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On Appeal from the United States Foreign Intelligence Surveillance Court

[redacted] **(Boasberg, J.)**

BRIEF OF AMICI CURIAE

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

As to the first question, Amici rely on the statement in the Government's opening brief. The second question presented is whether the Government's proposed Querying Procedures for the FBI comply with the statutory requirements and the Fourth Amendment.

STATEMENT OF THE CASE

Amici rely on the statement in the Government's opening brief, except to the extent that disagreements are apparent in the Argument section of this brief.

SUMMARY OF ARGUMENT

I. The Reauthorization Act imposed a new requirement that agencies' querying procedures must "include a technical procedure whereby a record is kept of each United States person query term." 50 U.S.C. § 1881a(f)(1)(B). In addressing this provision, the Foreign Intelligence Surveillance Court (FISC) correctly held that FISA's "text plainly requires the relevant agencies, including the FBI, to keep records of U.S.-person query terms used to query Section 702 information" and that the "FBI's practice of keeping records of all query terms in a manner that does not differentiate U.S.-person terms from other terms is inconsistent with that requirement." App. 49. The FISC reached those conclusions by carefully examining FISA's relevant text, legislative history, and purposes.

II. In recognition of the need for procedures that adequately protect the privacy and civil liberty interests of U.S. persons, the Reauthorization Act established a requirement that the agencies adopt separate querying procedures governing the use of U.S.-person query terms under Section 702. The FISC correctly found that the FBI's proposed Querying Procedures fail to satisfy the statutory requirements for such procedures and that the FBI could correct this deficiency by requiring agents to record a written justification for such queries before viewing the unminimized contents of 702 information returned pursuant to U.S-person queries. This modest requirement would protect against FBI agents' retrieving and reviewing U.S.-person information without appropriate justification, and the Government has offered no convincing explanation as to why this modest requirement would impose an undue burden. For similar reasons, the FISC correctly found that the FBI's proposed Querying Procedures are unreasonable under the Fourth Amendment, but would be reasonable if supplemented by the written justification requirement proposed by Amici and adopted by the FISC.

ARGUMENT

I. THE FBI'S QUERYING PROCEDURES ARE INCONSISTENT WITH THE RECORDKEEPING REQUIREMENT FOR U.S.-PERSON QUERY TERMS ESTABLISHED BY THE REAUTHORIZATION ACT IN SUBSECTION 702(F)(2)(B)

A. The FISC Properly Interpreted the U.S.-Person-Query-Terms Recordkeeping Requirement After Carefully Considering the Statute's Text, Legislative History, and Purpose As Well As the Government's Arguments

The Reauthorization Act imposed a new requirement that agencies' querying procedures must "include a technical procedure whereby a record is kept of each United States person query term." 50 U.S.C. § 1881a(f)(1)(B).[1] In addressing this new subsection 702(f)(1)(B), the FISC held that FISA's "text plainly requires the relevant agencies, including the FBI, to keep records of U.S.-person query terms used to query Section 702 information" and that the "FBI's practice of keeping records of all query terms in a manner that does not differentiate U.S.-person terms from other terms is inconsistent with that requirement." App. 49. The FISC

[1] In accord with that requirement, the agencies' Querying Procedures require them to "generate and maintain an electronic record of each United States person query term used for a query of unminimized information acquired pursuant to section 702" or, if that is impracticable or prevented for an unanticipated reason, "a written record" that contains the same information. App. 50. The Querying Procedures define "United States person query term" as "a term that is reasonably likely to identify one or more specific United States persons," which "may be either a single item of information or information that, when combined with other information, is reasonably likely to identify one or more specific United States persons." *Id.*

reached those conclusions by examining FISA's relevant text, legislative history, and purposes.

Beginning with text, the FISC noted that dictionaries define a "record" as something that "serves to memorialize information" and that "each United States person query term used for a query" is the information § 702(f)(1)(B) requires the agencies to memorialize. The FISC explained that the FBI's practice of recording all query terms was inconsistent with § 702(f)(1)(B)'s terms because § 702(f)(1)(B) "imposes a recordkeeping requirement only for queries that use United States-person query terms, not for all queries." App. 53. "The language Congress chose to enact," the FISC observed, "clearly conveys that the records are meant to memorialize when United States-person query terms are used," a requirement the FBI's undifferentiated recordkeeping system fails to satisfy. *Id.* at 53-54. By way of analogy, the FISC noted:

> Just as records of all applicants admitted to a university are not records of out-of-state applicants admitted if they do not differentiate out-of-state from in-state, records that do not memorialize whether a query term used to query Section 702 data meets the definition of United States-person query term do not preserve the information specifically required by Section 702(f)(1)(B).

Id. at 53.

The FISC also considered two other statutory sections that, in the Government's view, shed light on the meaning of § 702(f)(1)(B)'s recordkeeping requirement. Section 603 requires the DNI to make a public report annually on,

among other things, "the number of search terms concerning a known United States person used to retrieve the unminimized contents of" communications obtained under section 702 and "the number of queries concerning a known United States person of unminimized noncontents information relating to" communications obtained under section 702. 50 U.S.C. § 1873(b)(2)(B)-(C). But "information or records held by, or queries conducted by" the FBI are exempted from these requirements except insofar as they relate to FISC orders issued under subsection 702(f). *Id.* § 1873(d)(2)(A). The Government contended that the FBI exemption in Section 603 reflects Congress's recognition that the FBI's recordkeeping capabilities were inadequate to keep records of U.S.-person query terms as distinct from other query terms.

The FISC found this argument unconvincing for two reasons. First, "[t]he premise of the government's argument is that the only purpose for keeping records that identify United States-person query terms is to satisfy the DNI's reporting requirements," when the Government itself acknowledged that another purpose of the recordkeeping requirement was "oversight of the agencies' querying practices." App. 55. Second, "[t]he explicit exemption set forth in Section 603(d)(2)(A) demonstrates . . . that if Congress intended for Section 702(f)(1)(B) to make similar allowances for the FBI, it would have been easy to provide for them expressly." *Id.*

At the Government's urging, the FISC also considered section 112 of the Reauthorization Act, which requires the DOJ Inspector General (IG) to report to Congress on the FBI's implementation of querying procedures within one year of their approval by the FISC, including assessing any "impediments, including operational, technical, or policy impediments, for the [FBI] to count—(A) the total number of queries where the FBI subsequently accessed information acquired under . . . section 702; (B) the total number of such queries that used known United States person identifiers; and (C) the total number of queries for which the [FBI] received an order of the [FISC] pursuant to [§ 702(f)(2)]." App. 55-56 (quoting Reauthorization Act § 112(b)(8)). The Government argued that the requirement for the DOJ IG report on impediments to FBI recordkeeping reflects Congress's recognition that the FBI could not keep distinct records of U.S.-person query terms. The FISC found the argument unconvincing for two reasons. First, it was contradicted by the fact that one of the categories of information about which the IG was required to report on impediments—queries for which the FBI received § 702(f)(2) orders—is also one of the categories the DNI is required to report on under section 603. *Id* at 56. Thus, the fact of an impediment to the reporting requirement clearly does not indicate congressional acknowledgement of inability to collect the type of record specified. Second, and more generally, there is no tension between recognizing that the FBI may face difficulties in counting U.S.-

person query terms and viewing such counts as possible and thus requiring the FBI (and other agencies) to maintain records necessary to perform the count. *Id.* at 56-57.

The FISC also considered legislative history evidence concerning the Reauthorization Act—specifically the House Intelligence Committee's report—and found it supports the FISC's reading of the recordkeeping requirement. *See* App. 57-59. The Government drew the FISC's attention to two passages in the House Intelligence Committee's report. The first states:

> [Subsection 702(f)(1)(B)] does not impose a requirement that an Intelligence Community element maintain records of United States person query terms in any particular manner, so long as appropriate records are retained and thus available for subsequent oversight. The section ensures that the manner in which [an agency] retains records of United States person query terms is within the discretion of the Attorney General, in consultation with the Director of National Intelligence and subject to the approval of the FISC.

H. Rep. No. 114-475, pt. 1, at 18 (Dec. 19, 2017). The Government contended, as it contends on appeal, that the report's reference to the Attorney General's discretion concerning "the manner in which" records are retained supports its view that the recordkeeping requirement may be satisfied in a number of ways and that maintaining all query terms in an undifferentiated collection represents one permissible way of exercising of the recordkeeping discretion Congress authorized.

The FISC found the government's argument misdirected. The discretion the report mentions concerns the manner of retaining certain records. But the dispute

is over the nature of those records in the first place. As the FISC put it, "The government suggests that the FBI's recordkeeping practices reflect a permissible exercise of the discretion of the AG and the DNI 'to determine *how* an agency would keep records of queries in a manner that allows for meaningful oversight.' But the issue presented is *whether* the FBI records will memorialize the information required by the statute." App. 57 (quoting Gov't March 27, 2018 Memorandum at 27). As the committee report notes several times, in accord with the statutory language, the records that must be maintained are "records of United States person query terms." Without an indication in the record whether the query term is a U.S.-person query term, the record being maintained is not a record of a U.S-person query term at all. The FISC noted that, on the same page of the committee report as the passage highlighted by the Government, the report states that the recordkeeping requirement "mandates that all querying procedures include a provision requiring that a record is kept for each United States person query term used for a query of" section 702 data. App. 58 (quoting H. Rep. No. 115-475, pt. 1, at 18). The House Intelligence Committee's "reiteration of the 'U.S. person' nature of the query terms that must be recorded," the FISC reasoned, "makes clear that the discretionary manner in which an agency keeps the required records does not include the freedom to decide not to record the fact that a query term is a United States-person query term." App. 58.

A second passage from the House Intelligence Committee report highlighted by the Government and addressed by the FISC states that "the Committee believes that the Intelligence Community should have separate procedures documenting their current policies and practices related to the querying of lawfully acquired FISA Section 702 data." H. Rep. No. 115-475, pt. 1, at 17-18. In the Government's view, the report's use of the word "current" reflects the committee's understanding "that the FBI need not alter its recordkeeping in response to" the new requirement established by subsection 702(f)(1)(B). App. 59 (citing Gov't March 27, 2018 Memorandum at 26, 28). But, as the FISC noted, "the report's generic reference to current policies and practices of the Intelligence Community appears in a discussion of the general requirement to adopt querying procedures, not the specific recordkeeping requirements of" subsection 702(f)(1)(B). App. 59. Moreover, the report "does not mention any technical limitations of FBI systems or describe, let alone endorse, the FBI-specific practice of keeping records that do not identify which query terms are United States-person query terms." *Id.*

Having found the legislative history evidence to be consistent with its reading of the statutory text, the FISC briefly considered several practical concerns raised by the FBI Director in his declaration and supplemental declaration. *See* App. 59-62. The FISC acknowledged the Director's concern that identifying query terms as U.S.-person query terms would "divert resources from investigative work,

delay assessment of threat information, and discourage [FBI] personnel from querying unminimized FISA information to the detriment of public safety." *Id.* at 60. The FISC also recognized the Director's alternative suggestion that, if agents were to forgo such research and instead make judgments about whether a query term was a U.S.-person query term based on "personal knowledge," that practice "would 'result in inconsistent and unreliable information in FBI systems,' thereby complicating other aspects of the FBI's work—e.g., implementing its Section 702 targeting procedures." *Id.* (quoting Wray Declaration at 12). The FISC noted that the FBI's querying procedures themselves establish certain presumptions designed to ease distinguishing U.S.-person query terms from non-U.S.-person query terms. *See* App. 61-62 (citing FBI Querying Procedures § III.B). But apart from that, the FISC simply noted its lack of authority to favor policy considerations over "the clear command of the statute." App. 60.

B. The Government's Arguments for a Contrary Reading Are Not Persuasive

The Government attacks each of the bases for the FISC's conclusion that the "FBI's practice of keeping records of all query terms in a manner that does not differentiate U.S.-person terms from other terms is inconsistent with that requirement," App. 49, does not satisfy the requirement that agencies' querying procedures must "include a technical procedure whereby a record is kept of each United States person query term," 50 U.S.C. § 1881a(f)(1)(B). None of those

attacks is persuasive. The FISC's interpretation of the recordkeeping requirement is correct. It is supported not only by the considerations set out in the opinion below, but also by substantial additional evidence both from the statute's text and from its legislative history.

The Government's principal argument about statutory text is that the FISC's interpretation of the recordkeeping requirement effectively reads the word "separate" into the statute, treating subsection 702(f)(1)(B) as requiring "a technical procedure whereby a [separate] record is kept of each United States person query term." Gov't Br. 33-37. The FISC is innocent of the offense charged.

As the FISC explained, the FISC's reading does not require U.S.-person terms to be segregated from other query terms, as insertion of the word "separate" in subsection 702(f)(1)(B) might have suggested. Rather, its interpretation properly understands the term "record . . . of each United States person query term" to require that the record indicate whether the term retained was a U.S.-person query term. As the dictionary definitions cited by the FISC suggest, without the inclusion of that identifying information, the information retained would not amount to a record of a U.S.-person query term. That understanding comports with the definition of "query" established by the Reauthorization Act for subsection 702(f), which states that, for purposes of the recordkeeping

requirement, "query" means "the use of one or more terms to retrieve the unminimized contents or noncontents located in electronic and data storage systems of communications *of or concerning United States persons* obtained through acquisitions under section 702." 50 U.S.C. § 1881a(f)(3)(B) (emphasis added). *Cf.* H. Rep. No. 114-475, pt. 1, at 18 (House Intelligence Committee report emphasizing the limitation of the definition of "query" for purposes of subsection 702(f) to retrievals only "of or concerning United States person"). The Government ignores this related statutory provision.

The Government's contrary reading, as the FISC explained, would undercut the "essential aim of the recordkeeping requirement, which is to memorialize when a United States-person query term is used to query Section 702 information." App. 53. The Government criticizes the FISC for considering legislative purpose in reaching an understanding of the recordkeeping requirement's mandate. Gov't Br. at 35. But consideration of legislative purpose is often essential to resolving uncertainties about the meaning of statutory terms. As the Supreme Court, per Justice Kennedy, explained not long ago, consideration of "purpose, structure, and history of the statute" are all often necessary to "disclose the congressional purpose" behind a statutory phrase and thus its meaning. *California Pub.*

Employees' Retirement System v. ANZ Securities, 137 S. Ct. 2042, 2052 (2017).[2] Ensuring greater transparency about and enabling more effective oversight of the intelligence agencies'—and above all, the FBI's—use of U.S.-person query terms were absolutely essential goals of the Reauthorization Act's reforms of section 702. Interpreting the recordkeeping requirement in a way that undermines those goals would effectively undo the very improvements Congress sought to achieve.

The legislative history evidence amply demonstrates that (i) a central concern of the enacting Congress was better protecting U.S.-person privacy interests by, among other things, improving oversight of the use of U.S.-person query terms; and (ii) establishment of statutorily mandated querying procedures and of the U.S.-person-query-term recordkeeping requirement were understood as changes and "improvements" in the 702 program designed to advance U.S.-person privacy interests, not simply as codifications of existing practices.

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[2] *See also, e.g.*, *Gibbons v. Malone*, 703 F.3d 595, 601 (2d Cir. 2013) (Cabranes, J.) (interpreting ambiguous statutory term "in a way 'that best serves the congressional purpose'") (quoting *Reliance Electric Co. v. Emerson Electric Co.*, 404 U.S. 418, 424 (1972)); *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.* 165 F.3d 184, 188 (2d Cir. 1999) (Cabranes, J) ("we look to legislative history and purpose to determine the meaning" of ambiguous statutory terms); *Kooritzky v. Herman*, 178 F.3d 1315, 1320 (D.C. Cir. 1999) (Sentelle, J.) (looking to "underlying policy goals and congressional purpose in interpreting a provision of the Equal Access to Justice Act); *Gordon v. Virumundo, Inc.*, 575 F.3d 1040, 1052 (9th Cir. 2009) (Tallman, J.) (rejecting arguments based on technical compliance with a statutory requirement because they conflicted with "the overarching congressional purpose" behind the provision).

As it did in the court below, the Government in its brief before this Court emphasizes two passages from the report of the House Intelligence Committee that refer to the discretion afforded the Attorney General and the Director of National Intelligence concerning the manner in which U.S.-person query terms are maintained. Gov't Br. 40-42. As the FISC aptly explained, those passages concern the method of retention, not the content of what must be retained. Thus, they do not address the question at issue. App. 57-59.

But, to the extent that those passages reflect the committee's focus on improving oversight of the use of U.S.-person query terms, they fit with many other pieces of legislative history evidence reflecting the same concern in both house of Congress and on both sides of the aisle. The three committee hearings held in the run-up to enactment of the Reauthorization Act—by the House Judiciary Committee, the House Intelligence Committee, and the Senate Judiciary Committee—focus almost entirely on U.S.-person privacy interests and how best to improve their protection without harming section 702's critical intelligence function—whether in the discussion of limiting collection of so-called "about" communications, the debate over whether to impose a warrant or judicial approval requirement for U.S.-person queries, or the consideration of requiring distinct querying procedures and recordkeeping for U.S.-person query terms.

At the first hearing in the legislative process leading to enactment of the Reauthorization Act, before the House Judiciary Committee in March 2017, for example, Adam Klein, now the recently confirmed chair of the Privacy and Civil Liberties Oversight Board (PCLOB) (and a former law clerk to then-Judge Brett Kavanaugh and Justice Antonin Scalia), noted that "[a]nother area where there's room for pragmatic reform is queries of Section 702 using U.S. person identifiers, especially FBI queries in criminal investigations that are not related to national security." *Section 702 of the Foreign Intelligence Surveillance Act*: Hearing Before the Comm. on the Judiciary of the House of Representatives 59 (Mar. 1, 2017) ("House Judiciary Committee Hearing"). Mr. Klein opposed a court order requirement for U.S.-person queries but explained that "there are ways to address privacy concerns short of banning these queries altogether. The most important is transparency. So the government should provide more information about the number of such queries, about how often they return Section 702 information, and about how the Justice Department uses that information downstream in the criminal justice system." *Id.* at 60; *see id.* at 97-98 (similar colloquy with Representative Jordan (R-OH)); *id.* at 84-86 (colloquy between Representative Jordan (R-OH) and Elizabeth Goitein of the Brennan Center). Before the Senate Judiciary Committee, then-PCLOB member Elizabeth Collins explained for the committee how the PCLOB, in its report on section 702, had "weighed the value

and the privacy implications of using U.S. person identifiers to query 702 data" and had made a number of recommendations for increased transparency and oversight. *The FISA Amendments Act: Reauthorizing America's Vital National Security Authority and Protecting Privacy and Civil Liberties*: Hearing before the Comm. on the Judiciary of the Senate (June, 27, 2017), CQ Panel 2 Tr. 10-12.[3] At that hearing, Mr. Klein again opposed a court order requirement for U.S.-person queries and explained that "[t]here are other ways to get at this problem. It is not a trivial privacy question. We can have more transparency about why these queries are necessary. We can have more information precisely about how often the Bureau does them and how often they return information." *Id.* at 15.

These concerns for greater transparency and improved oversight drove the Reauthorization Act's mandate that the agencies obtain approval for separate querying procedures, that they maintain records of U.S.-person query terms, and that their U.S.-person querying practices be subjected to greater scrutiny by the FISC and the DOJ Inspector General's Office. As the FISC noted, the House Intelligence Committee report's repeated emphasis on the importance of recording U.S.-person query terms in particular fits this understanding of Congress's aim in establishing the U.S.-person-query recordkeeping requirement. The same is true

[3] Because the committee did not publish a hearing record, Amici have relied on the transcripts prepared by CQ Congressional Transcripts, which are not paginated. The page numbers indicated were determined by printing the transcripts and adding handwritten page numbers.

on the Senate side. *See* S. Rep. No. 115-182 (Sept. 7, 2017), at 2 (section 702(f) "also requires these querying procedures to ensure the retention of records of all queries using an identifier associated with a known U.S. person . . . and further requires the AG and the DNI to assess compliance with the querying procedures in the semiannual assessments provided to congressional intelligence and judiciary committees"). As one member of the Senate Intelligence Committee explained in his separate statement in the committee report, the recordkeeping requirement represented an "improvement" in the 702 program because the new provision "would require the Director of National Intelligence and the Attorney General to ensure that there is a technical procedure in place to keep a record of all queries referencing a known American, *which the FBI currently does not do*." *Id.* at 11 (emphasis added).

Perhaps recognizing that enhanced transparency concerning and oversight of the use of U.S.-person query terms were the essential purposes for Congress's establishment of the recordkeeping requirement, the Government devotes several pages to contending that the FISC's interpretation of the recordkeeping requirement will not advance those purposes. *See* Gov't Br. 42-46. The Government's arguments are unpersuasive and, most important, run contrary to Congress's own judgment on this score.

The Government reviews a number of mechanisms by which its compliance with Section 702's statutory requirements and the agencies' Minimization and Querying Procedures are scrutinized, whether by NSD, the DOJ IG, or the FISC. The Government highlights in particular NSD's annual review of querying practices in FBI field offices. *See* Gov't Br. 44-45. As explained below in section II.A, those reviews provide only a very partial picture of FBI practices. Systematic auditing of compliance with the law and procedures governing use of U.S.-person query terms can only be assured with firmer numbers about how often and in what circumstances FBI agents are using those terms. In the Wray Declaration and in oral argument below, the Government indicated that the FBI engages in b3, 7E per FBI [redacted] App. 164 (oral argument). If only a very small percentage of those queries involve use of U.S.-person query terms, the number of such queries would be very substantial. As the PCLOB noted in its 2014 report, "the collection and examination of U.S. persons' communications represents a privacy intrusion even in the absence of misuse for improper ends." Privacy and Civil Liberties Oversight Board, Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act 133 (2014) ("PCLOB 702 Report"). Without even an estimate of the frequency with which FBI agents use U.S.-person query terms, how can any of the overseers of the 702 program—whether in the

Executive Branch or the FISC—gauge the extent of the intrusion on U.S.-person privacy interests against which the national security benefits of the program must be weighed? Yet, if records of U.S.-person query terms are not identified as such, there will be no way make such an estimate and thus ensure effective oversight. Congress sought to address this very problem in the subsection 702(f) recordkeeping requirement.

The Government, supported by Director Wray's declaration, raises a concern that identification of U.S.-person query terms will be time-consuming if the identifications are to be accurate. But, as was discussed at the hearings on the Reauthorization Act, identification and thus counting of U.S.-person query terms need not be precise to be a step forward for purposes of transparency and thus oversight. *See* House Judiciary Committee Hearing at 84-85 (colloquy between Rep. Jordan and witness Elizabeth Goitein of the Brennan Center noting that while making a precise calculation of the number of U.S. persons whose communications are incidentally collected under Section 702 would be difficult, for oversight purposes an estimate would suffice and creation of an estimate of the number "should be quite straightforward"). As the FISC noted, the agencies' Querying Procedures, including the FBI's, define U.S.-person query terms only by reference to the likelihood that the term will identify a U.S. person and establish presumptions to guide the rapid, initial identification of query terms as pertaining

to U.S. persons. *See* App. 61-62 (discussing presumptions in § III.B of the FBI Querying Procedures). If reliance on those presumptions, as amplified in ways suggested by the FISC, and on evidence giving FBI agents confidence in many instances that a query term concerns a U.S. person, would lead to an undercount of U.S.-person query terms, those methods of identifying, counting, and thus enabling oversight of the use of U.S.-person query terms would nonetheless greatly advance Congress's goal in imposing the recordkeeping requirement: improving the ability of Executive Branch overseers, the FISC, and the congressional committees of jurisdiction to gauge the extent of the FBI's use of U.S.-person query terms and thus the extent of the privacy intrusions involved in such use as well as to assess more effectively the FBI's compliance with the requirements of Section 702 and the FBI's own Querying Procedures.

In sum, as the FISC concluded, the statutory text, legislative history, and animating purpose of the subsection 702(f)(2)(B) recordkeeping requirement all indicate that the FBI's practice of maintaining records of query terms in a way that does not identify U.S.-person query terms as such fails to satisfy the requirement.

II. THE FBI'S PROPOSED QUERYING PROCEDURES DO NOT COMPLY WITH THE STATUTORY REQUIREMENTS OR THE FOURTH AMENDMENT

The second question is whether the FBI's proposed Querying and Minimization Procedures comply with FISA and the Fourth Amendment. The

Government's brief misstates the question, in an attempt to limit this Court's review to the question of whether "recent misapplications by a small number of FBI personnel" render the procedures deficient. The Court should not walk into the narrow tunnel the Government would prefer. Rather, this Court's obligation under the FISA, as amended by the Reauthorization Act, is not merely to assess the impact of the FBI's significant instances of noncompliance, but to consider the proposed querying and minimization procedures for the first time in light of the Reauthorization Act's substantial changes to the Section 702 program. The Court must consider whether the proposed procedures meet the requirements of the statute and the Fourth Amendment in light of Congress's clear intent to strengthen privacy protections for U.S. persons. In addition, the Court must assess the impact of the Supreme Court's recent decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), which extended the Fourth Amendment to ensure adequate protections for the rights of privacy in the digital age.

The FBI's proposed procedures do not meet the statutory and constitutional requirements because they do not provide sufficient protections for U.S. persons. The FISC was correct to demand that the Government require the FBI to provide a written justification of its queries in order to ensure that the high volume of querying of U.S.-person information is conducted only when necessary for lawful purposes. The compliance problems that the Government acknowledges are only

one reason for this requirement. The written justification requirement would also significantly improve the Government's now quite limited ability to conduct oversight of FBI querying. The Government has not provided any explanation for why such a requirement would pose an obstacle to the effective querying of Section 702 data. As explained below, the written justification requirement for viewing unminimized 702 content associated with U.S. persons is a modest yet essential requirement to ensure that the FBI querying of 702 information complies with the law.

A. The Proposed FBI Querying Procedures Are Deficient Under the Statutory Definitions

1. The FBI's Minimization and Querying Procedures Must Be "Reasonably Designed" To Protect U.S.-Person Information and the Government Must Comply With Those Procedures

As the Government acknowledges and the FISC concluded, the Government's proposed Querying Procedures, like the Minimization Procedures, must be "reasonably designed" to achieve the purposes of the program while protecting the privacy interests of U.S. persons. Gov't Br. 49, n.15; *see also* FBI Minimization Procedures § I.A, App. 258 ("These minimization procedures apply in addition to separate querying procedures. . . [They] should be read and applied in conjunction with those querying procedures. . ."). The relevant FISA definition for minimization procedures requires "specific procedures. . . that are reasonably designed in light of the purpose and technique of the particular surveillance, to

minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate" foreign intelligence information and that "allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes. . ." 50 U.S.C. § 1801(h)(1) and (3).

Importantly, the FBI's Querying Procedures must not only be "reasonably designed" as a theoretical matter, but the government must actually comply with those "reasonably designed" procedures in order for the Court to find them sufficient under the statutory definition. b3, 7E [redacted] -50 USC 3024(i)

b3, 7E per FBI [redacted]

b3, 7E per FBI The FISC correctly found that the Government's proposed minimization and querying procedures are not "reasonably designed" given the significant frequency

and number of compliance incidents involving at least [redacted] (b)3 7E per FBI unjustified U.S.-person queries. App. 81.

2. The FBI's Querying Practices Demonstrate that U.S.-Person Information Is Subject to Frequent Querying Without Sufficient Oversight

The Government wrongly suggests that because the FBI receives a "very small portion" of information that is acquired under Section 702, FBI querying practices present less risk of improper retention and dissemination of "nonpublicly available information concerning unconsenting United States persons." Gov't Br. 51. That claim is undermined by the Government's own arguments and reporting. First, while the FBI receives information from only a subset of targets designated for acquisition under Section 702, that subset yields a significant quantity of information in an absolute sense. Indeed, the Government's reporting suggests that the amount of 702-acquired information—at least measured indirectly, by the number of targets—is growing significantly each year, with more than 129,080 targets designated for collection in 2017, up from 106,469 targets in 2016. App. 512, citing Office of the Director of National Intelligence, Statistical Transparency Report on Use of National Security Authorities for Calendar Year 2017 (2018) ("ODNI 2017 Transparency Report"). The Government's suggestion that the FBI should be less restricted than the other covered agencies also ignores the FBI's unique domestic law enforcement role and the frequency with which FBI personnel

have conducted queries touching on 702-acquired U.S.-person information. As Director Wray stated in his declaration, the FBI conducted 3.1 million queries against raw-702 information in 2017, App. 311, while the NCTC, the CIA, and the NSA used about 7,512 U.S.-person query terms during the same year. App 511, n.47, citing ODNI 2017 Transparency Report at 16. Even if only 1% of the FBI's total queries in 2017 used U.S.-person query terms (an overly-conservative estimate that cannot be tested given the Government's deficient record-keeping practices, discussed *supra*), the FBI will have conducted over four times the number of U.S.-person queries of raw 702 information than the other covered agencies combined. This volume is not surprising, given that it is the FBI's

b3, 7E per FBI [redacted]

investigation, FBI 2015 Minimization Procedures, Section III.D, n.3, which led the FISC to observe that "it seems likely that a significant percentage of its queries involve U.S.-person query terms." App. 66; *see also*, App. 438 ("Given its dual intelligence and law enforcement role, as well as its role as a domestic investigatory agency, FBI necessarily conducts U.S. person queries in its systems that store raw Section 702 information for these purposes on an order of magnitude substantially greater than the number of U.S. person queries run by NSA, CIA, or NCTC. . .") (Gov't Response Brief); App. 164 ("I can't give you a number. I

would say that [U.S.-person queries are] probably a sizable amount of [redacted] ') (Transcript of Proceedings, Sept. 28, 2018).

Given the vast number of 702 queries regularly conducted by the FBI—and because the FBI does not keep records of U.S.-person query terms identifiable as such or any contemporaneous account for their justification—the Government's ability to conduct oversight of U.S.-person queries is severely limited under the current procedures. NSD conducts after-the-fact reviews of about 10% of all queries run against 702-acquired information by FBI personnel, App. 440. In performing these audits, NSD must rely on the imperfect memories of those who conducted past queries, which are likely tainted by the passage of time and any relevant information reviewed after queries are conducted. The inherent limitation of such *ex post* query justifications is presumably why the Government relies on the contemporaneous written justification that personnel from the other covered agencies provide when conducting oversight of those agencies. App. 74. Under the Government's proposed FBI Querying Procedures, there is no comparable contemporaneous record available for subsequent oversight. The problems that deficiency creates for the Government in its oversight are apparent from events taking place while this matter is being briefed: the Government had to inform the FISC at oral argument in September, 2018, that it would report back within sixty days on compliance incidents originally reported on February 15, 2018 [redacted]

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[redacted] and on April 27, 2018 [redacted] both of which it was unable to assess in its initial review, as discussed further below. App. 70 and 77. With a contemporaneous justification for each query, these embarrassing and potentially unsuccessful after-the-fact inquiries would be unnecessary.

The limited oversight that the Government does conduct of FBI querying practices did not inspire confidence at the FISC during its review of the Government's proposed FBI Querying Procedures, and contrary to the Government's contention, Gov't Br. 55, the FBI's compliance record should weigh against approval of the Querying Procedures before the Court. The Government maintains that its limited oversight of FBI queries has been effective at identifying areas of systematic problems and "recurring misunderstandings of the query standard." Gov't Br. 55. However, misapplications of the querying standard have previously gone undetected for significant lengths of time. For example, in

[redacted]

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In fact, the Government's compliance reporting history indicates that even where the Government has reviewed certain non-compliant FBI 702 queries, it has

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initially failed to recognize deviations from the FBI querying standard. Only in May 2018, after re-evaluating queries by the FBI's [redacted] The re-evaluation of these queries from the [redacted] Divisions was prompted, itself, by b1, 3, 7E significant deviations from the FBI querying standard that the NSD discovered during its review of the FBI's [redacted] December 2017. b1, 3

b1, 3, 7E per FBI

b1, 3, 7E per FBI

b1, 3, 7E per FBI

b1, 3, 7E per FBI

Even when the Government has uncovered noncompliant FBI queries through routine oversight and reported them to the FISC, the lack of any contemporaneous records indicating the rationale for FBI queries has led to

protracted investigations of those queries by NSD in an effort to determine their justifications and appropriately inform the Court. While Amici have not been provided access to a copy of the Government's notification to the FISC regarding this incident, the record indicates that the Government reported in February 2018 that FBI personnel conducted queries of 702 content information using identifiers [redacted] During arguments in September 2018, the Government stated that it is "still gathering information and we have not finished making the assessment yet" of whether some or all of these queries were in violation of the FBI's querying procedures. App. 173-74. Additionally, although the relevant queries involved non-702 FISA information, the Government also reported in April 2018 that FBI personnel operating under the same "reasonably likely" query standard[4] governing 702 information conducted queries using the "identifiers [redacted] App. 70. Yet

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b1, 3 per FBI

[4] Under the FBI's proposed 702 Querying Procedures, "Each query of FBI systems containing unminimized content or noncontent information acquired pursuant to section 702 of the Act must be *reasonably likely* to retrieve foreign intelligence information, as defined by FISA, or evidence of a crime. . ." FBI Querying Procedures IV.A.2, App. 234 (emphasis added). The query [redacted] where the relevant query standard required the FBI to "design. . . queries to find and extract foreign intelligence information or evidence of a crime," which the Government understands to mean "query terms must be *reasonably likely* to return foreign intelligence information." App. 70 (internal citations omitted) (emphasis added).

b1, 3, 7E per FBI

b1, 3, 7E per FBI

the Government was unable to inform the court whether these queries violated the FBI's querying standard at the September 2018 hearing: "Since we provided the preliminary notice on these [redacted] queries, we've gotten additional information from FBI about their justification for why they ran the queries, and so we are continuing to discuss with them that—those views on justification." App. 174.

As an initial matter, even without the benefit of reviewing the Government's full set of compliance notifications, it seems impossible to Amici that queries [b1, 3, 7E] [b1, 3, 7E per FBI] [redacted] could comply with the "reasonably likely" standard. Moreover, the Government's indication that it was still gathering "additional information" from the FBI about [b1, 3, 7E] [redacted] queries in September 2018, six months after learning of them, is an example of how the FBI's current querying procedures do not provide for adequate oversight. If queries such as those [b1, 3, 7E per FBI] [redacted] had been supported by a written justification at the time any responsive content from the query was reviewed, the Government would have had a record of the FBI's actual, contemporaneous justification that NSD and potentially, the FISC, could use in evaluating the Government's compliance with procedures.

The compliance incidents that the Government has reported to the FISC and that are available to Amici indicate that at least some FBI personnel are querying

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databases containing raw 702 information for information broadly relevant to the FBI's investigative goals, but without any belief that those queries are "reasonably likely" to return foreign intelligence information or evidence of a crime. This was the case with the noncompliant FBI queries from [redacted] identified above, but also with other compliance incidents in the record before this Court, including the noncompliant queries conducted by an FBI [redacted] using identifiers associated with [redacted] b1, 3, 7E per FBI [redacted] b1, 3, 7E per FBI [redacted] b1, 3, 7E per FBI [redacted] b1, 3, 7E per FBI [redacted] b1, 3, 7E per FBI [redacted] Similarly, at [redacted] b1, 3, 7E per [redacted] conducted a query of raw FISA information using the term [redacted] in an effort to determine whom at [redacted] b1, 3, 7E per FBI [redacted] b1, 3, 7E per FBI [redacted] App. 712. In terms of the number of queried identifiers, the largest of such broad queries of which Amici are aware is a batch query the FBI conducted in March 2017 using b1, 3, 7E per FBI [redacted] identifiers associated with [redacted] b1, 3, 7E per FBI [redacted] b1, 3, 7E per FBI [redacted] b1, 3, 7E per FBI [redacted] These queries were undertaken in furtherance of the FBI's effort to conduct [redacted] but admittedly without any reasonable belief that they would return

foreign intelligence information or evidence of a crime. App. 714. In these cases, FBI personnel are treating FBI databases containing 702 information like any other repositories of information, despite the requirement for "reasonably designed" procedures to prevent to minimize the retention and dissemination of the sensitive information collected under Section 702. These compliance incidents suggest that the FBI personnel charged with implementing the FBI's querying standard do not adequately understand or follow it, and that the ability to oversee the FBI's querying must therefore be strengthened.[5]

3. The FBI's Proposed "Categorical Batch Query" Provision Is Insufficient To Remedy the Risk of Noncompliant Queries

The Government has proposed amending the FBI's Querying Procedures to require mandatory pre-approval from either the Chief Division Counsel's Office or the National Security and Cyber Law Branch in any instance in which the FBI seeks to review the unminimized contents of 702 information returned from a "categorical batch query," App. 235, but the limited explanation provided for what constitutes a "categorical batch query" suggests that it will be a confusing standard for FBI line personnel—let alone attorneys within the Chief Division Counsel's Office and National Security and Cyber Law Branch—to implement in practice.

[5] The Government concedes that these "misapplications of the query standard" are relevant to the Court's analysis and that there is a "risk of future misapplications of the query standard identified by the FISC" if not remedied in the FBI's procedures. Gov't Br. 57.

Nowhere in the proposed FBI Querying Procedures does the Government affirmatively define "categorical batch query," instead characterizing this type of query by what it is not: ". . .as opposed to queries conducted on the basis of individualized assessments." App. 235. The Government's opening brief provides no further guidance, other than reiterating that categorical batch queries are queries with "no individual assessment." Gov't Br. 22.

During argument below, the Government indicated that a categorical batch query is not defined by reference to how many identifiers or query terms are used. Instead, a categorical batch query is any query using terms associated with more than one person and based on a "common justification," not "individualized suspicion." App. 167-70. While this interpretative gloss—not found in the written FBI Querying Procedures—may help provide some clarification, its usefulness may be limited.

b1, 3, 7E per FBI

b1, 3, 7E per FBI

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[redacted] Does the FBI's basic analytical step of co-locating an individual's residence with a terrorist attack constitute an "individual assessment" for purposes of the Government's proposal, such that pre-approval under the categorical batch query provision is unnecessary? Such an assessment seems too broad, but the Government has not provided any limiting factor or basis for evaluation. In this example, as in countless others, the same underlying fact can be characterized as a commonality or as an individuality, providing little benefit to line FBI investigators who must decide whether to seek out FBI attorneys for pre-approval.

Given this uncertainty, confused FBI agents might simply interpret their batch queries to be "individualized" as opposed to "categorical," thereby avoiding the heightened review process set out in the Government's proposed procedures. Agents could also decide not to run batch queries that could be justified given the burdensome approval requirements. In either case, the Government's categorical batch query provision will have failed as a compliance safeguard.

In its explanation of this newly proposed provision before the FISC, the Government suggested that, in its view, the FBI can permissibly query multiple identifiers simply because those identifiers share some common attribute associated with a threat, even if it is known that only one of the identifiers is likely to return 702-information specific to the threat that is the rationale for the query in

the first place. App. 204 at n. 20. Yet the FISC observed that "it is by no means obvious how such justification-by-aggregation would be consistent with the requirement that '[e]ach query' must be reasonably likely to return foreign-intelligence information or evidence of a crime." App. 78-79, citing the FBI's Proposed Querying Procedures. The Government's articulation of permissible categorical batch queries may prove to be equally unclear to FBI personnel operating under the proposed categorical batch query provision and may lead to perverse incentives. Given the amount of information that the FBI receives and processes in the normal course, an agent might determine that there is a stronger justification for conducting b1, 3, 7E per FBI b1, 3, 7E per FBI b1, 3, 7E per FBI b1, 3, 7E per FBI Although the Government's proposed heightened-review requirement would require FBI agents and analysts to seek FBI attorney approval prior to reviewing the contents returned from any such categorical batch query, it would not restrict the FBI from conducting categorical batch queries in the first place, or from reviewing any of the resulting metadata.

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b1, 3, 7E per FBI

Taken to its logical limit, the Government's interpretation of the query standard as it relates to queries with aggregate justifications might allow for a batch query of identifiers associated with *all* U.S. persons based upon a determination that it is reasonably likely that *one* U.S. person's 702-collected communications contain foreign intelligence information, such as information concerning a potential threat to national security from a foreign organization. It is clear that not all of the 702 information returned from a query of all U.S. persons would be "reasonably likely" to relate to foreign intelligence information, nor can a procedure that allows for such a query be described as "reasonably designed." Nonetheless, given the Government's justification for batch queries offered in connection with its proposed categorical batch query provision, the FBI's procedures risk creating a system in which FBI investigators feel more empowered to conduct queries that are larger and broader in order to satisfy the querying standard.

This point goes to the danger that the FISC identified with the FBI's interpretation of its query standard and the use of categorical batch queries—it cannot and should not be the case that adding more query terms, which could make a query more likely to retrieve some piece of 702-acquired information, renders that query permissible under the relevant standard. Nor does this batch query

approval process do anything to address the potential for individual queries that do not meet the appropriate standard.

B. The Proposed FBI Querying Procedures Are Constitutionally Deficient Because They Do Not Sufficiently Protect U.S. Persons' Privacy Interests

1. The FBI's Querying of Information Conducted Under Section 702 Must be Reasonable

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Even though the Government's acquisition and review of information under the Section 702 program may not require a warrant, the Government's actions must be "reasonable" under the Fourth Amendment because they implicate the privacy interests U.S persons retain in communications acquired and queried pursuant to Section 702. b 3, 7E per FBI [redacted] b 3, 7E per FBI [redacted] *accord United States v. Mohamud*, 843 F.3d 420 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 636 (2018). To determine whether the Government's proposed procedures are "reasonable," the Court must balance the relevant interests by considering "the nature of the government intrusion and how the intrusion is implemented." *In re Directives Pursuant to Section 105B of FISA*, 551 F.3d 1004, 1012 (FISA Ct. Rev. 2008) ("*In re Directives*"). As the FISC correctly noted, this balancing requires the Court to assess "the degree to which the governmental action in question is needed for the promotion of the relevant governmental interest." App. 91, citing *In re Certified Question of Law*, 585 F.3d 591, 604-605 (FISA Ct. Rev. 2016). If the "protections

that are in place for individual privacy interests are . . . insufficient to alleviate the risks of government error and abuse, the scales will tip toward a finding of unconstitutionality." *In re Certified Question of Law*, 858 F.3d at 1012.

The FISC found that the proposed FBI Querying Procedures were not reasonable and did not comply with the Fourth Amendment because of the "demonstrated risks of error and abuse," and because the Government's interest in viewing the contents returned from U.S.-person queries without any restriction, let alone the modest restriction proposed by Amici, did not outweigh the risk of unjustified intrusion on U.S. persons' privacy that would likely result. App. 92. On appeal, the Government has incorrectly defined the "relevant" government interest that the Court must balance. The Government has also improperly discounted the privacy interests at stake in light of *United States v. Carpenter*. The Court should find that the proposed FBI Querying Procedures do not adequately balance the relevant interests at stake. Amici's proposed remedy would sufficiently protect privacy interests to balance the competing interests appropriately.

2. The Government Has Incorrectly Defined the Government Actions Requiring Fourth Amendment Scrutiny

On appeal, the Government reiterates its argument that the FBI should be permitted to query Section 702 information without restriction, subject only to individual applications of the FBI querying standard, which the significant

compliance incidents recounted above have demonstrated is confusing and fallible in practice. The Fourth Amendment demands more to adequately protect the privacy interests on the other side of the scale. Amici agree with the Government that the FBI has a compelling interest in protecting national security, including by "connecting the dots" to uncover hidden threats. But the Government has not demonstrated that this compelling interest would be undermined by Amici's proposed requirement that a written justification of fact—a justification as short as one sentence—be provided before an agent can review the contents returned from U.S.-person queries.

Properly framed, the Government actions to be assessed here are the FBI's U.S.-person querying *and inspection of the contents of Section 702-acquired communications returned from those queries* without any additional documentation requirements. *Cf.* App. 91 (FISC defining the government interest as "the FBI's continuing to run queries without taking further measures to ensure they actually satisfy the querying standard FBI personnel are supposed to apply."). As the FISC observed, the Government's substantial interest in investigating threats to national security would not be adversely affected by the proposed requirement of a written statement of fact to justify the review of any returned content from a U.S.-person query. The Government would remain able search for and inspect the links among different potential threats by querying and examining the 702 metadata, without

any written justification requirement. Amici's proposed requirement would not come into play until an agent or analyst sought to review contents returned from a U.S.-person query, and even then would only require that agent or analyst to articulate a basis for the query under the applicable querying standard, which the agent or analyst should know in any event.

Amici argue that the FBI's Querying Procedures need to be strengthened based in part on the understanding that the proliferation of data and tools to rapidly review that data in a sophisticated manner have changed the Fourth Amendment privacy calculus. As commentators familiar with the Section 702 program, including those who worked in senior national security positions, have observed, the evolving behaviors and expectations surrounding personal technology use and the Government's related surveillance capabilities call for a more stringent approach to what is "reasonable" under the Section 702 surveillance regime. For example, Robert Litt, the former General Counsel for the Office of the Director of National Intelligence, has suggested that "we should simply accept that any acquisition of digital information by the Government implicates Fourth Amendment interests" and that given this reality, the "law should focus on determining what is unreasonable rather than on what is a search." He adds, "this approach would mean that courts would assess the reasonableness of government activity in cases where today they simply find that the Fourth Amendment does not

apply." Robert S. Litt, The Fourth Amendment in the Information Age, The Yale Law Journal Forum (Apr. 27, 2016), 13-14. Similarly, Joel Brenner, the former Inspector General of the NSA and head of U.S. counterintelligence under three Directors of National Intelligence, has observed, "We are probably at the threshold of a new era. In the future, we are likely to be at least as concerned with the state's ability to access information already collected, or available in the marketplace, as we have been with the conditions under which the state may collect it using its own resources." Joel Brenner, "A Review of 'The Future of Foreign Intelligence: Privacy and Surveillance in a Digital Age' by Laura K. Donohue," 9 Journal of National Security Law & Policy 631, 649 (2018). Indeed, in Brenner's view, "the 702 database of lawfully collected U.S. Person information should be regulated," even if a warrant requirement does not apply. Brenner, 651. The views of these experts support the approach that Amici recommend to ensure that the Section 702 program is conducted in a manner consistent with the congressionally imposed requirements of the Reauthorization Act and the Fourth Amendment.

3. The FISC's Requirement of a Written Justification Prior to Inspecting Contents Returned from U.S.-Person Queries Would Provide the Necessary Privacy Protections

The FISC correctly determined that the FBI's Querying Procedures require some limitation on the FBI's current practices to achieve the proper balance under the Fourth Amendment. *See* App. 84-85; 88-97; *see* also App. 531-36 (Brief of

Amici Curiae). The limitation proposed by Amici and adopted by the FISC would require FBI personnel to provide a written justification for any query using a U.S.-person query term prior to reviewing any contents returned from such a query. A written justification could be as simple and as short as one sentence—perhaps just requiring the succinct completion of the sentence, "This query is reasonably likely to return foreign-intelligence information [or evidence of a crime] because . . ." as suggested by the FISC in its ruling below. App. 96. Even a very brief written justification would ensure that FBI personnel consider the proper querying standard and would enable NSD to conduct effective oversight of FBI U.S.-person queries after the fact.

The written justification requirement proposed by Amici would apply only in limited circumstances and would impose only a minimal burden on FBI investigators given the FBI's existing querying practices. Most importantly, Amici's proposal would not present *any* hindrance to the FBI's "use of queries to identify and to retrieve in a timely manner information relating to threats to national security—while filtering out irrelevant communications that might contain non-pertinent information of or concerning U.S. persons." Gov't Br. 65. As Director Wray stated in his declaration to the FISC, FBI personnel currently conduct queries within a system of aggregated datasets that includes both 702 and non-702 information. App. 310. It is Amici's understanding that when an FBI

agent queries those databases, the system indicates whether or not any responsive 702 information exists before revealing the content. It is at this intermediate stage—and only at this stage—that Amici's proposed requirement for a written justification would apply. But regardless of whether an FBI agent takes the next step to provide a written justification to view content, he or she would be able to inspect the "to," "from," "when," and other relevant metadata of any returned communication, thereby allowing the FBI to "connect the dots" to uncover potential threats to national security or other foreign intelligence information.

The NSA, CIA, and NCTC already have a similar, but more restrictive, requirement that applies to all U.S.-person queries run by those agencies' personnel. Those agencies require that their personnel provide a written justification of fact prior to running *any* U.S.-person query, in effect requiring a written justification even to view resulting metadata. App. 240 (NSA written statement of fact requirement), 247 (CIA written statement of fact requirement), 252 (NCTC written statement of fact requirement). In the case of the NSA, personnel must also receive approval from the NSA Office of the General Counsel prior to viewing any content returned from a U.S.-person query, even after providing a written justification for the query. App. 240. In contrast with the NSA's, CIA's, and NCTC's more restrictive Querying Procedures, the proposal adopted by the FISC for the FBI Querying Procedures would not prevent the FBI

from conducting any query initially. It would only require a written justification from FBI personnel if a U.S.-person query returned any hits and only then if the FBI personnel conducting the query desired to view the content.

C. The Supreme Court's Recent *Carpenter* Decision Supports the FISC's Demand for More Stringent Protections To Comply with the Fourth Amendment

The Government eschews even the modest requirement proposed by Amici and found adequate by the FISC, arguing that the FBI should be allowed to continue its current, unfettered querying practices given that similar FBI procedures have been approved previously by the FISC. Gov't Br 64. But in addition to considering the significant instances of noncompliance described above, the Court's review of the proposed FBI Querying Procedures must account for the Reauthorization Act's new requirement that the covered agencies adopt stand-alone Querying Procedures, separate from their Targeting and Minimization Procedures, that are consistent with the Fourth Amendment in their own right. 50 U.S.C. § 1881a(f).[7] And the Court must also account for the profound shift in how the Supreme Court now evaluates the privacy interests associated with digital data evident in *Carpenter*. These developments demand a re-balancing of the interests and a different result.

[7] Congress also placed specific limitations on FBI querying of U.S. persons, requiring a court order for the review of query results in "in criminal investigations unrelated to national security" in some instances. 50 U.S.C. § 1881a(f)(2).

As an initial matter, by arguing that the "targeting, minimization, and querying procedures" it has proposed are reasonable under the Fourth Amendment, as a whole, Gov't Br. 64, the Government has misframed the issue. Congress does not have the power to direct this Court's constitutional jurisprudence, but it can—and did—require judicial review of the new procedures. As the Reauthorization Act's legislative history suggests, the new statutory requirement for separate querying procedures was intended to assure the American public that the rules governing Section 702 querying adequately protect U.S. persons' privacy, in part through judicial review "to ensure that such procedures are consistent with the requirements of the Fourth Amendment to the U.S. Constitution." H.R. Rep. No. 115-475, pt. 1, at 17-18.

Moreover, the Supreme Court's decision in *Carpenter*, handed down just a week prior to the close of briefing at the FISC below, has profound consequences for the Fourth Amendment's protection of privacy in the digital age. *See* Orin Kerr, The Digital Fourth Amendment (forthcoming) (manuscript at 1), https://papers.ssrn.com/abstract_id=3301257 (calling *Carpenter* a "blockbuster for the Digital Fourth Amendment"). In the context of re-evaluating the applicability of the third party doctrine that otherwise would have allowed the Government to collect and review individuals' cell phone location information without limitation, the Supreme Court held that U.S. persons have a legitimate expectation of privacy

in this metadata and thus that its acquisition by the Government even from a third party constitutes a Fourth Amendment search. *Carpenter*, 138 S. Ct at 2217.[8] *Carpenter* did not arise in the context of a national security case, and the opinion specifies that it "does not consider other collection techniques involving foreign affairs or national security," *id.* at 2220, but its interpretation of the Fourth Amendment must be applied in this case as in any other.

The *Carpenter* majority's analysis of why the Government's acquisition of historical cell site location information was a search focused on the type of information the Government acquired and the Government's ability to analyze and draw conclusions from that information. *Id.* at 2217-2218. The *Carpenter* majority observed that while law enforcement has always been able to "tail" the subject of an investigation to determine that subject's location over brief periods, the acquisition of cell site location data held by third parties made possible in the digital age allows the Government to "monitor and catalogue" an individual's precise movements for long stretches, even retrospectively. *Id.* at 2217, citing *United States v. Jones*, 563 U.S. 400, 430 (2012) (Alito, J. concurrence). Although the Government's review of a single piece of cell phone location information may present a relatively modest intrusion on privacy, the Government's technologically

[8] While the FISC opinion noted Amici's reference to *Carpenter*, the FISC did not specifically address the impact of *Carpenter* and its reasoning on Section 702 querying. *See* App. 86-87.

advanced ability to review this set of aggregated metadata provides an "intimate window into a person's life" and "at practically no expense." *Id.* at 2217-18. *Carpenter* recognized that the Government's ability to efficiently sort through and organize a large quantity of digital data is what provides this "intimate window," which is why its review of digital data in that case amounted to a Fourth Amendment search.

Carpenter's logic is not limited to cell-site location information. *Carpenter* reflects only the latest step in the Supreme Court's examination of how Fourth Amendment analysis must adapt in the digital age, following its decisions in *Riley v. California*, 134 S. Ct. 2473, 2493 (2014) (holding that law enforcement's examination of a cell phone lawfully seized incident to arrest was a "search" requiring a warrant), and *United States v. Jones*, 563 U.S. 400 (requiring that law enforcement obtain a warrant to monitor a vehicle's movements with a digital location tracking device).[9]

[9] In another instructive case, the Seventh Circuit recently relied on *Carpenter* to find a "search" of digital information. *Naperville Smart Meter Awareness v. City of Naperville*, 900 F.3d 521 (7th Cir. 2018). In *Naperville*, a citizen group sued Naperville, Illinois, seeking to block the city from installing electricity "smart meters" that automatically collect and transit information on electricity consumption from individual homes. The Seventh Circuit held that the mandated installation of smart meters by the city would result in the transmission of smart meter electricity data to the Government, which would constitute a "search." Although the Naperville court held that Government's collection of this data without a warrant was not unreasonable under the Fourth Amendment, it based its decision on the city's lack of "prosecutorial intent" with respect to the

Carpenter's acknowledgment that the use of technology has the capacity to alter the nature of otherwise private information, which may now be easily acquired and analyzed by the Government in digital form, calls for a re-evaluation of the FISC's previous rulings with respect to 702 querying. Until now, the FISC has evaluated the Fourth Amendment reasonableness of querying together with the 702 targeting and minimization procedures "as a whole," rejecting the idea that querying constituted a separate event for purposes of the Fourth Amendment. [redacted] b 3, 7E per FBI [redacted] b3, 7E per FBI That view stemmed from this Court's first application of the Fourth Amendment "totality of the circumstances" test to the 702 program in *In re Directives,* where this Court weighed the "government intrusion and how the intrusion is implemented" against the Government's interest in reviewing this data. [redacted] at 19. Following *Carpenter*'s reasoning, in gauging the extent of the Government's invasion of U.S.-person privacy interests, courts should consider both the nature of the information that the Government has acquired and what the Government might do with it. *Carpenter*, 138 S. Ct. at 2217. Thus, the targeting requirements restricting the Government's acquisition of 702 information at the front end, which lead to the incidental but

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collection of smart meter data, and the fact that it was not city law enforcement which would "collect and review the data." *Id.* at 528. The FBI's purpose when querying 702 information is investigative and, potentially, prosecutorial.

predictable acquisition of information of nonconsenting U.S. persons, may be of limited relevance to determining the extent of the invasion of privacy that occurs at the back end through querying the data. Instead, the Court should focus on the Government's ability to review and ascertain information that would have otherwise remained private by querying Section 702-acquired communications in accordance with the proposed procedures.

The Government's ability to efficiently search for and analyze 702-collected data, which likely includes a large volume of communications between U.S. persons and Section 702 targets, weighs strongly in favor of evaluating querying as a separate Fourth Amendment event. As Director Wray noted, b 3, 7E per FBI

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This is the same type of "click of the button" capability that the Government had with respect to the cell phone location metadata in *Carpenter*, a capability that makes law enforcement's investigation "remarkably easy, cheap, and efficient compared to traditional investigative tools." *Carpenter*, 138 S.Ct. at 2218.

In light of *Carpenter* and the nature of the U.S.-person information subject to frequent querying by the FBI, the Government's assertion that the privacy interests of U.S. persons whose communications have been acquired and then queried are "diminished" is also misplaced. Gov't Br. 67, citing *United States v. Mohamud*, 843 F.3d 420, 442 (9th Cir. 2016), cert. denied, 138 S. Ct. 636 (2018). [10] *Carpenter*'s rejection of the third-party doctrine when it comes to cell-site location information suggests more broadly that individual communications collected under Section 702 continue to carry a "substantial" privacy interest for Fourth Amendment purposes despite the fact that they were collected incident to the Government's valid targeting of foreign individuals. *See* November 6, 2015 Opinion at 38. The fact that a multitude of incidentally collected communications

[10] In *Carpenter*, although the Government had complied with the Stored Communications Act by applying and receiving court orders based on "specific and articulable facts" demonstrating why the digital records at issue were relevant and material to its criminal investigation, the Supreme Court found that the data at issue was sensitive enough that even such a court-reviewed justification was insufficient and that the Fourth Amendment demanded a warrant based upon probable cause. *Carpenter* at 2212. The argument for requiring some additional level of protection beyond what the Government proposes in its FBI Querying Procedures is even stronger than with respect to the information at issue *Carpenter*, since 702 information involves not just metadata, but also content, and the FBI's proposed procedures contain few restrictions on law enforcement prior to conducting a query.

of U.S. persons are aggregated and easily searchable under 702 means that there is a significant privacy interest at stake when it comes to querying.[11]

Indeed, the Supreme Court acknowledged even before *Carpenter* that privacy is "affected by the fact that in today's society the computer can accumulate and store information that would otherwise have surely been forgotten long before a person attains age 80," within a "computerized summary located in a single clearinghouse of information." *U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 549, 711, 764 (1989) (evaluating privacy in the substantive Due Process context); *see also Whalen v. Roe*, 429 U.S. 589, 605 (1977) ("We are not unaware of the threat to privacy implicit in the accumulation of cast amounts of personal information in computerized data banks or other massive government files."); *United States v. U.S. Dist. Court for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 311-314 (1972) (suggesting that "broad and unsuspected governmental incursions into conversational privacy which electronic surveillance entrains necessitate the application of Fourth Amendment safeguards."). The

[11] *See* PCLOB 702 Report at 115 ("From a privacy perspective . . . incidental collection under Section 702 differs in at least two significant ways from incidental collection that occurs in the course of a criminal wiretap or the traditional FISA process. First, in the criminal or FISA context the targets of surveillance must be believed to be criminals or agents of a foreign power. . . . Second, to engage in traditional FISA or criminal electronic surveillance, the government must obtain approval from a judge, who independently assesses the legitimacy of the targeting and must be persuaded that the government's beliefs about the person and/or communications facility being targeted are supported by probable cause.")

privacy interests at stake remain significant, particularly in the post-*Carpenter*, digital age.

In summary, this Court must evaluate the proposed Querying Procedures not only in light of Congress's requirements for procedures that adequately protect the privacy interests of U.S. persons, but also in light of *Carpenter's* extension of Fourth Amendment protections to activities analogous to querying in their potential to reveal sensitive information about U.S. persons that is protected by the Fourth Amendment.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the FISC's Memorandum Opinion and Order dated October 18, 2018, this Court should affirm the FISC's decision and require (1) that the Government agencies, including the FBI, maintain records of U.S.- person queries identifying them as such, as required by the Reauthorization Act, and (2) that the FBI Querying Procedures require a written justification before FBI personnel may review content returned from a U.S.-person query conducted of any database containing Section 702 information, as the other agencies already require before their personnel conduct any U.S.-person query.

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CERTIFICATE OF COMPLIANCE

This brief complies with the Court's Order dated Dec. 17, 2018, directing that Amici's brief not exceed 16,188 words. This brief contains 12,398 words.

This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font and therefore complies with the requirements of Fed. R. App. P. 32.

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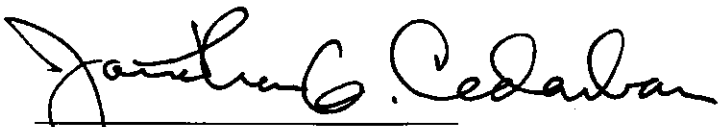
CERTIFICATE OF SERVICE

Pursuant to FISCR Rule 16(b), I hereby certify that I served the foregoing Brief of Amici Curiae by providing six copies thereof to the Clerk of the FISC, four for filing and two to served on Government counsel.

Respectfully submitted,



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