establish a basis for exercising personal jurisdiction over these
defendants. The Court also addresses Defendants’ second argument.

1 Here, Donor No. 1 contends the equitable relief sought from Heath and Smith in their
 2 individual capacities does not require official government action. See Prayer for Relief (seeking
 3 declaratory relief and reasonable attorneys’ fees against the Individual Defendants generally, but
 4 specifying equitable relief requiring government action is limited to “the official capacity claim
 5 only”). Donor No. 1 argues the FAC accordingly does not conflict with *McKelvey*. Pls.’ ID
 6 Opp’n at 21. This is a distinction without a difference: *McKelvey* and the cases it analyzes stands
 7 for the proposition a *Bivens* action against defendants in their individual capacity can only lie if it
 8 seeks money damages. See *McKelvey*, 820 F.3d at 1093 (“The only remedy available in a *Bivens*
 9 action is an award for monetary damages from defendants in their individual capacities.” (quoting
 10 and joining *Higazy v. Templeton*, 505 F.3d 161, 169 (2d Cir. 2007))); *Winifred Jiau v. Tews*, 2017
 11 WL 3491958, at *4 (N.D. Cal. Aug. 15, 2017) (“[T]he only available relief in a *Bivens* action is an
 12 award of money damages for any injuries caused by a defendant acting in his or her individual
 13 capacity) (citing *McKelvey*)); see also *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 967 n.4 (9th Cir.
 14 2009) (“This court . . . has held that *Bivens* authorizes First Amendment damages claims.”).

15 2. Official Capacity

16 Donor No. 1 also asserts a First Amendment claim against Heath and Smith in their official
 17 capacities, asserting jurisdiction exists through Section 702 of the APA.⁷ While Defendants
 18 conceded at oral argument that Section 702 waives the sovereign immunity of the United States
 19 (and its officers) in federal question cases, they argue the claim nonetheless must be dismissed
 20 because it fails to plausibly allege a First Amendment violation and because Donor No. 1 lacks
 21 standing to assert it. See ID Mot. at 9-19; ID Reply at 1-2; Sept. 28, 2017 FTR at 10:56 (standing
 22 argument).

23
 24
 25 ⁷ To the extent Donor No. 1 sues Heath and Smith in their official capacities, any *Bivens* claim
 26 would need to be dismissed with prejudice. See *McKelvey*, 820 F.3d at 1095 (“An action against
 27 an officer, operating in his or her official capacity as a United States agent, operates as a claim
 28 against the United States”); *Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1987) (“[A]
Bivens action can be maintained against a defendant in his or her individual capacity only, and not
 in his or her official capacity”).

1 a. Sufficiency of Allegations

2 The Individual Defendants argue the FAC fails to state a First Amendment claim because,
3 in light of the “obvious alternative explanation for the WePay subpoena[.]” it fails to plausibly
4 allege retaliation and fails to allege facts showing any First Amendment interests outweighs the
5 legitimate purpose of serving the subpoena. ID Mot. at 10-19.

6 The FAC alleges that in serving the WePay Subpoena, the Individual Defendants did not
7 seek any evidence of a connection to the crimes with which Mr. Brown was charged, and the
8 Subpoena’s true purpose was to gather information regarding donors to Mr. Brown’s campaign.
9 FAC ¶ 44. Defendants’ proffered purpose for serving the Subpoena—that they needed to
10 determine whether Mr. Brown could afford his own attorney—was pretextual. *Id.* ¶ 46. Mr.
11 Brown was not charged with withholding funds from the public defender, and the whole purpose
12 of the WePay campaign was to hire private counsel to relieve the public defender’s office of the
13 obligation to continue representing him. *Id.* Defendants did not need to use a subpoena to
14 discover this information, as the amounts raised by the campaign were publicly available;
15 moreover, the Subpoena sought the identity of donors, not just the amounts donated. *Id.* ¶¶ 47, 50.
16 Rather, the Individual Defendants served the Subpoena “because of” the donors’ political
17 messages: “Ms. Heath made her desire to suppress constitutionally-protected speech clear during
18 the gag order hearing . . . when she argued that Mr. Brown should be gagged because he had
19 written an article that was ‘critical of the government’ in a ‘tone’ that was ‘problematic.’” *Id.* ¶
20 54. Based on these facts, the FAC alleges Donor No. 1 “believes the WePay Subpoena was sent to
21 retaliate against the donors’ exercise of protected conduct.” *Id.* ¶ 55. The Court disagrees with
22 Defendants’ contention that these are “bald allegations . . . based on information and belief.” ID
23 Mot. at 12. The gravamen of the allegations is that Heath and Smith did not need to use the
24 Subpoena to ascertain whether Mr. Brown could afford a lawyer because that information was
25 publicly available; and that this alleged motivation does not explain why Heath and Smith sought
26 the identity of donors to the campaign and the content of donor messages rather than simply the
27 total amount collected.

28 The FAC therefore pulls the rug from under Defendants’ “obvious alternative

1 explanation.” *Id.* Defendants have failed to articulate any facially reasonable explanation for
2 requesting donors’ identities.⁸ This defeats Defendants’ arguments that the FAC did not plausibly
3 allege a retaliatory motive and that the Government’s legitimate purpose in issuing the subpoena
4 outweighs potential First Amendment concerns.

5 Defendants also argue Donor No. 1 lacked an expectation of privacy in records maintained
6 by WePay. *Id.* at 13-14. The FAC alleges Gallagher informed donors via the donation page that
7 “[w]hat information you choose to provide will be kept strictly confidential,” and that Donor No. 1
8 made an anonymous donation. *Id.* ¶¶ 12, 14, 25, 28; *see also id.* ¶ 34 (“Donor No. 1 was alarmed
9 to learn that his government illegally surveilled his donation. Donor No. 1 does not publicize his
10 financial activities and always ensures that any donations he makes are kept private.”).
11 Defendants argue this insufficient to state a claim because WePay’s privacy policy states it may be
12 compelled to provide personal information of donors to law enforcement officials. *ID Mot.* at 13.
13 The Court will not consider WePay’s privacy policy or weigh the reasonableness of the
14 expectation of privacy in connection with this Motion to Dismiss.

15 Defendants also argue individuals have no expectation of privacy in transaction records
16 retained by a third party. *Id.* (citing *United States v. Miller*, 425 U.S. 435, 442-43 (1976) and *In re*
17 *Grand Jury Subpoena Duces Tecum*, 549 F.2d 1317, 1318 (9th Cir. 1977)). The cases upon which
18 Defendants rely are inapposite because the FAC alleges that the donations themselves were
19 protected political speech, and that revealing the identity of the donors violated their right to
20 anonymous speech. *Miller* analyzed the expectation of privacy accorded to bank records under the
21 Fourth Amendment (*Miller*, 425 U.S. at 442-43), and the movant seeking to quash the subpoena in
22 *In re Grand Jury Subpoena* “identified no free speech interest impinged upon . . . and we can find
23 none[.]” (*In re Grand Jury Subpoena*, 549 F.2d at 1318). Here, Donor No. 1 has identified a
24 speech interest impinged upon, which the Court finds sufficient to support the First Amendment

25 _____
26 ⁸ Defendants argue they issued the subpoena to obtain evidence that the funds raised by WePay
27 were available for payment from or on behalf of Mr. Brown in order to obtain a court order to
28 redirect those funds to pay for Mr. Brown’s public defender. *ID Mot.* at 17 (“[T]o redirect funds a
court must ‘find that funds are available for payment from or on behalf of a person furnished
representation.’”). But Defendants do not explain why the identity of the donors would allow
them to establish the funds were available to Mr. Brown.

1 claim.

2 b. Standing

3 As relief for the First Amendment violation, Donor No. 1 asks the Court to declare the
4 alleged conduct violated the First Amendment rights of Donor No. 1 and the putative class; to
5 order the FBI, DOJ, and other agencies that received donor information to destroy the information;
6 to enjoin Defendants from engaging in similar unlawful surveillance in the future; and to award
7 Plaintiffs costs and fees. *See* Prayer for Relief, First Cause of Action.

8 As the party invoking federal jurisdiction, Donor No. 1 bears the burden of establishing the
9 elements of Article III standing. *Spokeo*, 136 S. Ct. at 1547. To establish standing to seek
10 prospective relief such as an injunction or declaratory relief, Donor No. 1 “must demonstrate that
11 he has suffered or is threatened with a ‘concrete and particularized’ legal harm, coupled with ‘a
12 sufficient likelihood that he will again be wronged in a similar way.’” *Bates v. United Parcel*
13 *Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555,
14 560 (1992)). Donor No. 1 also must establish there exists a “real and immediate threat of repeated
15 injury.” *Id.* (quoting *O’Shea v. Littleton*, 414 U.S. 488, 496 (1974)). While past wrongs do not in
16 and of themselves establish a threat of future harm, they are evidence bearing on whether there is a
17 threat of repeated injury. *Id.* Finally, Donor No. 1 must establish the prospective relief is likely to
18 redress the threat of injury. *Id.* Defendants argue Donor No. 1 lacks standing to pursue
19 declaratory relief because the FAC merely seeks “a declaration that a constitutional violation
20 occurred without an additional request regarding future conduct.” ID Mot. at 9; *see also* ID Reply
21 at 1-2; *see also* Sept. 28, 2017 FTR at 10:56 (also addressing standing to pursue injunctive relief).

22 WePay disclosed Donor No. 1’s identity, amongst others, to Defendants on February 1,
23 2013. *See* Resp. at 6 (Affidavit of Custodian). Defendants filed the WePay Response, in some
24 form, in *United States v. Brown* on February 13, 2013. *See* Resp. The FAC alleges that “Donor
25 No. 1 believes Defendants maintain and continue to use the information produced in response to
26 the WePay Subpoena, as well as other information gathered from the illegal monitoring program,
27 to continually and unjustifiably surveil the donors to Free Barrett Brown.” FAC ¶ 55. The FAC
28 does not set forth the basis for Donor No. 1’s belief that Defendants continue to maintain and use

1 the information more than four years after obtaining it from WePay, rendering this allegation
2 conclusory. The FAC does not allege facts showing any threat of real and immediate future harm,
3 or facts showing Donor No. 1 is likely to be harmed again. As such, it does not allege facts
4 sufficient to establish Donor No. 1 has standing to seek prospective relief on the First Amendment
5 claim.

6 If Donor No. 1 can amend the FAC to allege facts sufficient to show he has standing to
7 seek prospective relief against the Individual Defendants, the Court grants him leave to amend the
8 First Amendment claim against Heath and Smith in their official capacities.

9 **CONCLUSION**

10 For the reasons stated above, the Court

11 (1) **DISMISSES** the California Constitution claim in its entirety without leave to amend,
12 because the Court does not have subject matter jurisdiction over this claim;

13 (2) **DISMISSES** all claims against Heath and Smith in their individual capacities without
14 leave to amend, because the Court does not have personal jurisdiction over these defendants and
15 because Plaintiffs cannot allege any additional facts to establish jurisdiction exists;

16 (3) **DENIES** the Motion to Dismiss the SCA claim against the United States;

17 (4) **DISMISSES** the First Amendment claim against Heath and Smith in their official
18 capacity with leave to amend; and **DISMISSES** the First Amendment claim for equitable relief
19 against them in their individual capacity without leave to amend.

20 Plaintiffs may file an amended pleading within 21 days of this Order. If Defendants move
21 to dismiss any amended pleading, the Court encourages them to combine their arguments into a
22 single motion (*see* Fed. R. Civ. P. 1); they may apply for an extension of the standard page limit if
23 necessary.

24 **IT IS SO ORDERED.**

25 Dated: October 3, 2017

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MARIA-ELENA JAMES
United States Magistrate Judge