

1 AARON MACKEY (SBN 286647)
amackey@eff.org
2 NATHAN D. CARDOZO (SBN 259097)
nate@eff.org
3 ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
4 San Francisco, CA 94109
Telephone: (415) 436-9333
5 Facsimile: (415) 436-9993

6
7 Attorneys for Plaintiff
ELECTRONIC FRONTIER FOUNDATION

8
9 **UNITED STATES DISTRICT COURT**
10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN FRANCISCO DIVISION**

12 ELECTRONIC FRONTIER FOUNDATION,)
13 Plaintiff,)
14 v.)
15 UNITED STATES DEPARTMENT)
OF JUSTICE,)
16 Defendant.)
17

Case No. 16-cv-02041-HSG
**PLAINTIFF’S REPLY IN SUPPORT OF
CROSS MOTION FOR PARTIAL
SUMMARY JUDGMENT**
Date: November 8, 2018
Time: 2:00 pm
Courtroom: Courtroom 2—4th Floor
Hon. Haywood S. Gilliam Jr.

TABLE OF CONTENTS

1

2 INTRODUCTION 1

3 ARGUMENT 2

4 I. The Court Can Interpret Section 402 of USA FREEDOM to Determine Whether the

5 Government Has Met Its Burden to Withhold Six Significant FISC Opinions in Full..... 2

6 A. EFF Seeks to Enforce Its Rights Under FOIA to Disclose the Six Opinions the

7 Government Has Improperly Withheld. 2

8 B. The Government’s Dismissal of Section 402’s Relevance to This FOIA Case

9 Mischaracterize EFF’s Arguments and Misreads Its Own Authorities. 3

10 1. EFF asks the Court to interpret Section 402, not enforce it. 3

11 2. The Court has jurisdiction to interpret Section 402..... 6

12 II. The Government Has Failed to Meet Its Burden to Withhold Significant FISC

13 Opinions in Full..... 7

14 A. The Government Has Not Declassified and Released the Six Significant FISC

15 Opinions or Indicated that It Cannot and Provided a Declassified Summary in

16 Its *Vaughn* Index..... 7

17 1. The government has failed to meet its substantive burden to withhold the records

18 in light of USA FREEDOM. 7

19 2. The government has failed to adequately describe the withheld FISC opinions,

20 despite USA FREEDOM providing a method by which it could..... 9

21 B. The Plain Text of USA FREEDOM Requires the Government to Review Presently

22 Classified Significant FISC Opinions and Consider Releasing Them. 10

23 1. The Court should decline to follow *EPIC v. DOJ*. 16

24 2. USA FREEDOM poses no retroactivity concerns..... 17

25 C. Separate from Its Failure to Comply with USA FREEDOM, the Government

26 Has Not Complied with Its Obligations under FOIA. 18

27 CONCLUSION..... 20

28

TABLE OF AUTHORITIES

Cases

1
2
3 *ACLU v. Clapper*,
785 F.3d 787 (2d Cir. 2015) 14
4
5 *ACLU v. Dep’t of Defense*,
628 F.3d 612 (D.C. Cir. 2011)..... 4
6
7 *Assassination Archives & Research Ct. v. DOJ*,
43 F.3d 1542 (D.C. Cir. 1995).....5, 6
8
9 *BedRoc Limited, LLC v. United States*,
541 U.S. 176 (2004)..... 11
10
11 *Campbell v. DOJ*,
164 F.3d 20 (D.C. Cir. 1998)..... 8
12
13 *Dep’t of Air Force v. Rose*,
425 U.S. 352 (1976)..... 5
14
15 *Dep’t of Justice v. Tax Analysts*,
492 U.S. 136 (1989)..... 5
16
17 *Donovan v. FBI*,
806 F.2d 55 (2d Cir. 1986) 19
18
19 *EFF v. DOJ*,
2014 WL 12770239 (N.D. Cal. June 13, 2014)..... 19
20
21 *Epic Sys. Corp. v. Lewis*,
138 S. Ct. 1612 (2018) 8
22
23 *EPIC v. DOJ*,
296 F. Supp. 3d 109 (D.D.C. 2017) 16, 17
24
25 *INS v. St. Cyr*,
533 U.S. 289 (2001)..... 18
26
27 *King v. Dep’t of Justice*,
830 F.2d 210 (D.C. Cir. 1987)..... 10
28
29 *Lindh v. Murphy*,
521 U.S. 320 (1997)..... 11
30
31 *Long v. IRS*,
742 F.2d 1173 (9th Cir. 1984) 4
32
33 *Martin v. Hadix*,
527 U.S. 343 (1999)..... 18
34
35 *Maynard v. CIA*,
986 F.2d 547 (1st Cir. 1993) 19
36
37 *Military Audit Project v. Casey*,
656 F.2d 724 (D.C. Cir. 1981)..... 8
38
39 *Minier v. CIA*,
88 F.3d 796 (9th Cir. 1996)5, 6

1	<i>Optivus Tech., Inc. v. Ion Beam Applications S.A.</i> , No. 03-cv-2052, 2004 WL 5700631 (C.D. Cal. Aug. 31, 2004).....	12
2	<i>Ray v. Turner</i> ,	
3	587 F.2d 1187 (D.C. Cir. 1978).....	20
4	<i>South Carolina v. Catawba Indian Tribe, Inc.</i> ,	
	476 U.S. 498 (1986).....	13
5	<i>Spirko v. USPS</i> ,	
	147 F.3d 992 (D.C. Cir. 1998).....	20
6	<i>United States v. Estate of Romani</i> ,	
7	523 U.S. 517 (1992).....	9
8	<i>United States v. Reynard</i> ,	
	473 F.3d 1008 (9th Cir. 2007).....	17
9	<i>Univ. of Tex. Sw. Med. Ctr. v. Nassar</i> ,	
	570 U.S. 338 (2013).....	15
10	<i>Whitman v. Am. Trucking Ass’ns, Inc.</i> ,	
11	531 U.S. 457 (2001).....	13
12	<i>Wiener v. FBI</i> ,	
	943 F.3d 972 (9th Cir. 1991).....	18
13	<i>Young v. UPS</i> ,	
14	135 S. Ct. 1338 (2015).....	14
	Statutes	
15	5 U.S.C. § 552.....	2, 6
16	50 U.S.C. § 1803.....	15
17	50 U.S.C. § 1861.....	14
18	50 U.S.C. § 1872.....	<i>passim</i>
19	50 U.S.C. § 3024.....	8, 9
20	50 U.S.C. § 3605.....	8, 9
21	USA FREEDOM Act, Pub. L. 114-23 (2015), 129 Stat. 268.....	<i>passim</i>
	Legislative Materials	
22	161 Cong. Rec. H2914 (daily ed. May 13, 2015).....	12
23	161 Cong. Rec. H2915 (daily ed. May 13, 2015).....	12
24	161 Cong. Rec. H2916 (daily ed. May 13, 2015).....	12, 13
25	161 Cong. Rec. H2921 (daily ed. May 13, 2015).....	12
26	H.R. Rep. No. 114-109 (2015).....	12, 13, 14

Other Authorities

1

2 *Comments of the Judiciary on Proposals Regarding the Foreign Intelligence Surveillance Act,*

3 *filed by the Hon. John D. Bates, Director of the Administrative Office of the United States*

4 *Courts (Jan. 10, 2014).....11*

5 *Walter F. Mondale et al., No Longer a Neutral Magistrate: The Foreign Intelligence Surveillance*

6 *Court in the Wake of the War on Terror, 100 Minn. L. Rev. 2251, 2263-69 (2016).....11*

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

INTRODUCTION

1
2 This Court is being asked to do what it does in all FOIA cases—determine whether the
3 government has met its burden to withhold records. In this case, the Court can resolve that question
4 by determining whether the government has complied with Congress’ command in the USA
5 FREEDOM Act (“USA FREEDOM”) that it declassify significant opinions of the Foreign Intelligence
6 Surveillance Court (“FISC”). Pub. L. 114-23 (2015), 129 Stat. 268.

7 Because of the perfect overlap of the disputed FISC opinions that the government withholds
8 in full here in response to EFF’s FOIA request and USA FREEDOM Act’s declassification
9 requirements, it is necessary for this Court to interpret the statute to determine whether the government
10 has complied with its obligations under FOIA. The government does not dispute that the subject of
11 this FOIA request and USA FREEDOM Act concern the same documents: significant FISC opinions.
12 Nor does it dispute that with respect to the six FISC opinions it has withheld in full, it has failed to
13 comply with USA FREEDOM by either declassifying and releasing the opinions in part or providing
14 declassified summaries of them in its *Vaughn* Index. Doing either would satisfy its obligations under
15 FOIA.

16 The plain language and purpose of USA FREEDOM is clear: the government “shall conduct a
17 declassification review of each decision, order, or opinion issued by the [FISC] that includes a
18 significant construction or interpretation of any provision of law,” and “consistent with that review,
19 make publicly available to the greatest extent practicable each such decision, order, or opinion.” Publ.
20 L. 114-23, § 402, codified at 50 U.S.C. 1872(a) (“Section 402”). In passing this portion of USA
21 FREEDOM, Congress sought to bring much-needed transparency to the FISC, which since at least
22 2001 has been called on to determine the constitutional and statutory rights of all Americans in secret.
23 In 2016, EFF filed a FOIA request seeking all significant FISC opinions that Congress directed the
24 Executive Branch to review and declassify under USA FREEDOM. EFF’s FOIA request thus sought
25 the tangible results—declassified significant FISC opinions—of a process that the government was
26 already supposed to be undertaking as a result of USA FREEDOM’s declassification review
27 requirements.

28 There is thus no “loose thread” to unravel between EFF’s FOIA request and USA FREEDOM,

1 as the government argues. Defendant's Reply In Support of Its Motion for Partial Summary Judgment
2 (ECF No. 69) ("Def. Reply") at 1. Rather than recognizing that the specific circumstances of this case
3 directly align the burden the government must meet under FOIA with the declassification obligations
4 of USA FREEDOM, the government seeks to avoid its obligations under both statutes. It offers up a
5 bevy of arguments, including supposed jurisdictional and retroactivity concerns, that distract the Court
6 from the dispositive inquiry in this case: did the government satisfy its duties under FOIA, which
7 would could be discharged by review, declassification, and release of the six significant FISC opinions
8 pursuant to USA FREEDOM that it has withheld in full? Alternatively, did the government, upon
9 determining it must withhold the six opinions in full, satisfy its obligations under FOIA by reasonably
10 describing them in its *Vaughn* Index, which could be done by providing the declassified summaries of
11 those six opinions that USA FREEDOM independently requires them to create? On the current record
12 before the Court, the answers to both questions is no. Moreover, EFF has already addressed the
13 government's jurisdictional and retroactivity arguments and shown that they lack merit. EFF Cross-
14 Motion in Support of Partial Summary Judgment and Opposition to Defendant's Motion for Partial
15 Summary Judgment (ECF No. 68) ("EFF Mot.") at 8-15.

16 Because the government has failed to show it has complied with USA FREEDOM, it cannot
17 meet its burden to withhold the records under FOIA. EFF thus asks the Court to grant summary
18 judgment in its favor.

19 ARGUMENT

20 **I. The Court Can Interpret Section 402 of USA FREEDOM to Determine Whether the** 21 **Government Has Met Its Burden to Withhold Six Significant FISC Opinions in Full.**

22 **A. EFF Seeks to Enforce Its Rights Under FOIA to Disclose the Six Opinions the** 23 **Government Has Improperly Withheld.**

24 Resolution of this FOIA case, like every FOIA case, requires the Court to determine whether
25 the government has met its burden to withhold records under the statute. 5 U.S.C. § 552(a)(4)(B).
26 EFF's argument that the government has failed to meet its burden is simple: in light of Congress'
27 command in 2015 that the government review and declassify all significant FISC opinions, or create
28 declassified summaries of them when it determines that it cannot declassify them, the government here

1 cannot meet its burden under FOIA to withhold those very same significant FISC opinions without
2 showing it has complied with USA FREEDOM. EFF Mot. at 15-23.

3 Analyzing whether the government has satisfied its burden under FOIA requires the Court to
4 read Section 402 and determine, in light of the affirmative declassification requirements it places on
5 the government, whether it can continue to withhold in full six significant FISC opinions that are
6 subject to EFF's FOIA request. As EFF previously showed, EFF's FOIA request and Section 402 fit
7 hand in glove: the underlying request at issue asked the government to produce all the significant FISC
8 opinions that it had to declassify and release as part of USA FREEDOM. EFF Mot. at 7-10.

9 To be clear: EFF does not ask the Court to enforce Section 402 and hold that the government
10 has violated that statute, as the government erroneously claims. Def. Reply at 3. As EFF has said, it
11 agrees with the government that this case sounds only in FOIA and that the Court's jurisdiction is
12 limited to determining whether the agency has met its burden to withhold the six opinions in full. EFF
13 Mot. at 8. Moreover, resolving the question does not require this Court to enjoin the government under
14 USA FREEDOM. EFF asks that the Court hold the government to its burden under FOIA in
15 withholding six significant FISC opinions that Congress, in a separate statute, required it to either
16 declassify and disclose them or to release declassified summaries of them.

17 **B. The Government's Dismissal of Section 402's Relevance to This FOIA Case**
18 **Mischaracterize EFF's Arguments and Misreads Its Own Authorities.**

19 As explained above, this Court can to determine whether the government can meet its burden
20 to withhold six significant FISC opinions in full in light of Section 402's command that the
21 government declassify those opinions or determine that they cannot be declassified and release a
22 declassified summary of them. Rather than confront its burden and address its present shortcomings,
23 the government mischaracterizes EFF's position and its argument regarding the relevance of Section
24 402. It also misreads the authorities it relies on to support its arguments.

25 1. EFF asks the Court to interpret Section 402, not enforce it.

26 First, the government argues that the Court cannot consider Section 402 *at all* because courts
27 hearing FOIA case cannot enforce other disclosure statutes, particularly here because Congress gave
28 no private right of action to enforce Section 402. Def. Reply at 2-3. But as previously explained, this

1 is not what EFF seeks. EFF has agreed with the government that there is no private right of action
2 under Section 402. EFF Mot. at 8. The government argues that EFF is engaging in “subterfuge” by
3 asking the Court to read the plain text of Section 402 and consider its impact on the government’s
4 burden in this case. Def. Reply at 2. But EFF has engaged in no deception. It asks that this Court
5 interpret another statute that is directly relevant to the records at issue here and has consequences for
6 what the government must show to meet its burden in this FOIA case.

7 Thus, the Court here is in the same position as other courts hearing FOIA cases that, for
8 example, interpret tax statutes that bear on the government’s withholding of IRS records or interpret
9 the Executive Order that bears on the withholding of classified records. EFF Mot. at 8; *Long v. IRS*,
10 742 F.2d 1173, 1177 (9th Cir. 1984); *ACLU v. Dep’t of Defense*, 628 F.3d 612, 619-25 (D.C. Cir.
11 2011). The government misunderstands the import of cases like *Long* that involve construing another
12 statute passed by Congress. The point is, in analyzing whether the government satisfied its burden in
13 withholding records in response to a FOIA request in that case, the Ninth Circuit had to construe the
14 statute at issue to determine first, whether it was subject to FOIA and, if so, whether it qualified as a
15 withholding statute. *Long*, 742 F.2d 1177-1182. EFF similarly asks this Court to construe Section 402
16 and its consequences for the government’s withholdings in this case.

17 In response, the government says that “[n]one of this is remarkable.” Def. Reply at 4. EFF
18 agrees. There is nothing remarkable about a FOIA court interpreting statutes outside FOIA, which is
19 what EFF seeks here. The government would have the Court ignore other actions by Congress that
20 bear precisely on the government’s withholding of significant FISC opinions.

21 EFF’s argument is further unwarranted, according to the government, because the only time a
22 FOIA court can construe another statute in the context of a FOIA case is to withhold records under
23 Exemption 3, the provision of FOIA that permits agencies to withhold materials that are “specifically
24 exempted from disclosure by statute.” 5 U.S.C. § 552(b)(3); Def. Reply at 4. The government provides
25 no authority for its proposition that FOIA is such a one-way street, whereby only the government can
26 ask the Court to interpret other statutes that bear on its decision to withhold records, but a FOIA
27 requester cannot ask the Court to consider the implications of another law passed by Congress that
28 bears directly on the records at issue in the case and the government’s burden to withhold those

1 records. Not only is the argument unsupported, it conflicts with basic principles of FOIA that “require
2 that the disclosure requirements be construed broadly, the exemptions narrowly.” *Dep’t of Air Force*
3 *v. Rose*, 425 U.S. 352, 366 (1976); *see Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989)
4 (“Consistent with the Act’s goal of broad disclosure, these exemptions have been consistently given a
5 narrow compass”).

6 Finally, the government argues that EFF is improperly seeking to use Section 402 to override
7 its withholding of the six significant FISC opinions in this case. Def. Reply at 3. Again, this
8 misrepresents what EFF asks this Court to do. The inquiry in this case is whether the government can
9 satisfy its burden to withhold significant FISC opinions in full without showing that it conducted a
10 declassification review as required by USA FREEDOM that leads to either the release of the opinions
11 or the creation a declassified summary of them. EFF Mot. at 15-20. EFF has not and does not argue
12 that USA FREEDOM automatically requires the disclosure of the records withheld under FOIA here.
13 Instead, EFF argues that the government cannot meet its burden under FOIA without showing that it
14 complied with Section 402’s requirements to review all significant FISC opinions for declassification
15 and either release them in part create a declassified summary.

16 When EFF’s argument is accurately presented, it is clear that cases such as *Minier v. CIA*, 88
17 F.3d 796 (9th Cir. 1996) and *Assassination Archives & Research Ct. v. DOJ*, 43 F.3d 1542 (D.C. Cir.
18 1995) are irrelevant here. Def. Reply 3. EFF has previously explained that interpreting Section 402
19 does not require this Court to override properly claimed exemptions or devise other remedies outside
20 of FOIA, which is the central holding of those cases. EFF Mot. at 8. In any event, both *Minier* and
21 *Assassination Archives* are distinguishable.

22 *Assassination Archives* concerned an effort by a FOIA requester to obtain the procedural
23 benefits of a FOIA’s “timely public disclosure” of records while also importing the JFK Act’s
24 substantive standards to override exemption claims made by the agency. 43 F.3d at 1544-45. In essence
25 the requester wanted to avoid the perceived delay of the administrative review required by the JFK
26 Act’s disclosure procedures (and use FOIA’s procedures instead) but then use the JFK Act’s
27 substantive standards (rather than FOIA’s). *Id.* Here, EFF asks this Court to enforce FOIA’s substantive
28 provisions—particularly that it is the agency’s burden to justify withholding records. 5 U.S.C. §

1 552(a)(4)(B). EFF's argument is nowhere near as aggressive as the requester's in *Assassination*
2 *Archives*: EFF does not argue that it is entitled to disclosure of the six significant FISC opinions
3 because of Section 402. Rather, EFF argues that until the government complies with Section 402 by
4 declassifying and releasing the six significant FISC opinions or by providing declassified summaries
5 of them (or their equivalent) within its *Vaughn* index, it cannot meet its burden substantively or
6 procedurally. EFF Mot. at 15-20.

7 *Minier* is similarly distinguishable because the requester there argued that the JFK Act
8 overrode an Exemption 3 claim. 88 F.3d at 802. The Ninth Circuit held that Congress did not intend
9 the JFK Act "to override the CIA's ability to claim *proper* FOIA exemptions." *Id.* (emphasis added).
10 At bottom, EFF's argument is that the government's current exemption claims are not proper in light
11 of Section 402's requirements that they review and declassify all significant FISC opinions. As
12 explained below, had the government demonstrated that it complied with Section 402, it could
13 properly withhold the significant FISC opinions in full. But it is precisely because the government has
14 refused to even acknowledge Section 402's relevance, much less its application, that it has failed to
15 carry its burden.

16 2. The Court has jurisdiction to interpret Section 402.

17 Because EFF's FOIA request seeks disclosure of significant FISC opinions that are the subject
18 of Section 402's declassification review procedures, the Court can interpret the statute to determine
19 whether the government has met its burden to withhold records here. The government argues that to
20 interpret Section 402 would constitute an impermissible advisory opinion. Def. Reply at 8. This Court
21 has jurisdiction to interpret Section 402 in this FOIA case. This case satisfies Article III's case and
22 controversy requirement because federal law explicitly grants jurisdiction to hear cases arising under
23 FOIA. 5 U.S.C. § 552(a)(4)(B). Moreover, EFF previously demonstrated that Section 402 applies to
24 the subject matter of the FOIA request this Court has jurisdiction over, as both the FOIA request at
25 issue and Section 402 concern significant FISC opinions. EFF Mot. at 8-11. The government does not
26 dispute that EFF's FOIA request seeks significant FISC opinions. Indeed, it cannot because EFF's
27 request recited Section 402's language in requesting disclosure of the very same records that the statute
28 required the government to declassify and release. *Id.* at 2-4, 8-9. Moreover, there is a case or

1 controversy with respect to Section 402 because the government has withheld six opinions in full,
2 which runs counter to Section 402's declassification review mandate. There is thus nothing abstract,
3 hypothetical, or advisory about this Court determining whether Section 402 applies to the significant
4 FISC opinions withheld here and then interpreting the statute to determine its import on the
5 government's burden to withhold those opinions. The cases cited by the government are not applicable
6 here. Def. Reply at 8.

7 **II. The Government Has Failed to Meet Its Burden to Withhold Significant FISC Opinions**
8 **in Full.**

9 **A. The Government Has Not Declassified and Released the Six Significant FISC**
10 **Opinions or Indicated that It Cannot and Provided a Declassified Summary in Its**
11 ***Vaughn* Index.**

12 Because Section 402 imposes independent obligations on the government to conduct a
13 declassification review of all significant FISC opinions, it cannot meet its burden to withhold the six
14 significant opinions here until it demonstrates that it has complied with USA FREEDOM. As EFF
15 previously explained, the government's failure to show its compliance with Section 402 is obvious: it
16 has not declassified and released the six opinions at issue here, nor has it stated that it cannot declassify
17 and release them and created a declassified summary pursuant to the statute. EFF Mot. at 15-19. The
18 government could defeat EFF's cross-motion and meet its burden under FOIA by complying with
19 Section 402, *i.e.*: (1) releasing in part the six classified opinions or (2) including the declassified
20 summaries that USA FREEDOM requires it to create in its *Vaughn* Index to reasonably describe them
21 and thus justify their withholding in full. *Id.* In light of the government's failure to do so, it cannot
22 meet its burden substantively or procedurally under FOIA to withhold the opinions under Exemptions
23 1, 3, and 7. *Id.*

24 1. The government has failed to meet its substantive burden to withhold the
25 records in light of USA FREEDOM.

26 The government ignores the impact of Section 402 on its substantive burden in this case and
27 offers no new evidence to demonstrate that it has complied. Instead, it argues that USA FREEDOM
28 does not impact its burden at all. Def. Reply at 6-7.

First, the government argues that its withholdings under Exemption 1 are proper because

1 Section 402 does not alter the standard for the government’s classification of material withheld
2 pursuant to the exemption. *Id.* at 1. This argument misses the mark, as EFF agrees that Section 402
3 did not alter the classification standard set out in Executive Order 13526. Section 402’s impact on the
4 government’s Exemption 1 claim instead is that it must indicate whether it engaged in a
5 declassification review of the six significant FISC opinions withheld in full here and either released
6 them in part or determined that it could not do so. EFF Mot. at 15-16.

7 As EFF previously showed, nothing in the record demonstrates that any such declassification
8 review occurred with respect to the withheld opinions, much less whether a determination was made
9 regarding whether to release the decisions or produce a declassified summary as Section 402 requires.
10 50 U.S.C. § 1872. The silence of the government on this point is particularly troubling because one of
11 its declarants works for the Director of National Intelligence (“DNI”), the official that Section 402
12 explicitly commands to conduct the declassification review of significant FISC opinions. Declaration
13 of Patricia Gaviria (ECF No. 66-1). In light of Ms. Gaviria’s refusal to acknowledge the impact of a
14 duly passed law on the government’s continued withholding in full of the significant FISC opinions
15 here, the declaration cannot serve as a basis to withhold the records under Exemption 1. *See Campbell*
16 *v. DOJ*, 164 F.3d 20, 30 (D.C. Cir. 1998) (holding that a declaration’s insufficiency can stem from a
17 “failure to account for contrary record evidence”). Moreover, even in cases involving national security,
18 deference is not warranted where the agency’s declarations fail to account for contrary record
19 information. *See Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981).

20 Second, the government similarly argues that Section 402 cannot override its claims under
21 other statutes, specifically the National Security Act and the NSA Act. Def. Reply at 7; 50 U.S.C. §
22 3024(i)(1); 50 U.S.C. § 3605. But again, EFF is not arguing that Section 402 overrides those
23 Exemption 3 claims. Instead, it merely asks that the government read those statutes in harmony with
24 Section 402. This is in keeping with canons of statutory construction that counsel “[w]hen confronted
25 with two acts of Congress allegedly touching on the same topic,” the government and courts are “not
26 at liberty to pick and choose among congressional enactments and must instead strive to give effect to
27 both.” *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (citations omitted).

28 With respect to the National Security Act, USA FREEDOM requires that the Director of

1 National Intelligence (“DNI”) declassify and release, to the greatest extent practicable, significant
2 FISC opinions. 50 U.S.C. § 1872(a). Because Congress in Section 402 explicitly mandated that the
3 DNI disclose significant FISC opinions, disclosure of such opinions is clearly authorized and would
4 not violate the National Security Act’s unauthorized disclosure prohibition. 50 U.S.C. § 3024(i)(1);
5 EFF Mot. at 16.

6 With respect to the NSA Act, the government attempts to avoid Section 402’s impact by
7 arguing that because the NSA Act doesn’t explicitly reference FISC opinions, Section 402 is
8 irrelevant. Def. Reply at 7. This gets the analysis backwards. The government has claimed the NSA
9 Act applies to prevent disclosure of six significant FISC opinions. As EFF previously showed, 50
10 U.S.C. § 3605 generally prohibits disclosure of certain information concerning NSA activities. EFF
11 Mot. at 16-17. Section 402, on the other hand, specifically requires declassification of significant FISC
12 opinions. That later enacted, more specific statute governs here. *United States v. Estate of Romani*,
13 523 U.S. 517, 532 (1992). Finally, the government’s argument that the two statutes are not in conflict
14 is incorrect in light of the fact that it seeks to use the NSA Act’s broad, general nondisclosure provision
15 to withhold significant FISC opinions that are the exact subject of Section 402.¹

16 2. The government has failed to adequately describe the withheld FISC opinions,
17 despite USA FREEDOM providing a method by which it could.

18 The government has failed to adequately describe the six significant opinions it withholds in
19 full, though USA FREEDOM provides an avenue for it to easily satisfy its burden here. EFF previously
20 showed that the descriptions of the withheld FISC opinions fall short of FOIA’s requirement that the
21 government reasonably describe them. EFF Mot. at 17-19. EFF also demonstrated how Section 402
22 independently requires the government to produce declassified summaries of significant FISC
23 opinions when it determines it cannot publicly release them. *Id.*

24 Section 402 thus provides a roadmap for how the government could reasonably describe the
25 records as required under FOIA while avoiding disclosure of classified information. If it produced the
26 declassified summaries of the six withheld opinions that USA FREEDOM independently requires

27 _____
28 ¹ The government continues to also fail to meet its burden to withhold Document 1 under Exemptions
7(A) and 7(E) for all the reasons EFF explained in its cross-motion. EFF Mot. at 17, n. 8.

1 them to create, the government would satisfy its burden under FOIA.

2 Despite EFF explaining that it is not seeking the creation of records by asking the government
3 to provide declassified summaries that Section 402 compels when the government determines it cannot
4 release a significant FISC opinion, *Id.* at 17, n. 9, the government argues that EFF is seeking as much.
5 Def. Reply at 5-6. To be clear: these declassified summaries should not have been created in response
6 to EFF's FOIA request. Rather, the government should have created them when it determined,
7 pursuant to Section 402, that it could not declassify and release the underlying significant FISC
8 opinions. 50 U.S.C. § 1872(c). Assuming that the government did conduct such a review and
9 concluded that it could not declassify the six significant opinions at issue in this FOIA case, it was
10 under an independent duty to create declassified summaries of them. USA FREEDOM requires these
11 to already exist, regardless of EFF's FOIA request.

12 Given the specificity such summaries would undoubtedly include, it would be easy for the
13 government to provide them in its *Vaughn* index, as exhibits to its declarations, or to otherwise include
14 them in the record. Their inclusion in support of the government's summary judgment motion would
15 thus have satisfied its burden to reasonably describe the records it has withheld under FOIA. *See* EFF
16 Mot. at 18-19; *King v. Dep't of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987). Of course, the government
17 could provide more detailed descriptions of the documents in whatever way it wants to meet its duty
18 under FOIA. EFF submits that the declassified summaries would be the most appropriate and efficient
19 route for the government in light of its obligations under Section 402.²

20 **B. The Plain Text of USA FREEDOM Requires the Government to Review Presently**
21 **Classified Significant FISC Opinions and Consider Releasing Them.**

22 In Section 402, Congress required the government to review all significant FISC opinions that
23 are currently classified and make them publicly available unless the government certifies that it cannot.
24 As explained previously, the act states:

25 **Declassification Required** -- Subject to subsection (b), the Director of
26 National Intelligence, in consultation with the Attorney General, shall
conduct a declassification review of each decision, order, or opinion

27 ² The government's discussion of the differences between Section 402's declassification process and
28 those required by *Vaughn* proves little more than the fact that it should have already created summaries
of significant FISC opinions for which it has determined it cannot declassify. Def. Reply at 5-6.

1 issued by the Foreign Intelligence Surveillance Court or the Foreign
2 Intelligence Surveillance Court of Review (as defined in section 601(e))
3 that includes a significant construction or interpretation of any provision
4 of law, including any novel or significant construction or interpretation
5 of the term ‘specific selection term’, and, consistent with that review,
6 make publicly available to the greatest extent practicable each such
7 decision, order, or opinion.

8 USA FREEDOM § 402(a). Section 402’s requirements reach significant FISC opinions created before
9 passage of USA FREEDOM that still remain classified. That Section 402 reaches all classified
10 significant FISC opinions, regardless of the date they were issued, is plain from the explicit command
11 of the statute’s text, which says the government “shall conduct a declassification review of each
12 decision, order, or opinion issued by the [FISC] that includes a significant construction or
13 interpretation of any provision of law,” and “consistent with that review, make publicly available to
14 the greatest extent practicable each such decision, order, or opinion.” 50 U.S.C. 1872(a). As EFF has
15 previously shown, because the text is clear and unambiguous, the inquiry into its meaning ends. EFF
16 Mot. at 10-11; *BedRoc Limited, LLC v. United States*, 541 U.S. 176, 183 (2004).

17 The government disagrees, arguing that the statute is ambiguous and susceptible to multiple
18 interpretations. Def. Reply at 9-10. Further, regarding the plain meaning of “each” in Section 402
19 meaning every and all, the government argues that even if that is true, “it begs the question: each and
20 every one of *which* set of opinions?” *Id.* at 10 (emphasis in original). Of course, Section 402’s plain
21 text answers this question: the government must declassify each FISC opinion “that includes a
22 significant construction or interpretation of any provision of law.” 50 U.S.C. § 1872(a). The text is
23 clear that the declassification provisions of Section 402 are categorical, applying to particular FISC
24 opinions that contain significant interpretations of law, rather than temporal. The government’s
25 question-begging, and its reliance on *Lindh v. Murphy*, 521 U.S. 320 (1997), is thus incorrect in light
26 of the clear text and reach of Section 402. Def. Reply at 10.³

27 ³ In any event, the government need not embark on some legal history expedition to ascertain which
28 of the 30,000 FISC opinions and orders issued since 1978 are significant. Def. Reply 10-11. As both
FISC judges and outside observers have described, the vast majority of the FISC’s decisions do not
involve novel or significant legal issues and are instead run-of-the-mill FISA matters. EFF Mot. at 5;
Walter F. Mondale et al., *No Longer a Neutral Magistrate: The Foreign Intelligence Surveillance
Court in the Wake of the War on Terror*, 100 Minn. L. Rev. 2251, 2263-69 (2016); *Comments of the
Judiciary on Proposals Regarding the Foreign Intelligence Surveillance Act*, filed by the Hon. John
D. Bates, Director of the Administrative Office of the United States Courts (Jan. 10, 2014). Given that

1 *Optivus Tech., Inc. v. Ion Beam Applications S.A.*, No. 03-cv-2052, 2004 WL 5700631, at *13
2 (C.D. Cal. Aug. 31, 2004) demonstrates why the term “each” in Section 402 plainly means “every.”
3 That case involved construing disputed patent claims, including a claim that included the phrase “a
4 gantry at each treatment station.” *Id.* at *12. After the plaintiff argued that the word “each” meant
5 “more than one,” the court rejected the interpretation and used multiple dictionary definitions of
6 “each” to hold that the term meant “every” or “every one of two or more considered individually or
7 one by one.” *Id.* at *13. The Court here should similarly reject the government’s attempts to avoid the
8 clear implication of Section 402’s text that “each” means every.

9 The legislative history of Section 402 further buttresses the plain text. EFF Mot. at 11; H.R.
10 Rep. No. 114-109 (2015) at 2;⁴ 161 Cong. Rec. H2916 (daily ed. May 13, 2015) (statement of Rep.
11 Jim Sensenbrenner (R-Wisc.), the chief drafter of USA FREEDOM, that Section 420 was written to
12 bring “an end to secret laws” by requiring declassification of “significant legal decisions”). Additional
13 statements from other sponsors and supporters of USA FREEDOM demonstrate that by including the
14 word “each” in Section 402, Congress meant for the Executive Branch to declassify and release all
15 significant opinions—without regard to the date they were written. House Judiciary Chairman
16 Goodlatte stated that Section 402 “increases transparency by requiring declassification of *all*
17 significant FISA Court opinions.” 161 Cong. Rec. H2914 (daily ed. May 13, 2015) (emphasis added).
18 House Judiciary Committee Ranking Member John Conyers (D-Mich.), also an original sponsor of
19 the bill, similarly stated that Section 402 “requires the government to declassify and publish *all* novel
20 and significant opinions of the Foreign Intelligence Surveillance Court.” 161 Cong. Rec. H2915 (daily
21 ed. May 13, 2015) (emphasis added). Additionally, Rep. Adam Schiff (D-Calif.), the ranking member
22 of the House Permanent Select Committee on Intelligence said that Section 402 “increases
23 transparency by requiring a declassification review of *all* significant FISA court opinions and by
24 requiring the government to provide the public with detailed information about how they use these
25 national security authorities.” 161 Cong. Rec. H2921 (daily ed. May 13, 2015) (emphasis added).

26
27 _____
28 a FISC judge has identified that there are only a “small handful” of significant FISC opinions, it seems
plausible that the government could identify those same decisions with minimal effort.

⁴ Available at <https://www.congress.gov/114/crpt/hrpt109/CRPT-114hrpt109-pt1.pdf>.

1 In light of the plain text of Section 402, its purpose, and legislative history, the government
2 cannot feign surprise at its obligations and that the result would be to “hide elephants in mouseholes.”
3 Def. Reply at 11 (quoting *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001)). There is
4 no mousehole in Section 402, as the text explicitly directs the government to declassify each significant
5 FISC opinion. Whatever burden the government claims would result from conducting a
6 declassification review of each significant FISC opinion that remains classified, it is not because
7 Congress was unclear.

8 Moreover, it is the government’s incorrect reading of Section 402 that fails to give full effect
9 to each and every term of the provision and to Congress’ purpose in enacting it as part of USA
10 FREEDOM, violating a basic principle of statutory construction. *South Carolina v. Catawba Indian*
11 *Tribe, Inc.*, 476 U.S. 498, 510 n. 22 (1986) (collecting cases). The government argues that because
12 Section 402’s declassification mandate includes, by way of example, declassification review of FISC
13 opinions that contain “any novel or significant construction or interpretation of the term ‘specific
14 selection term,’” 50 U.S.C. § 1872(a), the only logical conclusion from the text of Section 402 is that
15 it is forward-looking and applies after enactment of USA FREEDOM. Def. Reply at 11.

16 Adopting the government’s interpretation of Section 402, however, would disregard the
17 structure of the provision and allow the specific example included within its text to govern the general
18 declassification review requirements it imposes on the government. Congress sought to accomplish
19 many objectives in passing USA FREEDOM, including bringing an end to decades of secret law. H.R.
20 Rep. No. 114-109 at 2; 161 Cong. Rec. H2916 (daily ed. May 13, 2015). Congress also sought to
21 prohibit the government from once again engaging in mass collection of Americans’ phone records.
22 *See* H.R. Rep. No. 114-109 at 17.⁵ It did this by amending the business records provision of FISA and
23

24 ⁵ The House Judiciary Committee’s report on USA FREEDOM describes how disclosures in 2013 by
25 whistleblower Edward Snowden “revealed the existence of a program operated by the NSA under
26 Section 215 of the PATRIOT Act (Section 501 of FISA)” that began in 2001. H.R. Rep. No. 114-109
27 at 8. The program “entailed the ongoing, daily collection of bulk telephony metadata from certain U.S.
28 telecommunications carriers.” *Id.* The FISC approved the program, and the government’s ongoing
collection of millions of innocent Americans’ phone records, based on a broad interpretation of Section
215’s provision that allowed for the collection of business records that “are relevant to” a foreign
intelligence investigation. *Id.* at 6-7. The government’s interpretation of Section 215, which the FISC
repeatedly endorsed, did not bear up to judicial or congressional scrutiny. The Second Circuit held

1 adding the phrase “specific selection term” to avoid bulk collection of call records. Further, Congress
2 included the phrase “specific selection term” within Section 402’s declassification review requirement
3 as one of the multiple ways it sought to prevent further abuses of Americans’ rights after learning that
4 the FISC was deciding these issues in secret without any opposing view or public awareness. 50 U.S.C.
5 § 1872. Congress included the “specific selection term” language to head off potential interpretations
6 of FISA’s business records provisions that might create a repeat of the FISC’s earlier approval of the
7 government’s bulk telephone records surveillance program.

8 The structure of Section 402 sets out the general requirements that the government must review
9 and declassify each significant FISC opinion and then includes a specific example that the government
10 review and declassify decisions regarding the newly created “specific selection term” provision in
11 FISA’s business records section. But that specific reference to a new provision of FISA does not limit
12 the previous general language of Section 402 requiring declassification of each FISC opinion “that
13 includes a significant construction or interpretation of any provision of law.” 50 U.S.C. § 1872(a).
14 This reading of Section 402 comports not only with the text of the act, it also avoids rendering Section
15 402’s general declassification review provisions “superfluous, void, or insignificant.” *Young v. UPS*,
16 135 S. Ct. 1338, 1352 (2015).

17 The government’s reliance on the *amicus curiae* provisions in USA FREEDOM does not
18 support its preferred reading of the Act. Def. Reply at 12. The text of the two provisions show that
19 Section 402’s reach is broader than the *amicus* provisions in Section 401. Section 402 speaks to
20 declassification of FISC opinions that contain a “significant construction or interpretation of *any*

21 _____
22 that the government’s interpretation of relevance under Section 215 “is unprecedented and
23 unwarranted.” *ACLU v. Clapper*, 785 F.3d 787, 812 (2d Cir. 2015). Congress responded in USA
24 FREEDOM to amend Section 215 to foreclose the government’s interpretation, while also explicitly
25 prohibiting the government from collecting in bulk Americans’ phone records. *See* USA FREEDOM,
26 §§ 101-108. Congress amended Section 215 to “establish a new, narrowly tailored mechanism for the
27 targeted collection of telephone metadata [. . .] as part of an authorized investigation to protect against
28 international terrorism.” H.R. Rep. No. 114-109 at 17. Under the new provisions of Section 215, the
government may only seek telephone records of a “specific selection term,” which the statute defines
as “a term that specifically identifies a person, account, address, or personal device, or any other
specific identifier.” USA FREEDOM, §§ 101, 107, codified at 50 U.S.C. §§ 1861(b)(2), (k). Congress
also prohibited similar bulk collection from occurring in the future. *Id.* at § 103, codified at 50 U.S.C.
§ 1861(c)(3) (“No order issued under this section may authorize the collection of tangible things
without the use of a specific selection term”).

1 provision of law,” 50 U.S.C. § 1872(a) (emphasis added), while Section 401 allows the FISC to
2 appoint an *amicus* when presented with a “novel or significant interpretation of the law.” 50 U.S.C. §
3 1803(i)(2)(A). The government ignores the two provision’s textual differences, including Section
4 402’s use of the term “any,” to argue that Section 402’s declassification provisions only apply to FISC
5 opinions in which the FISC appoints an *amicus*. But the text of Section 402 contains no such limitation,
6 foreclosing that argument. Moreover, because Section 402 is directed specifically at the government
7 and requires it to conduct a declassification review of each FISC opinion containing, “a significant
8 construction or interpretation of any provision of law,” the section accomplishes different objectives
9 than the *amicus* provisions.⁶ Once more, to read the statute in such a cramped manner would frustrate
10 Congress’ purpose in enacting USA FREEDOM and it gives short shrift to the declassification review
11 provisions in Section 402.

12 Finally, the government presses its argument that the language included in bills introduced in
13 earlier congressional sessions supports its theory that Section 402 only applies to FISC opinions
14 created after USA FREEDOM’s passage. Def. Reply 14. EFF previously showed the error of this
15 argument. EFF Mot. at 14. The crux of the government’s argument is that because those bills contained
16 temporal language, and an earlier law amending FISA contained similar language, the absence of
17 temporal language militates in favor of Section 402 only applying prospectively. *Id.* The import of
18 those earlier, unsuccessful legislative attempts, however, must yield to the plain text of the statute,
19 which contains no temporal language whatsoever. In this case, the lack of any temporal terms in the
20 statute show that Congress deliberately intended Section 402 to reach all significant FISC opinions.
21 The government is thus correct that “Congress’ choice of words is presumed to be deliberate,” *Univ.*
22 *of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013), though in this case the lack of temporal
23 language in Section 402 demonstrate why the statute concerns all significant FISC opinions. Even if
24 the Court needed to result to the government’s comparison, the more likely reading is that Congress

25 _____
26 ⁶ The legislative history Defendant relies upon, Def. reply 12-13, does not support its favored reading
27 of the statute. At most, it shows that in passing USA FREEDOM, Congress sought multiple ways to
28 avoid the FISC again deciding the rights of Americans in secret. But as EFF has already shown,
another way they sought to accomplish this objective was to end the classification of all significant
FISC opinions in which the Court may have also interpreted other laws or the Constitution in ways
that impacted the rights of Americans. *See* EFF Mot. at 4-5.

1 knew that it could provide temporal language in Section 402 but chose not to, instead requiring the
2 declassification of all significant FISC opinions as a category. That would be a far more appropriate
3 reading of Congress' decision to *not* include temporal language in Section 402.

4 1. The Court should decline to follow *EPIC v. DOJ*.

5 The Court should decline to follow *EPIC v. DOJ*, 296 F. Supp. 3d 109 (D.D.C. 2017) because
6 its treatment of Section 402 decided an issue not properly presented to it and it is also poorly reasoned.
7 As EFF previously described, the issue of Section 402's application to the records in question was not
8 before the *EPIC* court. EFF Mot. at 15, n. 7. A review of the briefing in that case confirms that the
9 records at issue were not significant FISC opinions, but rather other documents. Moreover, in
10 reviewing the briefing in that case, EFF was able to find only one mention of Section 402. It came in
11 the plaintiff's reply brief, in passing, in a single sentence in a paragraph arguing for the disclosure of
12 the records at issue there.⁷ Thus the issue of Section 402's application was both *not* before the *EPIC*
13 court and *not* fully briefed. This stands in stark contrast to the present case in which EFF has shown
14 that the text, structure, purpose, and legislative history of Section 402 counsel in favor of requiring the
15 government to disclose all significant FISC opinions.

16 The government responds that, even if Section 402 was not before the *EPIC* court, it rejected
17 the plaintiff's argument in that case that USA FREEDOM overrode its FOIA exemption claims and
18 thus this Court should rule similarly. Def. Reply at 9; *EPIC*, 296 F. Supp. 3d at 127. Yet EFF is not
19 arguing that Section 402 overrides the exemption claims made by the government. As said repeatedly,
20 EFF's argument is thus: the government cannot meet its burden to withhold the six significant opinions
21 in full under FOIA unless and until it demonstrates that it has complied with Section 402. This can be
22 done by either declassifying and releasing the opinions or by reasonably describing the records in its
23 *Vaughn* index, which could most easily be satisfied by providing the declassified summaries of the
24 opinions that Section 402 requires them to create. This Court is not being asked to read the statute in
25 the aggressive fashion suggested by the *EPIC* court, which is yet another reason why its analysis
26 should be rejected.

27 _____
28 ⁷ Should the Court wish to review that brief, see Declaration of Aaron Mackey, Exhibit A, filed with
this reply.

1 In sum, the government asks this Court to follow a decision in *EPIC* that reached issues not
2 properly presented to the court regarding the application and scope of Section 402, based on a
3 mischaracterization of EFF's argument and the *EPIC* court's misreading of the statute. The result was
4 a poorly reasoned decision that the Court should not repeat.

5 2. USA FREEDOM poses no retroactivity concerns.

6 Because the plain text of Section 402 directs the government to conduct a declassification
7 review of all significant FISC opinions that remained classified, there is no need to ask whether it
8 creates impermissible retroactive effects. *United States v. Reynard*, 473 F.3d 1008, 1014 (9th Cir.
9 2007). This is so because the plain text of the statute speaks to a category of significant FISC
10 opinions—those that are presently classified—and does not include within its terms any consideration
11 regarding the time period in which those opinions were enacted. EFF Mot. 12-14.

12 The government first quarrels with Section 402, which plainly applies to presently classified
13 significant FISC opinions regardless of the date they were issued, by arguing that there's no support
14 in the text of the statute for such a reading. Def. Reply at 15-16. Because the text of Section 402
15 requires that the government "shall conduct a declassification review" of significant FISC opinions,
16 the text plainly contemplates its application only to those significant FISC opinions which remain
17 classified and not public. EFF agrees with the government that the classification of significant FISC
18 opinions is not an event or predicate for purposes of the retroactivity analysis. Def. Reply 15. Indeed,
19 that demonstrates why the government's retroactivity concerns do not apply to Section 402: the statute
20 is not concerned with the date FISC opinions were created, only whether they are significant and
21 remain classified.

22 Next, the government argues that because it was under no obligation to declassify significant
23 FISC opinions prior to passage of USA FREEDOM, retroactive application of the statute would
24 impose impermissible obligations and burdens. Def. Reply at 16. The government's classification
25 decisions, however, are not legal rights, completed transactions, well-settled expectations, or other
26 completed past events that are cognizable under the retroactivity doctrine. EFF Mot. at 12-13. The
27 government admits that its classification decisions are not complete or settled, as they "can change
28 over time in light of subsequent official disclosures," Def. Reply at 15. Further, despite the

1 government's argument to the contrary, common sense demonstrates that the Executive Branch's
2 classification decisions are not cognizable under the doctrine. The retroactivity cases cited by the
3 government, *INS v. St. Cyr*, 533 U.S. 289 (2001) and *Martin v. Hadix*, 527 U.S. 343 (1999), do not
4 alter this conclusion. Rather, they reaffirm that the doctrine seeks to protect non-governmental
5 individuals and other entities whose rights and liabilities are affected by later enacted laws. EFF Mot.
6 13, n. 6.⁸

7 **C. Separate from Its Failure to Comply with USA FREEDOM, the Government Has**
8 **Not Complied with Its Obligations under FOIA.**

9 Even if USA FREEDOM did not impact the government's burden in this case, it has still failed
10 to adequately describe the withheld records and to segregate non-exempt material in the six significant
11 FISC opinions. Those failures defeat the government's summary judgment motion. Moreover, in light
12 of the government's decision to withhold the significant FISC opinions in full, *in camera* review is
13 warranted here.

14 Regarding the government's failure to adequately describe the six significant FISC opinions,
15 the government's arguments do not alter the fact that its showing is inadequate. Def. Reply 18-22. The
16 government again summarizes the declarations it submitted and stands on them as being adequate, but
17 as EFF has previously shown, the descriptions of the six opinions do not go beyond reciting the
18 categories of information it has withheld on classification grounds. EFF Mot. at 19-20. Those
19 descriptions, which essentially parrot the Executive Order's categories of information that may
20 permissibly be classified, do not afford EFF with enough information to meaningfully challenge those
21 withholdings. *See Wiener v. FBI*, 943 F.3d 972, 977 (9th Cir. 1991).

22 Regarding segregability, the government's continued withholding in full of all six opinions is
23 insufficient to meet its burden. The point of EFF's argument in its cross-motion regarding segregability

24 ⁸ In response to EFF's observation that it is unaware of any court holding that the government
25 possesses rights and liabilities that could give rise to colorable retroactivity concerns, the government
26 argues that "this is of no moment" because EFF has not identified a case foreclosing such a possibility.
27 Def. Reply 16. But battling legal authorities to a draw in this instance is not really the point. Rather,
28 the absence of any case identified by either party to support that the government itself possesses rights
or liabilities that can be impaired by retroactive application of new laws strongly indicates that there
is no such government right in the first instance, much less that such a right extends to the
government's classification decisions.

1 was not to demean the government. Def. Reply 22-23. Rather, the point of discussing previous efforts
2 to obtain FISC opinions in other FOIA cases shows that when the government is pushed to justify its
3 withholding of FISC opinions in full, it has fallen short of meeting its segregability obligations. EFF
4 Mot. at 20-23. Thus, even if the government is entitled to a presumption of good faith in its
5 segregability decisions, the fact that it has withheld the opinions in full raises the possibility that it has
6 not complied.

7 Of course, EFF is pleased that the government reprocessed the FISC opinions responsive to its
8 FOIA request and determined that it could release 31 additional opinions in part. And EFF's continued
9 press for the disclosure of more FISC opinions here is not meant to punish or otherwise disincentivize
10 the government's decision to release additional opinions in this case, or in the future. Def. Reply. at
11 23, n. 9. EFF merely seeks to hold the government to its burden under FOIA.

12 Finally, the Court should review six significant opinions *in camera*, which will efficiently
13 resolve this case. EFF previously demonstrated that *in camera* review is necessary and appropriate
14 here in light of the strong public interest in disclosing significant FISC opinions. EFF Mot. at 23-24.
15 The public interest is significant, as the six FISC opinions concern "[t]he scope and legality of the
16 government's current surveillance practices of broad swaths of its citizenry," which "is a topic of
17 intense public interest and concern." *EFF v. DOJ*, 2014 WL 12770239 at *2 (N.D. Cal. June 13, 2014).
18 The government argues in response that other factors militate against the Court reviewing the opinions
19 *in camera*. Contrary to the government's argument, judicial economy would also be served were the
20 Court to review the documents *in camera*.

21 Here, because only six documents are at issue, the potential efficiency of resolving the case by
22 reviewing them *in camera* tilts the balance in favor of the Court doing so.⁹ Courts have looked to the
23 number of documents at issue in a case to determine whether *in camera* review is warranted, finding
24 "[i]n camera review is particularly appropriate when the documents withheld are brief and limited in
25 number." *Maynard v. CIA*, 986 F.2d 547, 558 (1st Cir. 1993) (citations omitted); *see also Donovan v.*
26 *FBI*, 806 F.2d 55, 59 (2d Cir. 1986) ("[I]n camera inspection has been found to be appropriate when

27 _____
28 ⁹ Because the government has not revealed the number of pages in the Six Opinions, EFF cannot make representations concerning their length.

1 only a small number of documents are to be examined.”) (citation omitted).

2 Further, given that the government’s declarations fall short of reasonably describing the
3 records or contend with Section 402’s declassification review requirements, *in camera* review is
4 appropriate to resolve doubts about the propriety of those claims. “A judge has discretion to order *in*
5 *camera* inspection on the basis of an uneasiness, on a doubt” she wants satisfied before taking
6 “responsibility for a *de novo* determination.” *Spirko v. USPS*, 147 F.3d 992, 996 (D.C. Cir. 1998)
7 (quoting *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978)) (internal quotation marks omitted).
8 EFF respectfully submits that should this Court have doubts regarding the government’s withholdings,
9 it should review them *in camera*.

10 CONCLUSION

11 For the reasons described above, EFF respectfully requests that the Court grant its motion for
12 partial summary judgment, deny the government’s motion for partial summary judgment, and order
13 the government to produce the six significant FISC opinions it has withheld in full.
14

15 DATED: October 10, 2018

Respectfully submitted,

17 /s/ Aaron Mackey
Aaron Mackey

18 ELECTRONIC FRONTIER FOUNDATION
19 815 Eddy Street
20 San Francisco, CA 94109
Telephone: (415) 436-9333
Facsimile: (415) 436-9993

21 Attorney for Plaintiff
22 ELECTRONIC FRONTIER FOUNDATION
23
24
25
26
27
28