UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

(U) IN RE APPLICATION OF THE FEDERAL BUREAU OF INVESTIGATION FOR AN ORDER REQUIRING THE PRODUCTION OF TANGIBLE THINGS

Docket Number BR 15-99

(U) MEMORANDUM OF LAW BY AMICUS CURIAE REGARDING GOVERNMENT'S AUGUST 27, 2015, APPLICATION TO RETAIN AND USE CERTAIN TELEPHONY METADATA AFTER NOVEMBER 28, 2015

(U) Undersigned counsel, as *amicus curiae*, respectfully submits this memorandum of law to assist the Court in its consideration of the government's August 27, 2015, application to, among other things, continue to retain and use its archive of telephony metadata (or call detail records or BR metadata) – collected under the bulk business records production procedures previously authorized by this Court – after the statutory authority to collect bulk business records expires at 11:59 p.m. Eastern Time on November 28, 2015.[1]

(U) On August 27, 2015, the Court approved the government's application to collect until 11:59 p.m. Eastern Time on November 28, 2015, certain call detail records under the business records/tangible things provision of the Foreign Intelligence Surveillance Act (FISA), codificd at 50 U.S.C. § 1861. See Primary Order at 3-4, 17 *In Re Application of the FBI for an Order*

(U) [1] The Court appointed undersigned as *amicus curiae* to advise the Court as to whether the government's requests to retain and use "BR metadata" are precluded by Section 103 of the USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (2015) (to be codified as amended in various sections of 50 U.S.C.) (USFA), or any other provision of that Act. See Order Appointing An Amicus Curiae at 3, ¶ 2, *In Re Application of the FBI for an Order Requiring the Production of Tangible Things From [REDACTED]*, Docket No. BR 15-99 (FISA Ct. Sept. 17, 2015) (Amicus Order).

Requiring the Production of Tangible Things From [REDACTED], Docket No. BR 15-99 (FISA Ct. Aug. 27, 2015) (Primary Order). The business records provision on which the government relies was enacted as Section 215 of the USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 215, 115 Stat. 272, 287 (2001), as amended by the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006). See Mem. Op. at 1-2, *In Re Applications of the FBI for Orders Requiring the Production of Tangible Things*, Docket Nos. BR 15-77 and 15-78 (FISA Ct. June 17, 2015). On June 29, 2015, this Court ruled that Congress authorized the continued bulk acquisition of call detail records until the USFA amendments to the business records provision become effective on November 29, 2015. See Op. and Order at 9-10, *In Re Application of the FBI for an Order Requiring the Production of Tangible Things*, Docket No. BR 15-75 and Docket No. Misc. 15-01 (FISA Ct. June 29, 2015) (Mosman J.) (Mosman Opinion).[2]

(U) In Docket No. BR 15-99, the government proposed, and this Court agreed, that the government may not access its archive of call detail records for intelligence analysis purposes after November 28, 2015. See Primary Order at 4, ¶ 3. The government has, however, requested the ability to retain and use the telephony metadata collection for an additional three months after November 28 to verify the completeness and accuracy of call detail records it obtains under the targeted business records collection process mandated in the USFA. See Amicus Order at 2. The government has committed to destroy its Section 215 telephony metadata archive "as soon as possible" at the end of that additional three-month period subject to its compliance obligations under preservation orders issued by other courts. See Application at 14-15, 24 *In Re Application of the FBI for an Order Requiring the Production of Tangible Things From [REDACTED]*,

(U) [2] Accord *American Civil Liberties Union v. Clapper*, No. 14-42, slip op. at 4 (2d Cir. Oct. 29, 2015.

Docket No. BR 15-99 (FISA Ct. Aug. 27, 2015) (Application). The Court has taken these requests under advisement. See Primary Order at 12-13, ¶ E; Amicus Order at 2.

Introduction

(U) The USA FREEDOM Act of 2015 forbids indiscriminate bulk collection of tangible things under the FISA business records provision after November 28, 2015. See USFA §§ 101, 103, and 109. That date marks the end of a 180-day transition window to a more demanding targeted business records/tangible things application standard. *Id.*; Mosman Opinion at 10. The new standard conditions the issuance of orders requiring the production of tangible items on, among other things, the government's satisfactory articulation of specific selection terms, as opposed to the previously existing regime that permitted the government to request indiscriminate bulk production of certain types of tangible things relevant to an authorized foreign intelligence investigation. Compare USFA § 103(a) with 50 U.S.C. §1861(b)(2)(A); see Mosman Opinion at 10.

(U) As discussed below, the text of the USFA does not direct a particular fate for the government's archive of telephony metadata. Instead, the Act provides that the Court shall decide issues concerning the use, retention, dissemination, and eventual destruction of the tangible things collected under the FISA business records statute as part of its oversight of the statutorily mandated minimization procedures.[3] USFA at § 104; 50 U.S.C. § 1861(c)(1), (g) and (h); accord Primary Order at 4-15, ¶¶ 3 (A.-G.). Although FISA judges enjoyed similar oversight authority before Congress enacted the USFA, see 50 U.S.C. § 1803(h), the 2015 statute explicitly authorizes the Court to require implementation of additional minimization procedures

(U) [3] Mosman Opinion at 22 ("[U]nder the applicable minimization procedures, the government's ability to search the data is carefully regulated, and . . . court approval is required before querying the data.").

it deems appropriate, including procedures requiring the destruction "within a reasonable time period" of information produced to the government as a result of a FISA business records order. See USFA § 104. This function is consistent with the FISA structure, as amended by the enactment of the USFA and, to the extent it deserves weight, the legislative history of the USFA. In other words, the government's proposed use and retention of call detail records for three additional months beyond the November 28, 2015, bulk collection deadline (and compliance with preservation orders issued by other courts) is neither categorically prohibited by the USFA nor authorized in all contexts. Undersigned respectfully sets forth below suggested inquiries that the Court may wish to consider in implementing additional minimization procedures and in determining whether the government's requests are reasonable.

I. (U) Historical Collection of Business Records under FISA

(U) In 1998, Congress amended FISA to permit the government to apply for court orders requiring four types of businesses to produce records to the government. See Privacy and Civil Liberties Oversight Board, *Report on the Telephone Records Program Conducted Under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court*, 21, 40 (January 23, 2014) (PCLOB Report); Dept. of Justice Office of the Inspector General, *A Review of the FBI's Use of Section 215 Orders*, 4 (May 2015) (IG Report); *American Civil Liberties Union v. Clapper*, 785 F.3d 787, 795 (2d Cir. 2015).[4] The business records provision was originally codified at 50 U.S.C. § 1862. IG Report at 4. To obtain an order under the original FISA business records provision, the government was required to demonstrate "specific and articulable facts" giving reason to believe that the person or entity to whom the

(U) [4] Upon request, the Department of Justice provided to undersigned the un-redacted, classified version of the IG Report. Citations herein are to the publicly-available unclassified, redacted version unless specifically noted. The pagination between the two versions is slightly different.

records pertained was a foreign power or agent of a foreign power. PCLOB Report at 40-41; IG Report at 4; *Clapper*, 785 F.3d at 795. Before 2001, the government obtained only one order under the FISA business records provision. IG Report at 4

(U) In 2001, Congress expanded the business records provision in the USA PATRIOT Act. See PCLOB Report at 41. In the 2001 Act, Congress broadened the types of entities subject to the business records provision to include virtually all types of businesses and expanded the information obtainable to "any tangible things." See PCLOB Report at 41 (citing 50 U.S.C. § 1861(a)(1)(2002)). What is more, the USA PATRIOT Act of 2001 (and further clarified in the USA PATRIOT Improvement and Reauthorization Act of 2005), imposed a less onerous, broad "relevance" standard on the government in seeking to obtain such an order. PCLOB Report at 41-42; IG Report at 5; *Clapper*, 785 F.3d at 795. The government thereafter relied upon the business records provision to seek indiscriminate daily bulk production of certain types of business records and tangible things. IG Report at 6. From 2004 to 2009, the government applied to the FISA Court 83 times for orders under Section 215, though not all such applications involved bulk production programs. Classified IG Report at 29-30.

~~(S//NF)~~ Beginning in May 2006, the government has applied to this Court 43 times for orders requiring telecommunications providers to produce in bulk certain call detail records under the business records/tangible things provision. See Application at 11. The purpose of the telephony program is to enable the government to amass a database that will be queried in an effort to identify communications between known and unknown terrorism suspects. See PCLOB Report at 8. The orders issued by this Court have resulted in the daily production to the National Security Administration (NSA) of certain metadata generated by billions of telephone made [redacted] telecommunications systems operated by the providers subject to the

orders. See IG Report at 6; Application at 17. The data produced under those orders does not include the substantive content of the telephone calls; it does include comprehensive routing information, time and duration of the calls, and other identifiers. See Primary Order at 3 n.1; Application at 4.

(U) The Court's orders requiring the production of this data have evolved over time to impose stricter oversight of the government in response to various concerns regarding aspects of the NSA's administration of the program and questions with respect to the accuracy and veracity of the government's representations to this Court. See IG Report at 50-57; PCLOB Report at 46-54. For example, for several months in 2009, the Court required the government to obtain advance approval to conduct searches of the collected data. See Order at 5, 9, 18, *In Re Production of Tangible Things*, Docket No. BR 08-13 (FISA Ct. Mar. 2, 2009) (Walton, J.) (suspending certain access to metadata produced in response to daily violations of the minimization procedures set forth in FISC orders and citing government officials' claims regarding their understanding of the Court's orders as "straining credulity"); Order at 6-8, *In re: Application of the FBI for an Order Requiring the Production of Tangible Things From [Redacted]*, Docket No. BR 09-13 (FISA Ct. June 22, 2009) (Walton, J.) (requiring enhanced reporting obligations in response to analysts' failures to adhere to dissemination restrictions and failed program oversight by NSA's Office of General Counsel); see also PCLOB Report at 52 (citing FISA cases). The Court's exercise of this oversight function derives from its FISA supervisory authority, see 50 U.S.C. § 1803(h), as well as its specific statutory responsibility to review the government's procedures to minimize the use, retention, and dissemination of the information it receives under the production orders. See 50 U.S.C. §§ 1861(c), (g) and (h).

(U) Aspects of the call records data collection program and other NSA surveillance programs became known publicly in early June 2013 when a British newspaper disclosed information leaked by former government contractor Edward Snowden. See *Clapper*, 785 F.3d at 795; PCLOB Report at 1. Public identification of the program's existence triggered substantial debate concerning the legality, propriety, and utility of the bulk telephony metadata collection program.

(U) In response to the controversy, the Obama Administration initially issued statements defending the legality of the program. See Administration White Paper, *Bulk Collection of Telephony Metadata Under Section 215 of the USA PATRIOT Act* (August 9, 2013). Five months later, the Administration announced self-imposed curbs on how the government would seek call detail records under the FISA business records provision, asserting that it would limit the breadth of its data queries and seek advance FISA Court approval for those queries. See Remarks on United States Signals Intelligence and Electronic Surveillance Programs, 2014 Daily Comp. Pres. Doc. 30 p. 7 (January 17, 2014). The Privacy and Civil Liberties Oversight Board examined the Section 215 telephone records collection program in detail and issued a comprehensive report addressing statutory, constitutional, and operational concerns with respect to the government's indiscriminate bulk collection of call detail records under the business records provision. See generally PCLOB Report. The PCLOB also made numerous recommendations for reforms to Section 215 and the operation of the FISA Court generally. *Id.*

(U) Members of Congress introduced legislation to eliminate the telephony metadata program and amend this Court's procedures. In October 2013, for example, Senator Patrick J. Leahy introduced legislation to amend various USA PATRIOT Act and FISA Act provisions. See USA FREEDOM Act of 2013, S.1599, 113th Congress (2013) (available at

https://www/congress.gov/bill113th-congress/senate-bill/1599).[5] Such initial legislative efforts failed to gain passage.

(U) Several groups and individuals filed lawsuits challenging the constitutional and statutory authority for the bulk telephony collection program. See, e.g. *ACLU v. Clapper*, 959 F.Supp. 2d 724 (S.D.N.Y. 2013), rev'd, 785 F.3d. at 826; *Smith v. Obama*, 24 F.Supp. 3d 1005 (D. Idaho 2014) (pending decision in No. 14-35555 (9th Cir.)); *Klayman v. Obama*, 957 F. Supp.3d 1 (D.D.C. 2013), rev'd, 800 F.3d. 539 (D.C. Cir. 2015). In May 2015, a unanimous Second Circuit panel decided that the bulk call data records program had been illegally administered under the business records statute. See *Clapper*, 785 F.3d at 824 (concluding that telephony collection program distorted statutory concept of relevance but declining to reach constitutional claims). Finally, on June 2, 2015, the USFA ("United and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015") was enacted. See USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (2015).

(U) Among its modifications to the existing FISA scheme, the USFA revised the business records provision on which the government had relied to collect telephony metadata in bulk. See USFA §§ 101 and 103; Mosman Opinion at 10; *Clapper*, No. 14-42, slip op. at 8-9 (2d Cir. Oct. 29, 2015). The USFA provides that the bulk collection practice shall end on November 28, 2015. See USFA § 109(b) (180 days from June 2, 2015); Mosman Opinion at 10. After November 28, the government must articulate specific selection terms as a prerequisite for obtaining an order obligating a business to produce tangible things. See USFA at § 103(b);

(U)[5] In the 2013 legislation introduced by Senator Leahy, "USA FREEDOM Act" stood for the Uniting and Strengthening America by Fulfilling Rights and Ending Eavesdropping, Dragnet-collection, and Online Monitoring Act." See USA FREEDOM Act of 2013, S.1599, 113th Congress (2013).

Mosman Opinion at 10. The transition period to the new regime regarding the collection process for tangible things (as well as other reforms to FISA and related statutes) was publicly supported by Attorney General Loretta E. Lynch and Director of National Intelligence James R. Clapper. See 161 Cong. Rec. S3012-13 (daily ed. May 19, 2015) (Statement of Senator Patrick J. Leahy (reading letter from Attorney General Lynch and DNI Clapper to Senator Leahy and Senator Mike S. Lee (May 11, 2015)).

(U) After Congress enacted the USFA, this Court issued two opinions allowing the government to continue to collect call detail records in bulk under the business records provision until the effective date of the statutory prohibition of this practice at 11:59 p.m. on November 28, 2015. First, Judge F. Dennis Saylor, IV, held that the USFA revived the government's ability to seek the production of bulk business records under the terms of the USA PATRIOT Act provisions on which it previously had relied, notwithstanding the one-day expiration of those provisions when Congress failed to renew the USA PATRIOT Act on June 1, 2015. See Mem. Op. at 13, *In Re Applications of the FBI for Orders Requiring the Production of Tangible Things*, Docket Nos. BR 15-77 and 15-78 (FISA Ct. June 17, 2015).

(U) On June 29, 2015, this Court issued an opinion stating that the government may continue until 11:59 p.m. Eastern Time on November 28, 2015 to collect telephony metadata as it generally has been authorized to do under the FISA bulk business records provision since 2006. That decision declined to follow the Second Circuit's analysis in *Clapper* which disagreed with the interpretation of "relevance" that animated prior FISA Court orders authorizing the bulk production of call detail records. See Mosman Opinion at 14-15. The June 29 opinion also reasserted the Court's disagreement with the district court's analysis of the Fourth Amendment issues in *Klayman v. Obama*, citing a previous FISA Court decision rebutting that analysis. See

Mosman Opinion at 20-21 (citing Op. and Order at 17, *In Re Application of the FBI for an Order Requiring the Production of Tangible Things*, Docket No. BR 14-01 (FISA Ct. Mar. 20, 2014) (Collyer J.)). The Court also rejected other Fourth Amendment arguments asserted by *amici* in that case, including their attempts to distinguish the third-party disclosure principle and *Smith v. Maryland*, 442 U.S. 735 (1979). See Mosman Opinion at 21-25. Today, the Second Circuit issued a decision denying Appellants' request for a preliminary injunction and concluding, "that Congress intended to authorize the continuation of the bulk telephone metadata collection program for a limited period of 180 days . . . ." *Clapper*, No. 14-42, slip op. at 2 (2d Cir. Oct. 29, 2015).

(U) Less than a month after the Court issued its Opinion, the Office of the Director of National Intelligence (ODNI) announced on July 27, 2015, that, as part of its analysis of the USA FREEDOM Act, it had evaluated whether the NSA should maintain access after the conclusion of the 180-day transition period to historical metadata the NSA already had gathered.[6] ODNI further stated that the NSA's analytical use of its historical metadata collection would cease on November 29, but that it would permit NSA personnel for "an additional three months" to have access to that archive for data integrity verification purposes and, separately, it would further retain the database to comply with court-ordered document preservation obligations.

(U) On August 27, 2015, the government applied to renew its ability to continue to collect telephony metadata under the bulk business records provision until the bulk collection provisions of the statute terminate on November 28, 2015. Consistent with the ODNI announcement, the

[6] See Statement by the ODNI on Retention of Data Collected Under Section 215 of the USA PATRIOT Act (July 27, 2015) (available at http://www.dni.gov/index.php/newsroom/press-releases/210-press-releases-2015/1236-statement-by-the-odni-on-retention-of-data-collected-under-section-215-of-the-usa-patriot-act).

government also sought to have access to the metadata archive after November 28 to (1) verify the completeness and accuracy of call detail records produced under the targeted production orders required by the USA FREEDOM Act; and (2) notified the Court of its intention to fulfill its obligations under document preservation orders issued in pending civil litigation in other courts. See Primary Order at 12-13. This Court granted the government's application to continue to collect the BR metadata and took the government's additional requests under advisement. See Primary Order at 3, 12-13. The Primary Order specifically prohibits the government from accessing for intelligence-gathering purposes after November 28, 2015, the metadata that it previously obtained during this process. See Primary Order at 4. On September 17, 2015, the Court issued an Order appointing undersigned as *amicus curiae* to provide the Court with an independent assessment of the retention and use issues it has taken under advisement. See Amicus Order at 3. Specifically, the Court has requested the undersigned to examine whether such use and retention are precluded under Section 103 of the USFA. Amicus Order at 3.

II. (U) The USA FREEDOM ACT of 2015 does not categorically prohibit (nor permit) the government's requested access and retention of telephony metadata previously obtained under Section 215 after the expiration of the 180-day transition period.

(U) The USA FREEDOM Act terminates the government's ability to seek bulk *collection* of telephony metadata under the previous Section 215 business records procedures as of 11:59 p.m. Eastern Time on November 28, 2015. See USFA at §§ 103 and 109; Mosman Opinion at 10. The text of the USA FREEDOM Act does not, however, address squarely what the government may or may not do with previously-gathered data after that program ends.

(U) A. **The USA FREEDOM Act of 2015 contains no specific textual command regarding the use and retention of data.**

~~(S//OC/NF)~~ In interpreting any statute, a court must start with the text. See *Immigration and Naturalization Serv. v. Phinpatha*, 464 U.S. 183, 189 (1984) ("This Court has noted on numerous occasions that "in all cases involving statutory construction, 'our starting point must be the language employed by Congress,' ... and we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'" *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68, (1982))." (citations omitted). No provision of the USFA, however, explicitly states how the government or this Court shall manage or use the data archive generated by years of collection.

[redacted]

(U) The existence of the telephony data archive was clearly known to Congress when it considered reforms to Section 215. Government officials testified about it at open hearings. See Kris, *Bulk Collection* at 15 n. 60 (citing June 2013 testimony of former NSA Deputy Director Chris Inglis). The PCLOB Report, published in January 2014, recommended that the database be destroyed or, alternatively, that the program's data retention period be reduced from five to three years. PCLOB Report at 17, 169-170. The ACLU identified the bill's failure to resolve the data retention issue and set forth numerous proposals that the ACLU maintained would strengthen the bill. See Letter from Michael W. Macleod-Ball, Acting Director, ACLU, to

Members of Senate re: S. 1123, the USA Freedom [sic] Act of 2015 at 2 (May 23, 2015) (stating that current version of bill at the time lacked language contained in prior versions that would have required prompt destruction of irrelevant data). Another privacy group, the Center for Democracy and Technology, while generally supporting the reforms under congressional consideration, also observed that the bill did not contain statutory direction regarding data retention unlike earlier versions of the bill. See Center of Democracy and Technology, *Congress Should Pass USA FREEDOM Act of 2015* (April 28, 2015) (available at https://cdt.org/press/congress-should-pass-usa-freedom-act-of-2015/).

(U) During congressional proceedings regarding the USA Freedom Act, several congressmen introduced amendments and made floor statements with respect to the issue whether responsibility for hosting the database would be transferred from the government to telecommunications providers.[7] See, *e.g.*, Markup of: H.R. 2048, the USA FREEDOM Act Before the House Comm. on the Judiciary, 114th Congress 23 (April 30, 2015) (statement of Congressman Steve King) (introducing amendment to permit the Intelligence Community to contract with telecommunications providers);[8] 161 Cong Rec. S3429 (daily ed. June 2, 2015) (statement of Senator John Cornyn) ("we understand that the House wants to change the current custody of these phone records and leave them with the phone company[.]"). Yet with all this

(U) [7] The President also proposed that metadata be held by the private telecommunications companies instead of the government. See Statement on the National Security Agency's Section 215 Bulk Telephony Metadata Program, 2014 Daily Comp. Pres. Doc. 213 (March 27, 2014). Again, Congress did not implement such a proposal.

(U) [8] Congressman Bob Goodlatte, Chairman of the House Judiciary Committee, noted in response o the amendment offered by Congressman King, that "data retention issues are controversial, and inclusion of this amendment will most certainly prevent consideration of this bill on the House floor and in the Senate." Markup of: H.R. 2048, the USA FREEDOM Act Before the House Comm, on the Judiciary, 114th Congress 26 (April 30, 2015). The King amendment was defeated 24 to 4. *Id.* at 33.

public debate and awareness of the existence of the database, the enrolled statute contains no explicit language regarding the maintenance of a data archive or establishing a timetable for purging the data archive. Nor does it direct the telecommunications providers to create and maintain a database or a cloud network for intelligence agencies to query.

(U) The legislative debate regarding the USA FREEDOM Act focused largely on curbing the bulk *collection* of the telephony metadata. See 161 Cong. Rec. S3427 (daily ed. June 2, 2015) (Statement by Senator Patrick J. Leahy, a co-sponsor of the bill) ("The core of this legislation is its prohibition on the bulk collection of records under section 215 of the USA PATRIOT Act, the FISA pen register and trap-and-trace device statute, and the national security letter statutes.").[9] As enacted, the USFA addressed that issue by forbidding some of these practices immediately and by imposing a 180-day sunset on bulk collection before the USFA's more restrictive business records/tangible things provisions became effective. USFA at Section 109(a); see Mosman Opinion at 10-11. Congress did not articulate clearly in the statutory text any specific prohibition on the government's retention and usage of metadata gathered under the business

---

(U) [9] See also 161 Cong. Rec. S3424 (daily ed. June 2, 2015) (Statement of Senator Michael Lee., another USFA co-sponsor)("Most importantly, it would definitively end the NSA's bulk collection of Americans telephone metadata and ensures that the FISA pen register statute and the NSL letter statutes cannot be used to justify bulk collection."); 161 Cong. Rec. S3337 (daily ed. May 31, 2015) (Statement by Senator Ron Wyden) ("[T]he USA Freedom Act would make several worthwhile reforms, such as increasing transparency, reducing the government's reliance on secret laws. But from my perspective, the centerpiece of it is ending the bulk collection of Americans' information under the PATRIOT Act.").

(U) In statutory interpretation, "[f]loor statements are not given the same weight as some other types of legislative history, such as committee reports, because they generally represent only the view of the speaker and not necessarily that of the entire body. However, floor statements by the sponsors of the legislation are given considerably more weight than floor statements by other members." *Kenna* v. *United States District Court for the Central District of California*, 435 F.3d 1011, 1015 (9th Cir. 2006) (citation omitted).

records provision before November 29, 2015. Nor does the USFA provide textual direction regarding any other destiny for that database, which this Court has ruled it amassed legally. As a result, the Court must look to other sources, including other provisions of the statute, to determine the manner in which the USA FREEDOM Act addresses whether and how the government may continue to retain the data archive after November 28. See *U.S. Nat'l Bank of Or.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (describing statutory construction as "a holistic endeavor" (quoting *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 371 (1988)).

B. (U) The Structure of the FISA statute, as reformed by the USA FREEDOM Act shows that Congress conferred oversight of data retention and destruction to this Court.

(U) Although the text of the USA FREEDOM Act does not answer the questions at issue, the statute's structure reflects Congress's intent regarding the statute's scope, namely to continue to assign to the FISA Court oversight of questions regarding use, retention and dissemination of material produced under the business records provision. See 50 U.S.C. § 1803, 1861(c),(g) and (h); USFA § 104(Judicial Review) (amending 50 U.S.C. § 1861(g)). As stated by Judge Saylor, "[u]nder 'one of the most basic interpretive canons, . . . [a] statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative, superfluous, void or insignificant.'" Mem. Op. at 10, *In Re Applications of the FBI for Orders Requiring the Production of Tangible Things*, Docket Nos. BR 15-77 and 15-78 (FISA Ct. June 17, 2015) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)). The USFA plainly confers issues regarding retention and destruction to this Court for resolution.

(U) Prior to the enactment of the USFA, the FISA statutes provided that this Court was required to review the government's minimization procedures for information it receives under

business records orders. See 50 U.S.C. § 1861(c). As part of the business records order application process promulgated by the 2006 Reauthorization of the PATRIOT Act, the government is required to provide the Court with enumerated minimization procedures addressing its intended use, retention, and dissemination of the tangible things it acquires. See 50 USC §1861(g)(2)(A); IG Report at 8.

(U) The minimization procedure requirement is a significant component of the FISA business records production process, providing, at least structurally, a set of limitations on the access, use, and dissemination of the data the government acquires. See 50 U.S.C. § 1803, 1861(c),(g) and (h); Primary Order at 4-15 (detailing minimization procedures). It is also the statutory means by which the acquisition request is subjected to judicial analysis of the government's intended behavior for reasonableness and to avoid other constitutional questions. See David S. Kris, *On the Bulk Collection of Tangible Things*, 1 Lawfare Res. Paper Series Vol. 4 at 15 (Sept. 29, 2013) (Kris, *Bulk Collection*); see also *In Re [Redacted]*, 2011 WL 10945618, at *9 (FISA Ct. Oct. 3, 2011) (Bates J.) (finding NSA minimization procedures insufficient and inconsistent with the Fourth Amendment).

(U) Although the government is required to enumerate minimization procedures addressing the use, retention, dissemination, and (now) ultimate destruction of the metadata in its applications to the Court, the Court's review of those procedures is not simply ministerial. And, indeed, Judge Walton's 2009 orders, cited above, addressing deficiencies in the administration of the call detail record program made clear that the FISA Court may impose more robust minimization procedures. See also Kris, *Bulk Collection* at 15-17 (discussing FISA Court's imposition of new restrictions to the telephony program). Likewise, the Court may decline to endorse procedures sought by the government. See Opinion at 11-2, *In re Application of the FBI*

for an Order Requiring the Production of Tangible Things, Docket No. BR 14-01 (March 7, 2014) (denying the government's motion to modify the minimization procedures), amended, Opinion at 5, *In re Application of the FBI for an Order Requiring the Production of Tangible Things*, Docket No. BR 14-01 (March 12, 2014). Similarly, Judge Bates found substantial deficiencies in the NSA's minimization procedures in *In Re [Redacted]*, 2011 WL 10945618, at *9 (FISA Ct. Oct. 3, 2011) (Bates J.) (finding NSA minimization procedures insufficient and inconsistent with the Fourth Amendment). As a result, the NSA amended its procedures, including reducing the data retention in issue in that case (under a different FISA statute) from five to two years. See *In Re [Redacted]*, 2011 WL 10947772, at *5 (FISA Ct. Nov. 30, 2011) (Bates J.).

(U) In addition, prior to the enactment of the USFA, the FISA statute made clear that the Court enjoyed latitude in assessing the government's adherence to its orders:

> Nothing in this chapter shall be construed to reduce or contravene the inherent authority of the [FISA] court . . . to determine or enforce compliance with an order or rule of such court or with a procedure approved by such court.

50 U.S.C. §1803(h). That provision was undisturbed by the amendments contained in the USFA.

(U) But the USFA augmented this minimization review authority even more and dispels any suggestion that the Court may not modify the minimization procedures articulated in the government's application. The statute's fortification of Judicial Review provisions makes clear that Congress intended for the FISA Court to oversee these issues in the context of imposing minimization procedures that balance the government's national security interests with privacy interests, including specifically providing for the prompt destruction of tangible things produced

under the business records provisions.[10] Significantly, USFA § 104 empowers the Court to assess and supplement the government's proposed minimization procedures:

> Nothing in this subsection shall limit the authority of the court established under section 103(a) to impose additional, particularized minimization procedures with regard to the production, retention, or dissemination of nonpublicly available information concerning unconsenting United States persons, including additional particularized procedures related to the destruction of information within a reasonable time period.

USFA § 104 (a)(3) (now codified at 50 U.S.C. §1861(g)(3)(emphasis supplied). That provision applies to *all* information the government obtains under the business records procedure, not just call detail records.[11] Moreover, that amendment, set forth in USFA § 104, went into effect immediately, unlike the 180-day transition period for the revisions to the business records sections. See USFA § 109 (amendments made by §§101-103 take effect 180 days after enactment).[12]

(U)[10] See Op. and Order at 4, *In Re Application of the FBI for an Order Requiring the Production of Tangible Things*, Docket No. BR 14-01 (FISA Ct. March 7, 2014) (Walton, J.) "[W]ith respect to the records produced under Section 1861, Congress has sought to protect the privacy interests of United States persons by requiring the government to apply minimization procedures that restrict the retention of United States person information." (citing 50 U.S.C. § 1861(g)(2)); *In Re [Redacted]*, 2011 WL 10945618, at *22 (FISA Ct. Oct. 3, 2011) ("government failed to demonstrate that minimization procedures struck reasonable balance between foreign intelligence needs and requirement to protect U.S. persons information).

(U) [11] Compare USFA § 101(b)(3)(F)(vii)(I) (addressing minimization requirements for productions of call detail records) with USFA § 104 (a)(3) (addressing Judicial Review of minimization procedures for all tangible things productions).

(U) [12] The question whether such a role is appropriate for a Court is not material once congressional intent has been determined. Various commentators have raised questions about the wisdom (and propriety) of having Article III judges perform such an oversight function and whether judges are effectively making policy decisions regarding the implementation of programs rather than addressing individual cases. See Orin S. Kerr, *A Rule of Lenity for National Security Surveillance Law*, 100 Va. L. Rev. 1513, 1535 (2014); see also Kris, *Bulk Collection* at 34-41; see generally see also Elizabeth Goitein & Faiza Patel, *What Went Wrong with the FISA Court*, at 33, Brennan Center for Justice (March 2015). Regardless of whether this was the role Congress originally intended when the FISA Court was established or whether it is a good idea, USFA § 104 makes clear that this is the Court's role.

(U) Congress also enacted the USFA with the benefit of a robust public debate and publicity regarding the bulk call data records program and the Court's oversight role. See Mosman Opinion at 12. The existence of the database was known, the Court's role in the process was known, and proposals were made and ultimately not acted upon to address the issue explicitly, leaving the matter in the hand of the Court. Thus, this interpretation of the statute is consistent with another established statutory interpretation canon, providing that "'Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.'" *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 343, 382 n. 66 (1982) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580–581 (1978)(internal citations omitted)).[13]

(U) [13] But see *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (distinguishing *Curran*) ("[W]e recently criticized *Curran's* reliance on congressional inaction, saying that "[a]s a general matter ... [the] argumen[t] deserve[s] little weight in the interpretive process." And when, as here, Congress has not comprehensively revised a statutory scheme but has made only isolated amendments, we have spoken more bluntly: "It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation.") (internal citations and quotations omitted). Here, Congress did comprehensively revise the statutory business records scheme, limiting both government power and confirming greater FISA judicial authority regarding minimization procedures to the extent it was ever in doubt.

(U) The PCLOB rejected this approach to assessing Section 215 largely because it believed that Congress did not re-enact the statute in its various PATRIOT Act reauthorizations and because it did not believe it was fair to presume that legislators intended to adopt a prior interpretation of a statute they lacked a means to have evaluated. See PCLOB Report at 95-101 (Judicial Reenactment). Given that the USFA reformed the bulk records statute and that this was done after an exhaustive two-year legislative process, the factual scenario the PCLOB considered is fundamentally different. Another point to consider is that Congress also legislated with the *Clapper* decision in mind but that decision addresses the relevance issue, which was reformed to curb government requests, not the judicial role in overseeing the requests.

C. (U) The legislative history for the USFA confirms that Congress assigned consideration and resolution of retention issues to the Court.

(U) Although the structure of the FISA statute, as amended by the USFA, makes clear that Congress expected the Court to maintain and expand its oversight of retention and (now) destruction issues, the USFA legislative history confirms that understanding.[14] USFA co-sponsor Senator Lee addressed the new legislation's clarification of any doubt regarding the FISA Court's oversight role, "Section 104 of the bill authorizes the FISA Court to impose additional, particularized minimization procedures for information obtained under section 501 of FISA. That section provides that the FISA Court may impose additional procedures related to the 'destruction of information within a reasonable time period.' That provision therefore provides authority for the FISA Court to specify a time period within which the government must destroy information." 161 Cong Rec. S3427 (daily ed. June 2, 2015) (Statement of Senator Lee). Thus, the little commentary on this issue confirmed that Congress envisioned the Court's continuing oversight role in regard to the use, retention, dissemination, and destruction of data produced in response to business records orders.[15]

(U) [14] In doing so, we recognize the generally limited utility of legislative history. "[I]t is utterly impossible to discern what the Members of Congress intended except to the extent that intent is manifested in the only remnant of 'history' that bears the unanimous endorsement of the majority in each House: the text of the enrolled bill that became law." *Graham County Soil and Water Conservation Dist. v. United States*, 559 U.S. 280, 302 (2010) (Scalia, J., concurring). The Court has made its own observations on the value of considering the grab bag of legislators' various views. See Mosman Opinion at 12.

(U) [15] A possible reading of a sentence in House Judiciary Committee Report suggests that at least some Members of Congress were aware that that the government had amassed and would continue to use its database of metadata after the transition to the new, targeted search regime. "In addition, the government can use the FISC-approved specific selection term to identify CDRs ***from metadata it already lawfully possesses***." H.R. Rep. No. 114-109 pt. 117 (May 8, 2015)

D. (U) The purpose of the 180-day transition period

(U) The USA FREEDOM Act imposed a 180-day transition period before its more restrictive requirements for applications seeking tangible things would become effective. See USFA § 109. The 180-day period was extensively debated.[16] As discussed above, the thrust of the legislative debate, however, concerned the transition of the collection process (a type of prospective issue) and did not address the question of what to do with the existing data archive (a type of retrospective issue).

(U) Did the 180-day sunset described in Section 109 establish a hard deadline for concluding *all* aspects of the bulk collection process, including data retention? One possibility is that the 180-day phase-in permitted, but did not *require*, continuing bulk collection and the government elected to continue collecting at its own peril. But, as reflected in remarks made by one of the bill's sponsors, the 180-day transition period "was intended to provide as seamless a transition as possible to the new [] program . . . under the USA FREEDOM ACT." 161 Cong. Rec. S3440 (daily ed. June 2, 2015) (Statement of Senator Patrick J. Leahy). That intent is reflected in the USFA "Rule of Construction" provision, which states that "nothing in this Act shall be construed to alter the authority of the Government to obtain an order [under the business records

---

(emphasis supplied). The context of that sentence, however, more fairly suggests that it was addressing prospective productions under the new targeted regime.

(U) [16] See 161 Cong. Rec. S3340 (daily ed. May 31, 2015) (amendment proposed by Senator Mitch McConnell to extend effective date of bulk collection act prohibition to 12 months after enactment from 180 days). Senator Bill Nelson suggested enlarging the transition period to 12 or 18 months. 161 Cong. Rec. S3374 (daily ed. June 1, 2015). Senators Franken and Leahy opposed the extension of the transition period beyond the 6 months set forth in the House bill. 161 Cong. Rec. S3441-42 (daily ed. June 2, 2015). In particular, Senator Al Franken noted that the NSA advised the Senate that it could make the transition. *Id.* Senator Burr observed that 24 months was safer but urged that 12 months would be a good compromise between the legislative houses. 161 Cong. Rec. S3375 (daily ed. June 1, 2015).

provisions of FISA] as in effect prior to the [ban on bulk acquisition taking effect after 180 days]," USFA § 109 (b). Continuing the established process of judicial review of the minimization procedures for retention and more specifically including an explicit new directive to the government and the Court to require the articulation of destruction plans furthers the seamlessness transition goal. What is more, permitting collection of data until 11:59 p.m. on November 28 but requiring the instant destruction of that very same material at 12:00 a.m. on November 29 would be a ridiculous construction of both the statutory regime and the congressional intent evidenced in USFA § 109, offending another statutory interpretation canon, avoidance of absurd constructions.[17]

(U) And, even if the 180-day period properly may be characterized as a deadline, the USFA does not set forth sanctions if the government fails to comply with it. Absent a clear statutory command, courts do not ordinarily impose consequences for failing to comply with a deadline. See *Dolan v. United States*, 560 U.S. 605 (2010) (upholding sentencing judge's imposition of restitution after 90-day statutory deadline expired); *United States v James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993) (cited in *Dolan*); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 172 (2003). Here, the statute explicitly addresses termination of the existing process for

(U) [17] See, e.g., *United States v. Kirby*, 74 U.S. 482, 486 (1868) ("All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.").

~~(S//OC/NF)~~ [redacted]

collection; it does not impose explicit restrictions for retention or impose an explicit deadline for destruction, much less impose sanctions for failure to comply even if the 180-day period may be considered as a deadline.[18]

(U) Thus, in this context, where the existence of the database was well-known and attempts to address it at all were deemed controversial, in the absence of clearer statutory text, we believe that a reading that the 180-day transition period to wind down the bulk collection process was also intended to serve as a countdown to the immediate destruction of the government's metadata archive is strained and unreasonable.

III. (U) The minimization procedures in this case

(~~TS//SI//OC/NF~~) The first government application for bulk production of telephony metadata in May 2006 included representations to this Court that the collected metadata would be destroyed after five years. See Application for Certain Tangible Things for Investigations to Protect Against International Terrorism at 14, *In Re Application of the FBI for an Order Requiring the Production of Tangible Things and* [redacted] Docket No. BR 06-05 (May 23, 2006); see also IG Report at 48. Presumably, some destruction of that archive occurred as the collection aged, consistent with FISA Court-ordered minimization procedures and the NSA standards, until the data archive became subject to preservation orders and/or other litigation hold obligations suspending whatever destruction process that may have occurred. See David S. Kris, *On the Bulk Collection of Tangible Things*, 1 Lawfare Res. Paper Series Vol. 4 at 15 (Sept.

(U) [18] Congress knows how to articulate sanctions for failing to meet deadlines. See *Dolan*, 560 U.S. at 611 (citing Speedy Trial Act, codified at 18 U. S. C. §§ 3161(c)(1) and 3162(a)(2)); *Zedner* v. *United States*, 547 U.S. 489, 507-09 (2006) (sanction for missed 70-day deadline in Speedy Trial Act requires dismissal of indictment).

29, 2013) (Kris, *Bulk Collection*) (citing congressional testimony of Chris Inglis, former Deputy Director of the NSA, generally explaining the data destruction/deletion process).

(U) The minimization procedures sought in this case generally mirror their predecessors except they articulate a plan for the imminent destruction of the database. See Primary Order at 12-13. The Primary Order makes clear that the Court's consideration of the minimization procedures includes assessing those procedures contained in prior orders, which would include retention of data gathered and retained under those prior orders. See Primary Order at 4, ¶3 ("With respect to the information that NSA *receives or has received as a result of this Order or predecessor Orders* of this Court requiring production to NSA of telephony metadata pursuant to 50 U.S.C. § 1861 ("BR metadata"), NSA shall strictly adhere to the limitations and procedures set out at subparagraphs A through G. below [the "minimization procedures."]") (emphasis supplied).

A. (U) Technical retention

(U) Undersigned does not presume to suggest to this Court how to exercise its review and oversight authority. Because of the significant privacy concerns that motivated Congress to amend the bulk collection provisions of the statute, however, the undersigned respectfully submits that, the Court should consider requiring the government to answer more fully fundamental questions regarding:

- The current conditions, location, and security for the data archive.
- The persons and entities to whom the NSA has given access to information provided under this program and whether that shared information will also be destroyed under the NSA destruction plan (and, if not, why not?).
- What oversight is in place to ensure that access to the database is not "analytical" and what the government means by "non-analytical."

- Why testing of the adequacy of new procedures was not completed by the NSA (and whether it was even initiated) during the 180-day transition period.

- How the government intends to destroy such information after February 29, 2016, (its proposed extinction date for the database) independent of the resolution of any litigation holds.

- Whether the contemplated destruction will include only data that the government has collected or will include all data that it has analyzed in some fashion.

(U) This case, due to the relatively limited period of time sought by the government to accomplish its stated narrow purpose, likely does not require a difficult assessment of the reasonableness of the government's technical retention request. To evaluate even such a limited request, however, the Court may wish to consider availing itself of technical expertise from national security experts or computer technology experts. Technical expertise is an *amicus* category contemplated by Congress in its reform of the FISA statutes. 50 U.S.C. § 1803 (i)(2)(B), as amended by USFA Section 401. That section alone suggests congressional expectation of greater judicial oversight of the government's surveillance program and requests. See USFA § 401; see also Kris, *Bulk Collection* at 37 (contemplating theoretical procedures for cross-examining NSA engineers as one example of the challenges in implementing a more adversarial system for the FISA Court).

B. (U) Preservation orders

(U) Finally, the government notified the Court of its intention to continue to retain the database to fulfill preservation obligations imposed by other courts. Application at 15. In February 2014, the government applied to the Court for an amendment of the Primary Order to permit the government to retain the data beyond five years from its collection to comply with general preservation responsibilities. See Motion for Second Amendment to Primary Order at 1,

In Re Application of the FBI for an Order Requiring the Production of Tangible Things, Docket. BR 14-01, (Feb. 23, 2014). Initially, the FISA Court was not persuaded by the government's presentation of the issue and denied its motion—again, exercising oversight of proposed minimization procedures. See Op. and Order at 2, *In re Application of FBI for an Order Requiring the Production of Tangible Things*, Docket No. BR. 14-01 (March 7, 2014).

(U) Judge Walton reasoned that the Court's duties to enforce the minimization procedures to protect the privacy rights of individuals outweighed the competing preservation obligations raised by the government. *Id.* at 11-12. He further reasoned that such preservation jeopardized those privacy rights and potentially subjected the voluminous records to greater risk of improper use or dissemination. *Id.* at 6. The government returned to the Court with an augmented record supplemented by actual preservation orders issued by other courts. See Notice of Entry of Temporary Restraining Order Against the United States and Motion for Temporary Relief from Subparagraph (3)(E) of Primary Order, *In re Application of FBI for an Order Requiring the Production of Tangible Things*, Docket No. BR. 14-01 (March 11, 2014). Judge Walton then issued a revised opinion and order modifying the minimization procedures to permit retention pending resolution of the issues raised in two cases in the Northern District of California—*First Unitarian Church* and *Jewel*. See Opinion and Order at 6-7, *In re Application of FBI for an Order Requiring the Production of Tangible Things*, Docket No. BR. 14-01 (March 12, 2014).[19]

(U) [19] The cases are *First Unitarian Church of Los Angeles v. NSA*, No 4:13-cv-3287 (JSW) (N.D. Cal.) and *Jewel v. NSA*, No. 4:08-cv-4373-JSW (N.D. Cal.). The cases remain pending. The district court in *Jewel* rejected Plantiffs' Fourth Amendment claim and entered a judgment in favor of the government on that issue. See Judgment, *Jewel v. NSA*, No 4:13-cv-3287 (JSW) (N.D. Cal. May 21, 2015). Aspects of that case are now on appeal to the Ninth Circuit. See *Jewel v. NSA*, Case No. 15-16133 (9th Cir.). Oral argument on the government's motion to dismiss for lack of jurisdiction was scheduled for October 28, 2015.

(U) If this Court chooses to follow Judge Walton's approach and defer to the preservation orders issued by the other courts, the Court nonetheless should address a number of questions before deciding whether to grant the government's preservation request:

- Why has the government been unable to reach some stipulation with the plaintiffs to preserve only the evidence necessary for plaintiffs to meet their standing burden? Consider whether it is appropriate for the government to retain billions of irrelevant call detail records involving millions of people based on, what undersigned understands from counsel involved in that litigation, the government's stubborn procedural challenges to standing – a situation that the government has fostered by declining to identify the particular telecommunications provider in question and/or stipulate that the plaintiff is a customer of a relevant provided.

- As Judge Walton identified when he first denied the modification of the minimization procedures to extend the duration of preservation, the continued retention of the data at issue subjects it to risk of misuse and improper dissemination. The government should have to satisfy the Court of the security of this information in plain and meaningful terms.

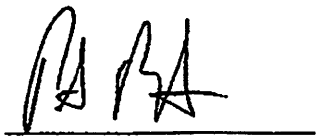
(U) The Plaintiffs in *Clapper*, *Smith*, and *Klayman* all sought immediate purges of the collected data. See Complaint, *ACLU v. Clapper*, Case No. 13-CIV-3994, Dkt. 1 at 10 (S.D.N.Y June 13, 2013); Amended Complaint, *Klapper v. Obama*, Case No. 1:13-cv-851, Dkt. 4 at 23, ¶97 (D.D.C. June 9, 2013); Complaint, *Smith v. Obama*, Case No. 2:13-cv-257, Dkt. 1 at 8 (D. Idaho June 12, 2013).

(U) Conclusion

(U) For the reasons set forth above, *amicus curiae* respectfully submits that the government's proposed retention and limited access to the telephony data archive for three additional months is not prohibited by the USFA. Ultimately, *amicus curiae* urges the Court to ensure that meaningful effect is given to the USFA's statutory directive that the government's minimization procedures for the call detail records include a plan for prompt destruction of such material. In light of the significant privacy interests affected by the creation and retention of the database, the undersigned urges the Court as part of its statutory oversight of the minimization procedures to demand full and meaningful information concerning the condition of the data at issue, the data's security, and its contemplated destruction as a condition of any retention beyond November 28, 2015.

Date: October 29, 2015

Respectfully submitted,



Preston Burton
D.C. Bar No. 426378
Poe & Burton PLLC
The Executive Building
1030 15th Street, N.W., Suite 580 West
Washington, D.C. 20005
Telephone: (202) 583-2500
Fax: (202) 583-0565
Email: pburton@poeburton.com

Amicus Curiae

(U) **CERTIFICATE OF SERVICE**

(U) I hereby certify that on the 29th day of October, 2015, I filed a true and correct copy of the foregoing Memorandum with the Clerk of Court who will transmit a true copy via appropriate secure means to:

Stuart J. Evans
Deputy Assistant Attorney General
National Security Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Room 7300
Washington, DC 20530

Preston Burton
D.C. Bar No. 426378
Poe & Burton PLLC
The Executive Building
1030 15th Street, N.W., Suite 580 West
Washington, D.C. 20005
Telephone: (202) 583-2500
Fax: (202) 583-0565
Email: pburton@poeburton.com

I, [redacted] Chief Deputy Clerk, FISC, certify that this document is a true and correct copy of the original [redacted]