

United States

Foreign Intelligence Surveillance  
Court of Review

2023

Maura Peterson, Clerk of Court

In the

**United States Foreign Intelligence  
Surveillance Court of Review**

**IN RE PETITION TO SET ASIDE OR  
MODIFY DIRECTIVE ISSUED TO [REDACTED]**

Docket No. FISCR [REDACTED]

On Petition for Review of a Decision of the  
United States Foreign Intelligence Surveillance Court

Decided: [REDACTED] 2023

Before SENTELLE, HIGGINSON, MILLER, *Judges.*

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[REDACTED] (Matthew G. Olsen,  
Melissa MacTough, J. Bradford Wiegmann,  
[REDACTED], [REDACTED], [REDACTED]  
[REDACTED], [REDACTED], *on the brief*)  
Appellate Counsel, National Security Division,  
Department of Justice, *for Petitioner*.

[REDACTED]  
[REDACTED]  
*for Respondent.*

Also Present at Oral Argument:

Matthew Olsen, Assistant Attorney General for  
National Security, Department of Justice;

Melissa MacTough, Deputy Assistant Attorney  
General, National Security Division, Department  
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J. Bradford Wiegmann, Deputy Assistant Attorney  
General, National Security Division, Department  
of Justice;

[REDACTED], Deputy Section Chief, National  
Security Division, Department of Justice;

[REDACTED]  
[REDACTED]  
[REDACTED];  
and  
[REDACTED]

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PER CURIAM.

The question presented in this appeal is whether a provider [REDACTED]

[REDACTED] is an “electronic communication service provider” (“ECSP”) as defined in 50 U.S.C. § 1881(b)(4)(B) and/or (D) such that the provider must comply with a written directive issued pursuant to 50 U.S.C. § 1881a(i)(1)(A) requiring its assistance with an acquisition authorized under Section 702 of the Foreign Intelligence Surveillance Act (“FISA”). 50 U.S.C. § 1881a.

The Government, petitioner herein, appeals an order issued by the United States Foreign Intelligence Surveillance Court (“FISC”) [REDACTED] 2022, which decided this question adverse to the Government. In its decision, the FISC determined that [REDACTED] respondent herein, [REDACTED] [REDACTED] did not satisfy the definition of ECSP under 50 U.S.C. § 1881(b)(4)(B) or (D).

For the following reasons, we affirm the order of the FISC.

## I. BACKGROUND

Section 702 provides procedures under which the Government may target non-United States persons located outside the United States without a warrant supported by probable cause. Specifically, pursuant to Section 702,

upon the issuance of an order in accordance with subsection (j)(3) or a determination under subsection (c)(2), the Attorney General and the Director of National Intelligence may authorize jointly, for a period of up to 1 year from the effective date of the authorization, the targeting of persons

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reasonably believed to be located outside the United States to acquire foreign intelligence information.

50 U.S.C. § 1881a(a). For the FISC to issue the required order, the Attorney General and the Director of National Intelligence must provide the FISC with a written certification and any supporting affidavit, in accordance with 50 U.S.C. § 1881a(h). The certification must include, among other things, an attestation that “the acquisition involves obtaining foreign intelligence information from or with the assistance of an electronic communication service provider.” 50 U.S.C. § 1881a(h)(2)(A)(vi).

FISA defines ECSP to include several categories of providers:

- (A) a telecommunications carrier, as that term is defined in section 153 of Title 47;
- (B) a provider of electronic communication service, as that term is defined in section 2510 of Title 18;
- (C) a provider of a remote computing service, as that term is defined in section 2711 of Title 18;
- (D) any other communication service provider who has access to wire or electronic communications either as such communications are transmitted or as such communications are stored; or
- (E) an officer, employee, or agent of an entity described in subparagraph (A), (B), (C), or (D).

50 U.S.C. § 1881(b)(4). Section 702 also authorizes the Government to direct an ECSP to provide the assistance necessary to accomplish the acquisition. 50 U.S.C. § 1881a(i)(1)(A).

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On April 21, 2022, the FISC approved three Certifications submitted in accordance with 50 U.S.C. § 1881a(h) (DNI/AG Certification 2021-A, DNI/AG Certification 2021-B, and DNI/AG Certification 2021-C ("2021 Certifications")) [REDACTED]

Government served [REDACTED] with a written directive requiring it to "immediately provide the Government with all information, facilities, or assistance necessary to accomplish this acquisition in such a manner as will protect the secrecy of the acquisition and produce a minimum of interference with the services that [REDACTED] provides to the targets of the acquisition." App. 182.

The Government sought [REDACTED] assistance in the acquisition of foreign intelligence information [REDACTED]

[REDACTED] (commonly referred to in the Section 702 context as "selectors") [REDACTED]

An ECSP may challenge a directive by filing a petition to modify or set aside the directive with the FISC. 50 U.S.C. § 1881a(i)(4)(A) [REDACTED]

[REDACTED] 2022, [REDACTED] filed such a petition, arguing that for purposes of [REDACTED] it is not an ECSP as defined by FISA.

[REDACTED] argued that its qualification as an ECSP must be determined based on the service being provided [REDACTED]

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[REDACTED] focused on subparagraph (D) of the definition of ECSP to argue that with respect to [REDACTED] it was not providing a communication service and [REDACTED] contended would not be an authorized recipient of a directive under Section 702. [REDACTED] also argued, among other things, that it was not a provider of “electronic communication service” under subparagraph (B) [REDACTED]

[REDACTED]

The Government’s response focused on subparagraphs (B) and (D) of the ECSP definition. With respect to subparagraph (B), the Government contended that the definition of “electronic communication service” has been broadly interpreted

[REDACTED]

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[REDACTED]

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On [REDACTED] 2022, the FISC granted [REDACTED] petition and modified the directive to specify that [REDACTED] was not required to assist the Government when [REDACTED]

[REDACTED]<sup>2</sup> The FISC found that [REDACTED] did not satisfy subparagraph (B) because: (1) [REDACTED] not a type of service that courts have found to satisfy the definition of "electronic communication service"

[REDACTED] is "more akin to 'a product or service' that [REDACTED] which in and of itself does not constitute an [electronic communication service]"; and (3) other statutory provisions pertaining to providers of electronic communication service illustrate a presumption that [REDACTED]

[REDACTED] *Id.* at 9–11, 13–14 (internal quotation omitted). The FISC found that [REDACTED] provision of [REDACTED] did not satisfy subparagraph (D) because: (1) it does not [REDACTED]

[REDACTED] and thus, is not a communication service provider; and (2) it does not [REDACTED]

[REDACTED] *Id.* at 15, 18.

Either the Government or an ECSP may file a petition with this Court for review of the FISC's decision. 50 U.S.C. § 1881a(i)(6)(A). The Government filed a Notice of Appeal and Petition for Review of the FISC's [REDACTED] 2022 Decision [REDACTED] 2022. This Court has

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<sup>2</sup> The FISC did not modify the directive to the extent it concerned [REDACTED] [REDACTED]. The FISC examined whether [REDACTED] functions as an ECSP on a per-service basis and, thus, only considered [REDACTED] [REDACTED] No party disputes this approach.

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jurisdiction to consider [REDACTED] petition pursuant to 50 U.S.C. § 1881a(6)(A).

## II. DISCUSSION

### A. Standard of Review

We review the interpretation of statutory provisions de novo. *In re: DNI/AG 702(h) Certifications 2018-A, 2018-B, and 2018-C, and Predecessor Certifications*, No. FISCR [REDACTED], July 12, 2019, at 21 (citations omitted).

### B. Provider of Electronic Communication Service

The Government first challenges the FISC's conclusion that [REDACTED] does not qualify it as an ECSP under 50 U.S.C. § 1881(b)(4)(B). Subparagraph (B) defines an ECSP as "a provider of electronic communication service, as that term is defined in section 2510 of Title 18." 50 U.S.C. § 1881(b)(4)(B). Section 2510(15), in turn, defines "electronic communication service" as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15). The meaning of subparagraph (B), as well as the meaning of 18 U.S.C. § 2510(15), are issues of first impression for this Court.

The Government argues that section 2510(15) "unambiguously covers a provider who [REDACTED]

[REDACTED] Gov't Br. at 17, 19–20. The definition of "electronic communication service," however, is a service that provides its users "the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15). Consequently, to qualify as an

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ECSP under subparagraph (B), [REDACTED] must provide a service that gives its users the ability to send or receive wire or electronic communications.

The parties agree that the statutory cross-reference to the Electronic Communications Privacy Act (“ECPA”) makes relevant the mature body of caselaw regarding the definition of “electronic communication service” as applied under the Stored Communications Act (“SCA”). [REDACTED] Hearing Tr. at 6. In assessing the reach of these statutes, courts have noted that section 2510(15) “most naturally describes network service providers” and covers telephone companies, Internet or e-mail service providers, and bulletin board services. *In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 806 F.3d 125, 147 (3d Cir. 2015) (internal citation omitted). Courts also have interpreted section 2510(15) to include web hosting and social networking services, *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 980–82 (C.D. Cal. 2010), Airbnb’s electronic messaging system, *In re Application of the U.S. for an Order Pursuant to 18 U.S.C. § 2705(b)*, 289 F. Supp. 3d 201, 209 (D.D.C. 2018), and police department paging systems, *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892, 902 (9th Cir. 2008), rev’d in part on other grounds sub nom. *City of Ontario v. Quon*, 560 U.S. 746 (2010); *Bohach v. City of Reno*, 932 F. Supp. 1232, 1236 (D. Nev. 1996). Needless to say, the definition of “electronic communication service” is not limited to what has already been found to satisfy it. *See, e.g., Crispin*, 717 F. Supp. 2d at 980 (“[T]reating [one court’s] formulation as the exclusive definition of ECS provider . . . improperly limits the reach of the statute, which extends to ‘any service which provides to users thereof the ability to send or receive wire or electronic communications.’” (quoting 18 U.S.C. § 2510(15)) (emphasis omitted)).

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Courts also have found that certain services, despite relating in some way to “communication,” do not satisfy the statutory definition.<sup>3</sup> *See, e.g., Garcia v. City of Laredo*, 702 F.3d 788, 793 (5th Cir. 2012) (finding that a “cell phone does not provide an electronic communication service just because the device enables use of electronic communication services” (emphasis omitted)); *Loughnane v. Zukowski, Rogers, Flood & McArdle*, 2021 WL 1057278, at \*5 (N.D. Ill. Mar. 18, 2021) (“[C]ourts have consistently concluded than an individual’s personal computer does not provide an electronic communication service simply by virtue of enabling use of electronic communication services.” (internal quotation omitted)); *In re JetBlue Airways Corp. Priv. Litig.*, 379 F. Supp. 2d 299, 307 (E.D.N.Y. 2005) (finding that an airline that operated a website was not a provider of an electronic communication service because “[m]ere operation of the website . . . does not transform [it] into a provider of internet access”); *In re Michaels Stores Pin Pad Litig.*, 830 F. Supp. 2d 518, 524 (N.D. Ill. 2011) (finding that a PIN pad that facilitates data transport does not in itself constitute an electronic communication service); *Keithly v. Intelius Inc.*, 764 F. Supp. 2d 1257, 1271–72 (W.D. Wash. 2011) (finding that an online information service that sold background checks and caller-identification information was not a

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<sup>3</sup> Under Section 702, the Government is prohibited from intentionally targeting any person known at the time of acquisition to be located in the United States. 50 U.S.C. § 1881a(b)(1). Thus, customers using WiFi access provided by a café or library, for example, would not be targeted under Section 702, regardless of whether the Internet connectivity being provided is considered an “electronic communications service” under section 2510(15). That is not the case under Title I (electronic surveillance) or Title III (physical search) of FISA, where orders based on probable-cause findings can target persons located inside the United States and the persons who can be directed to assist the Government are not limited to ECSPs. This opinion in no way addresses the scope of authorized recipients of orders issued pursuant to Title I (electronic surveillance) or Title III (physical search) of FISA.

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provider of electronic communication services, as it did “not provide the wire or electronic communication services utilized by its customers”); *K.F. Jacobsen & Co., Inc. v. Gaylor*, 947 F. Supp. 2d 1120, 1126 (D. Or. 2013) (finding that an employer who allowed third parties to use its computer terminals was “properly characterized as a user,” not a provider, of an electronic communication service).

The FISC, assessing this body of caselaw, articulated a common attribute of providers of “electronic communication services,” noting that those entities [REDACTED]

App. 9. The Government argues that neither the statute nor the caselaw embraces this characterization, and further argues that the caselaw supports its broader construction of the statutory definition of ECSPs. We address these arguments in turn.

First, we do not disagree that [REDACTED]

[REDACTED] To the extent the FISC implied that these extra-statutory terms are elements required for an entity to qualify as an ECSP, we agree with the Government that that is not so. However, on close analysis, the FISC appears to us to have correctly highlighted that [REDACTED] not a service [REDACTED] enables its users to send or receive wire or electronic communications.

Second, [REDACTED]

[REDACTED] *In re Application of the U.S. for an Order Authorizing the Roving Interception of Oral Commc'ns* (“Car Company”), 349 F.3d 1132 (9th Cir. 2003), and *In re Application of the U.S. for an Order Pursuant to 18 U.S.C. § 2703(d)* (“Royal Caribbean”), 2018 WL 1521772 (D.D.C. 2018). Both cases [REDACTED]

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[REDACTED] services gave users of the in-vehicle and onboard systems the ability to send or receive wire or electronic communications.

In *Car Company*, the court determined that an entity providing the service of an onboard driver assistance telematics system was a provider of “electronic communication service” as defined by section 2510(15) for purposes of compelling that entity to assist law enforcement in intercepting conversations taking place inside a car equipped with the system. 349 F.3d at 1140. Even though the company contracted with a national cellular telephone company for the system’s cellular airtime, the system it operated (1) enabled and routed emergency calls, information requests, and requests for roadside assistance, (2) automatically contacted the company if an airbag deployed or the vehicle’s supplemental restraint system activated, and (3) could be used to continuously send a signal to the car in the event of a theft and open a cellular connection and listen in on the occupants—a feature that assisted car owners and law enforcement in locating and retrieving stolen cars. *Id.* at 1134–35.

Similarly, in *Royal Caribbean*, the court explained that the “internal Ship Network dynamically assigns specific ‘private’ IP addresses to individual customers to use for particular sessions of internet connectivity,” and that those IP addresses are “unknown outside the Ship Network” and “can transmit communications only between a user’s device and the Ship Network, not directly with the Internet.” 2018 WL 1521772, at \*5. Based on these facts, the court found that the cruise line’s

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provision of Internet access to passengers was itself an “electronic communication service” under § 2510(15). *Id.* at \*7.<sup>4</sup>

These cases stand for the proposition that [REDACTED] service to send or receive wire or electronic communications qualifies that entity as a provider of an “electronic communication service,” whether or not the provider relies on others for the cellular or Internet connectivity component of the service given. [REDACTED]

Third, [REDACTED]

[REDACTED] *Council on Am.-Islamic Rels. Action Network v. Gaubatz (CAIRAN)*, 793 F. Supp. 2d 311 (D.D.C. 2011) and, again, *Royal Caribbean*, [REDACTED]

[REDACTED] to reject a narrow interpretation of “electronic communication service,” confined to telephone companies and e-mail providers.

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<sup>4</sup> In *Royal Caribbean*, the Government sought an order compelling the cruise line to disclose subscriber and transaction records relating to money transfers executed via the Internet from onboard a cruise ship pursuant to 18 U.S.C. § 2703(d) of the SCA. 2018 WL 1521772, at \*1. In recognizing the cruise line as a provider of “electronic communication services,” the court noted that it “likely is the only entity from which the government could obtain records that would enable the targets’ identification.” *Id.* at \*6. Neither the financial services provider nor the third-party with which the cruise line contracted for Internet connectivity could identify the persons who executed fund transfers using the ship’s outward-facing IP address—at best, they could identify the ship from which the targets acted. *See id.*

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793 F. Supp. 2d at 334 (citation omitted). In *Royal Caribbean*, the court noted that “[18 U.S.C. § 2510(15)] captures any service that stands as a conduit for the transmission of wire or electronic communication from one user to another,” to reject the contention that a service must be the provider’s primary business function to qualify as an “electronic communication service.” 2018 WL 1521772, at \*7.



“electronic communication services.”

“electronic communication service.” The Government has not provided, and we have not found, any authority that would support this proposition. We hold instead [REDACTED] does not make [REDACTED] a provider of an “electronic communication service.”

[REDACTED] is not a provider of “electronic communication service” [REDACTED] not a service that provides users of that service the ability to send or receive wire or electronic communications, as required by 50 U.S.C. § 1881(b)(4)(B) and 18 U.S.C. § 2510(15).

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**C. Any Other Communication Service Provider Who Has Access to Wire or Electronic Communications Either as Such Communications Are Transmitted or as Such Communications Are Stored**

Section 701(b)(4)(D) extends the list of specified types of qualifying communication service providers by adding “any other communication service provider who has access to wire or electronic communications either as such communications are transmitted or as such communications are stored.” 50 U.S.C. § 1881(b)(4)(D). The meaning of this provision is also an issue of first impression for this Court.

The FISC found that [REDACTED] did not satisfy subparagraph (D) for two reasons: (1) [REDACTED] so it is not “any other communication service provider”; and (2) [REDACTED] does not have the access required by subparagraph (D) [REDACTED]

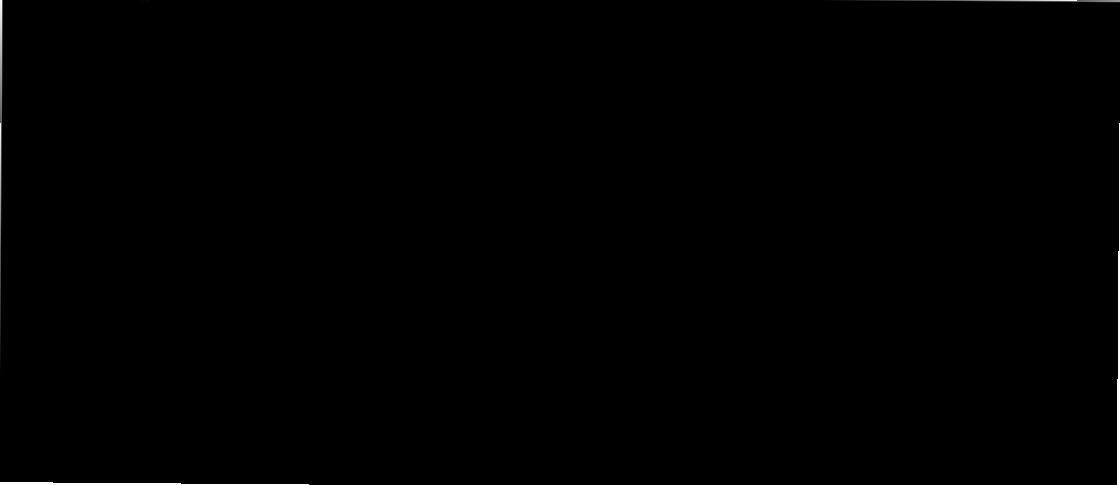
App. 14–18. The Government challenges both reasons.

FISA does not define “communication service provider” or “access,” but “access to wire or electronic communications either as such communications are transmitted or as such communication are stored” determines whether a “communication service” qualifies its provider as an ECSP under subparagraph (D). 50 U.S.C. § 1881(b)(4)(D). We therefore focus on the meaning of “access to wire or electronic communications either as such communications are transmitted or as such communication are stored.” *Id.*

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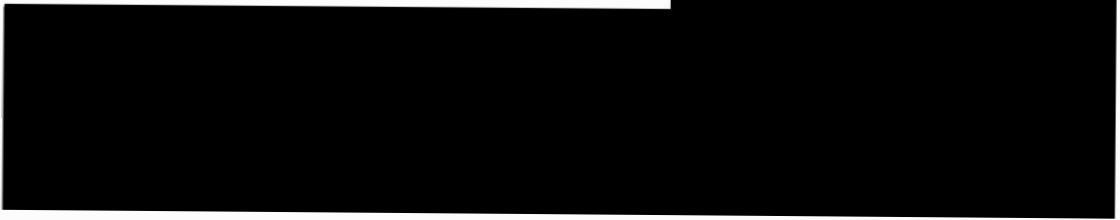
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A cardinal rule of statutory interpretation is that when words in a statute are not defined, “we look first to the word’s ordinary meaning.” *Mohamad v. Palestinian Auth’y*, 566 U.S. 449, 454 (2012) (citation omitted). The Government asserts that “[t]he plain meaning of ‘access’ is



Context reinforces this understanding. *See, e.g., Van Buren v. United States*, 141 S. Ct. 1648, 1657–58 (2021) (“When interpreting statutes, courts take note of terms that carry ‘technical meaning[s].’”). In *Van Buren*, the Supreme Court observed that “[a]ccess” is one such term, long carrying a ‘well established’ meaning in the ‘computational sense’—a meaning that matters when interpreting a statute about computers.” *Id.* at 1657 (citation omitted).

In the context of a statute that defines “electronic communication service providers,” “access” is distinctive in an electronic sense. To determine the particular meaning of “access” applicable here, the FISC assessed the “access” possessed by the communication service providers specified in subparagraphs (A) (telecommunications carriers), (B) (providers of electronic communication service) and (C) (providers of remote computing service), and concluded

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And [REDACTED] interprets “access” to mean [REDACTED]

[REDACTED]  
Gov’t Br. at 50.

[REDACTED] “access to wire or electronic communications either as such communications are transmitted or as such communications are stored.” 50 U.S.C. § 1881(b)(4)(D).

We agree with the FISC and [REDACTED] that the “access” contemplated in subparagraph (D) [REDACTED]

[REDACTED] If an entity provides a communication service that entails “access to wire or electronic communications either as such communications are transmitted or as such communications are stored,” 50 U.S.C. § 1881(b)(4)(D), it is an ECSP defined by subparagraph (D); if [REDACTED]

[REDACTED] it is not.<sup>5</sup> Furthermore, nothing in the legislative record or caselaw cited by the parties supports the Government’s suggestion that Congress intended the definition of ECSP

5 [REDACTED]

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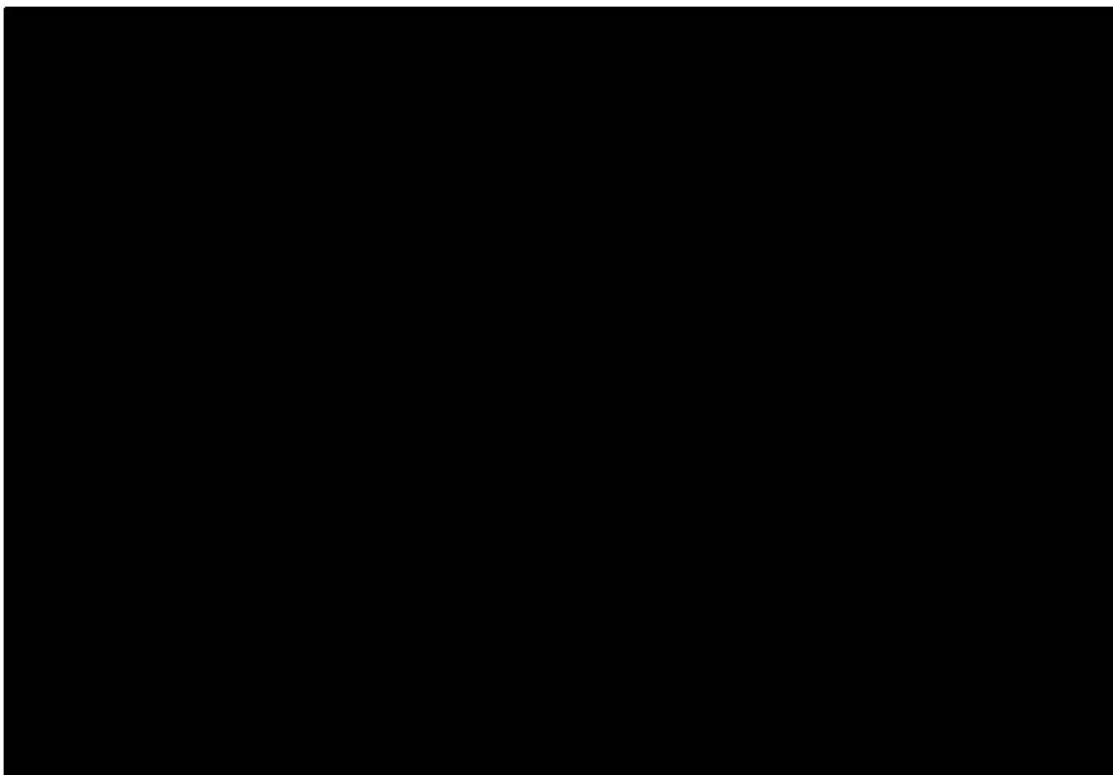
under subparagraph (D) to encompass [REDACTED]

A reexamination of subparagraphs (A), (B) and (C) confirms that it is the service being rendered—and nothing else about the provider—that is the crux of each definition. For “provider of electronic communication service,” and “provider of remote computing service,” only the specified communication service is statutorily defined. *See* 50 U.S.C. § 1881(b)(4)(B) (relying on the definition of “electronic communication service” at 18 U.S.C. § 2510(15) to delineate providers of such); 50 U.S.C. § 1881(b)(4)(C) (relying on the definition of “remote computing service” at 18 U.S.C. § 2711 to delineate providers of such). Although the term “telecommunications carrier” is itself statutorily defined, that definition similarly relies on the definition of “telecommunications services,” except for one exclusion. *See* 47 U.S.C. § 153(51) (“[T]elecommunications carrier’ means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services . . .”); 47 U.S.C. § 153(53) (defining “telecommunications service”). Except for this exclusion, no other factual circumstance, [REDACTED]

[REDACTED] is relevant to an entity’s qualification as an ECSP under subparagraph (A), (B) or (C). Cf. *Royal Caribbean*, 2018 WL 1521772, at \*7 (“[T]he statutory definitions of [electronic communication service] and [remote computing service] are functional and context sensitive. What matters is the service that is being provided at a particular time (or as to a particular piece of electronic communication at a particular time), rather than . . . the service provider itself.” (internal quotations omitted)).

Consideration of FISA’s other assistance provisions reinforces our conclusion. [REDACTED]

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Subparagraph (D) reflects the extent of Congress's effort to define ECSPs in anticipation of developments in technology and communication services.

If an entity does not provide a communication service through which it has "access to wire or electronic communications either as such communications are transmitted or as such communications are stored," 50 U.S.C. § 1881(b)(4)(D), it is not an ECSP as defined by subparagraph (D).

\* \* \*

Section 702 was most recently reauthorized by the FISA Amendments Reauthorization Act of 2017, and expires on December 31, 2023. Pub. L. No. 115-118 (Jan. 19, 2018). The statutory scope and

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inclusivity questions raised in this case reflect, in part, that section 2510(15) was written in 1986, hence premised on Internet architecture now almost forty years old. Any unintended gap in coverage revealed by our interpretation is, of course, open to reconsideration by the branches of government whose competence and constitutional authority extend to statutory revision.

### III. CONCLUSION

For the foregoing reasons, we affirm the order of the FISC.