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United States
Foreign Intelligence Surveillance
Court of Review

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(U) UNDER SEAL

~~(S)~~

(U) IN THE UNITED STATES FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW

~~(S)~~

~~(S)~~ On Appeal from the United States Foreign Intelligence Surveillance Court (Boasberg, J.)

~~(S)~~ REPLY BRIEF FOR THE UNITED STATES

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(U) ARGUMENT

I. ~~(S//NF)~~ AMICI'S DEFENSE OF THE FISC'S INTERPRETATION OF THE RECORDKEEPING REQUIREMENT SET FORTH IN FISA SECTION 702(f)(1)(B) LACKS MERIT

A. ~~(S//NF)~~ The Plain Language of Section 702(f)(1)(B) Does Not Require Records that Specify Whether Each Recorded Query Term Relates to a U.S. Person

~~(S//NF)~~ Amici contend (Br. 3-20) that the FISC was correct to conclude that the FBI's recordkeeping practices are inconsistent with Section 702(f)(1)(B) of FISA, which requires "a technical procedure whereby a record is kept of each United States person query term." 50 U.S.C. § 1881a(f)(1)(B). Contrary to amici's contention, the FBI's Querying Procedures satisfy the plain language of the recordkeeping provision. The procedures ensure that a record is kept of every term, including "each United States person query term," that is used to query unminimized Section 702 information. Section 702(f)(1)(B) requires nothing more.

~~(S//NF)~~ Like the FISC, amici take the view that Section 702(f)(1)(B) requires that the FBI's records indicate which query terms relate to U.S. persons. But that differentiation requirement is not found in the statutory text. Observing that Section 702(f)(1)(B) imposes a recordkeeping requirement "'only for queries that use United States-person query terms, not for all queries,'" amici reason that

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the provision is "'meant to memorialize when United States-person query terms are used,' a requirement the FBI's undifferentiated recordkeeping system fails to satisfy." Amici Br. 4 (quoting App. 53-54). It is true that Section 702(f)(1)(B) requires only records of U.S. person query terms, but nothing in the statutory text *precludes* the FBI from also keeping records of other query terms, in accordance with its longstanding practice. *See* Opening Br. of the United States ("Gov't Op. Br.") 12. And nothing in the statutory language requires that records of U.S. person query terms be separately identifiable from the records of other query terms. Rather, it is only by reading additional words into the statutory text that one can find such a differentiation requirement in Section 702(f)(1)(B). Indeed, amici effectively concede as much by asking this Court to require the FBI to "maintain records of U.S.-person queries *identifying them as such*." Amici Br. 53 (emphasis added). There is no basis for reading extra language into the statutory text when Congress did not include it.[1]

[1] ~~(S//NF)~~ Amici assert (Br. 12-13) that Section 702(f)'s definition of "query"—which is limited to the use of terms to retrieve information "of or concerning United States persons," *see* 50 U.S.C. § 1881a(f)(3)(B)—supports the FISC's reading of Section 702(f)(1)(B), but they fail to explain how. The definition arguably makes Section 702(f)(1)(B)'s separate reference to "*United States person* query term[s]" redundant, but it otherwise says nothing about the recordkeeping requirement.

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B. ~~(S//NF)~~ The Relevant Statutory Context Contradicts Amici's Contention that Section 702(f)(1)(B) Mandates a Change in the FBI's Recordkeeping Practices

~~(S//NF)~~ Amici err in claiming that the recordkeeping requirement set out in Section 702(f)(1)(B) was intended to be an "'improvement[]' in the [Section] 702 program designed to advance U.S.-person privacy interests" and not merely a "codification[] of existing practices." Amici Br. 13; *id.* at 15-19. When Congress enacted Section 702(f)(1)(B) as part of the FISA Amendments Reauthorization Act of 2017, Pub. L. No. 115-118, 132 Stat. 3 (Jan. 19, 2018) ("Reauthorization Act"), it was aware of the FBI's historical querying practices, including its practice of keeping records of all terms used to query unminimized Section 702 information without distinguishing between U.S. person query terms and non-U.S. person query terms. Those practices were described, among other places, in the PCLOB Report,[2] which was relied upon by Congress in the debating and enacting the Reauthorization Act. *See, e.g.,* 164 Cong. Rec. E80 (Jan. 19, 2018) (statement of Rep. Nunes). The FBI's recordkeeping practices were also addressed in the FBI's minimization procedures,[3] which the government has long been required to

[2] (U) Privacy and Civil Liberties Oversight Bd., *Report on the Surveillance Program Operated Pursuant to Section 702 of [FISA]* 59 (July 2, 2014).

[3] (U) *See, e.g., Minimization Procedures Used by the [FBI] in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of [FISA]* 11, 29, 39 (2016), *available at* https://www.dni.gov/files/documents/icotr/

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provide to Congress. *See* 50 U.S.C. § 1881f(b)(1)(H).

~~(S//NF)~~ Review of the Reauthorization Act makes clear that when Congress intended to require the FBI to alter its practices relating to querying, it knew how to do so clearly and explicitly. A provision of the Reauthorization Act not directly at issue here requires the government, for the first time, to obtain an order from the FISC before the FBI reviews the results of certain queries made for law enforcement purposes. Pub. L. No. 115-118, § 101, 132 Stat. 4-5. That provision, now set out in Section 702(f)(2), unequivocally required the FBI to alter its preexisting practice by imposing detailed new provisions describing the circumstances in which such orders are required and the process for issuing them. *See* 50 U.S.C. § 1881a(f)(2). By contrast, the provision at issue here, Section 702(f)(1)(B), is worded in a manner that is flexible enough to accommodate the distinct recordkeeping practices of the FBI and those of the other agencies that separately track U.S. person query terms. Amici fail to account for the contrast between Sections 702(f)(1)(B) and 702(f)(2), which undercuts their claim that Congress intended the former provision to require the FBI to alter its preexisting recordkeeping practices.

~~(S//NF)~~ Amici further contend that the FISC's interpretation of Section

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51117/2016_FBI_Section_702_Minimization_Procedures_Sep_26_2016_part_1_and_part_2_merged.pdf.

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702(f)(1)(B) is necessary to further what they describe as the recordkeeping provision's "essential goal[]" of "[e]nsuring greater transparency" about the "use of U.S.-person query terms." Amici Br. 13. That contention also lacks merit. As an initial matter, "transparency" is not a purpose that is reflected in the plain language of Section 702(f)(1)(B). *See, e.g., Park'N Fly v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.").[4] The language of Section 702(f)(1)(B) addresses only recordkeeping and says nothing about transparency, reporting, or disclosures.

~~(S//NF)~~ Another provision of FISA that requires the government to publish reports, including on querying, confirms that Section 702(f)(1)(B) is not aimed at enhancing "transparency" with respect to "the frequency with which FBI agents use U.S.-person query terms" to query unminimized Section 702 information, as amici assert. *See* Amici Br. 18-19. Section 603 of FISA requires the DNI to publicly report on an annual basis certain statistics, including, for information acquired pursuant to Section 702, "the number of search terms concerning a known

[4] ~~(S//NF)~~ Contrary to amici's assertion (Br. 12), the government did not "criticize[] the FISC for considering legislative purpose." The government merely observed that, contrary to the FISC's conclusion, "separate tracking of U.S. person query terms is not an 'aim' that is reflected in the plain language used by Congress." Gov't Op. Br. 35.

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United States person used to retrieve . . . unminimized contents," and "the number of queries concerning a known United States person of unminimized noncontents information." *See* 50 U.S.C. § 1873(b)(2)(B), (C). But Congress expressly exempted the FBI from that reporting requirement, *id.* § 1873(d)(2)(A), explaining that "[t]he FBI is exempted from reporting requirements that the agency has indicated it lacks the capacity to provide," H.R. Rep. No. 114-109, pt. 1, at 26 (2015). And when Congress added other disclosure requirements for the FBI in the Reauthorization Act—which also enacted Section 702(f)(1)(B)—it retained the provision expressly exempting the FBI from reporting on U.S. person queries and updated the statutory cross-references in the exemption provision to account for the newly added disclosure requirements. Pub. L. No. 115-118, § 102(b), 132 Stat. 9-10; *see also, e.g.*, 50 U.S.C. § 1873(b)(2)(D). Contrary to amici's contention, there is no basis for deviating from the plain text of Section 702(f)(1)(B) for the purpose of facilitating disclosures that Congress has unequivocally exempted the FBI from having to make.[5] *See also* Gov't Op. Br. 39 (discussing a second pertinent

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[5] ~~(S//NF)~~ Contrary to amici's contention, the exception to the exemption in Section 603(d)(2)(A) does not undermine the government's reliance on the exemption. *See* Amici Br. 6 (discussing 50 U.S.C. § 1873(d)(2)(A)). The exception effectively directs the government to disclose the number of FISC orders issued under Section 702(f)(2), which, as noted above, requires the government to obtain an order before viewing the contents of communications retrieved in response to a U.S. person query designed to elicit evidence of a crime unrelated to foreign intelligence. The government has never sought such an order. And it is

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provision).

C. ~~(S//NF)~~ The Legislative History Cited by Amici Fails To Support the FISC's Interpretation of Section 702(f)(1)(B)

~~(S//NF)~~ Amici cite several pieces of legislative history in support of the FISC's interpretation of Section 702(f)(1)(B). *See* Amici Br. 15-17. Insofar as the Court sees the need to consider legislative history—*see, e.g., Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2008) (reaffirming that "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material")—the snippets cited by amici are unavailing.

~~(S//NF)~~ Amici first claim that reports of the congressional intelligence committees support the FISC's interpretation of Section 702(f)(1)(B). *See* Amici Br. 8, 14, 17. Amici observe that the Senate Report states that Section 702(f) "'ensure[s] the retention of records of all queries using an identifier associated with a known U.S. person,'" *id.* at 17 (quoting S. Rep. No. 115-182, at 2 (2017)), and that the House Report "notes several times . . . [that] the records that must be maintained are 'records of United States person query terms,'" *id.* at 8 (citing H.R.

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exceedingly rare for a query designed to elicit evidence of a crime unrelated to foreign intelligence to return responsive Section 702 results. *See* PCLOB Report 59-60; *id.* at 162 (statement by Board members Brand and Cook); *see also* ODNI, *Statistical Transparency Report Regarding Use of National Security Authorities, Calendar Year 2017*, at 19 (Apr. 2018), *available at* https://www.odni.gov/files/documents/icotr/2018-ASTR----CY2017----FINAL-for-Release-5.4.18.pdf.

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Rep. No 115-475, pt. 1, at 18 (2017)). But the statements cited by amici merely track the statutory text and reflect no requirement that records of U.S. person query terms be separately identifiable from other records.

~~(S//NF)~~ Moreover, the House Report expressly states that Section 702(f)(1)(B) "is not intended to, and does not impose a requirement that an Intelligence Community element maintain records of U.S. person query terms in any particular manner, so long as appropriate records are retained and thus available for subsequent oversight." H.R. Rep. No. 115-475, pt. 1, at 18; *see also id.* ("[T]he manner in which the element 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."). Like the FISC, amici contend that this language is unhelpful to the government because "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." Amici Br. 8. But nothing in the text of Section 702(f)(1)(B) requires the government to "record the fact that a query term is a United States-person query term." Rather, the statutory language requires only that when a query is made using a term associated with a U.S. person, a record of the query term itself must be maintained. Contrary to amici's view, the record of a

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U.S. person query term does not cease to exist because it is commingled with other records.

~~(S//NF)~~ The House Report also states that, "to provid[e] assurances to the American public that the procedures and processes *currently in place* satisfy the Fourth Amendment[] and do not impede on United States person privacy," each element of 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.R. Rep. No. 115-475, pt. 1, at 17-18 (emphasis added). Like the FISC, amici take the view that this language is unhelpful to the government because it '"appears in a discussion of the general requirement to adopt querying procedures, not the specific recordkeeping requirements of' subsection 702(f)(1)(B)." Amici Br. 9 (quoting App. 59). But amici and the FISC fail to explain why the location of this language alters its plain meaning. At the time of the House Report, the FBI's practice of keeping undifferentiated records of all query terms was among its "current policies and practices" relating to querying, and the context provides no basis for concluding otherwise.

~~(S//NF)~~ Amici also rely on the testimony of several witnesses before congressional committees, which they contend reflects "concerns for greater

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transparency" and therefore supports the FISC's reading of Section 702(f)(1)(B). Amici Br. 15-16. But the "testimony of witnesses before congressional committees prior to passage of legislation is generally weak evidence of legislative intent." *Public Citizen v. Farm Credit Admin.*, 938 F.2d 290, 292 (D.C. Cir. 1991) (per curiam); *accord Laborers' Local 265 Pension Fund v. iShares Trust*, 769 F.3d 399, 405 (6th Cir. 2014). Here, the value of the testimony cited by amici is particularly weak, as it addresses neither query recordkeeping nor the language of Section 702(f)(1)(2). *See* Amici Br. 15-16 (citing testimony).

~~(S//NF)~~ Equally unhelpful is amici's citation to the statement of a single member of the Senate Intelligence Committee who opposed the Reauthorization Act. *See* Amici Br. 17 (citing S. Rep. No. 115-182, at 11 (minority views of Sen. Heinrich)). Like witness testimony, the "statement of a single Senator—even the bill's sponsor—is only weak evidence of congressional intent." *SW General, Inc. v. N.L.R.B.*, 796 F.3d 67, 77 (D.C. Cir. 2015) (citing cases). And the sentence quoted by amici does not address the differentiation requirement endorsed by amici. It instead appears to reflect a misunderstanding of the FBI's historical recordkeeping practices. *See* Amici Br. 17.

D. ~~(S//NF)~~ The FISC's Interpretation of Section 702(f)(1)(B) Is Not Necessary To Ensure Adequate Oversight

~~(S//NF)~~ Amici's claim (Br. 13, 17-19) that the FISC's interpretation of

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Section 702(f)(1)(B) is necessary to enhance oversight also lacks merit. Oversight of the FBI's use of queries to locate and retrieve information in the data the government has already acquired under Section 702 is accomplished principally through audits by DOJ's National Security Division (NSD) b3, 7E per FBI b 3, 7E per FBI *See* Gov't Op. Br. 44-45. Compliance incidents that are discovered during those oversight audits are reported to Congress and to the FISC. *See id.* at 43-44. NSD's audits establish that the rate of noncompliant queries by FBI personnel is very low. *See id.* at 45.

~~(S//NF)~~ Separately identifying and tracking U.S. person query terms in the FBI's records would not enhance oversight of the FBI's querying practices. *See* Gov't Op. Br. 45-46. The vast majority of the FBI's investigative activity focuses on individuals in the United States, and the FBI's general practice is to treat everyone located in the United States the same under the law. *Id.* at 45. The query standard—*i.e.*, the requirement that a query must be reasonably likely to return foreign intelligence information or evidence of a crime—applies to all queries, whether or not the query involves someone who is known to be a U.S. person. And U.S. person queries and non-U.S. person queries are subject to oversight on the same basis. Thus, little, if any, oversight purpose would be served by interpreting Section 702(f)(1)(B) to require that records of U.S. person query terms

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be identifiable as such.

~~(S//NF)~~ Amici do not dispute the foregoing in asserting that the FISC's reading of Section 702(f)(1)(B) is necessary for effective oversight. Rather, they claim that NSD audits "provide only a very partial picture of FBI practices." Amici Br. 18. They contend that separate tracking would permit counting, which, in turn, would provide "firmer numbers" and reveal the degree to which FBI queries "intru[de] on U.S.-person privacy interests." *Id.* at 18-19.[6] Amici's oversight argument is thus effectively indistinguishable from its transparency argument, and it fails for the same reasons. There is no indication in the plain language of Section 702(f)(1)(B) that the recordkeeping provision is intended to require the counting of U.S. person queries or the reporting of the resulting counts. And if Congress had intended Section 702(f)(1)(B) to facilitate transparency of the

[6] ~~(S//NF)~~ Here and elsewhere in their brief, amici assume that knowing the number of U.S. person queries conducted by the FBI would provide an accurate measure of the degree to which U.S. person privacy interests are implicated by the FBI's querying practices. *See* Amici Br. 18-19, 25. But not all queries return responsive Section 702 information, and, even when they do, the results may never be viewed. As the FISC recognized (*see, e.g.,* App. 89-90, 92)—and as amici's written justification proposal itself assumes (*see* App. 93)—it is the review of any U.S. person communications that might be returned by a query, not the act of conducting the query itself, that can result in an intrusion on privacy interests. Congress appears to have reached the same conclusion in new Section 702(f)(2), which requires the government to obtain FISC approval not whenever it runs a U.S. person query designed to elicit evidence of a crime unrelated to foreign intelligence, but only when the FBI seeks to review the contents of communications returned in response to such query. *See* 50 U.S.C. § 1881a(f)(2).

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sort endorsed by amici, it would not have maintained the provision in Section 603 expressly exempting the FBI from having to disclose the number of U.S. person queries and query terms it uses each year. *See* 50 U.S.C. § 1873(d)(2)(A).

~~(S//NF)~~ Finally, the practical considerations identified in the declaration of FBI Director Wray undermine amici's claim that the FISC's interpretation of Section 702(f)(1)(B) would produce a reliable set of records concerning which query terms are U.S. person query terms. Researching the U.S. person status of each term used to query Section 702 information would be resource intensive and time consuming, and, in many cases, would fail to produce definitive information, in part because many such queries are performed early in investigations or when FBI personnel are still attempting to identify threats based on limited or incomplete information. App. 313-14. Foregoing such research and instead allowing FBI personnel to rely on information in their personal knowledge or possession would be less burdensome, but it would also likely be even less reliable in determining the U.S. person status of query terms, even if aided by presumptions. *See* App. 317-19.

II. (U) THE FBI'S MINIMIZATION AND QUERYING PROCEDURES ARE CONSISTENT WITH FISA'S DEFINITION OF MINIMIZATION PROCEDURES AND WITH THE FOURTH AMENDMENT

~~(S//NF)~~ Amici claim that the FBI's Querying and Minimization Procedures are inconsistent with FISA's definition of minimization procedures and with the

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Fourth Amendment. That claim lacks merit.[7]

A. ~~(S//NF)~~ Properly Viewed in Their Entirety, the FBI's Minimization Procedures, Which Operate in Conjunction with the Querying Procedures, Satisfy FISA's Definition of Minimization Procedures

~~(S//NF)~~ As an initial matter, amici err in asserting that the FBI's "[q]uerying [p]rocedures, like the [m]inimization [p]rocedures," must independently satisfy FISA's definition of minimization procedures set forth in 50 U.S.C. § 1801(h). Amici Br. 22. Section 702(f)(1) requires the Attorney General to adopt "querying procedures . . . for information collected pursuant to an authorization under [Section 702(a)]." *Id.* § 1881a(f)(1)(A). Those procedures must, as discussed in Part I above, "include a technical procedure whereby a record is kept of each United States person query term used for a query," *id.* § 1881a(f)(1)(B), and they must be "consistent with the requirements of the [F]ourth [A]mendment," *id.* § 1881a(f)(1)(A). The querying procedures are subject to judicial review by the FISC, *see id.* § 1881a(f)(1)(C), which must determine whether they "comply with

[7] ~~(S//NF)~~ Amici contend that 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." Amici Br. 21. Amici are mistaken. The government framed its statement of the issue based on the decision below. *See* App. 62. In any event, nothing in the government's formulation of the question precludes this Court from considering the developments in the law identified by amici. *See* Amici Br. 21. As discussed below, amici's arguments based on those developments are unavailing.

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the requirements of [Section 702(f)(1)]" and "with the [F]ourth [A]mendment." *id.* § 1881a(j)(2)(D), (j)(3)(A). Unlike minimization procedures, querying procedures need not independently satisfy the definition of minimization procedures. *See id.* § 1881a(e), (j)(2)(C), (j)(3)(A).

~~(S//NF)~~ The FBI querying procedures at issue here are effectively incorporated into the FBI minimization procedures, *see* App. 254, 283, 289, and thus function not only as the procedures required by Section 702(f)(1), but also as part of the minimization procedures. Accordingly, the FISC considered the FBI's querying procedures in its statutory minimization analysis. *See* App. 48-49. Although the FISC reached the wrong result, it correctly stated the pertinent question as "whether each agency's minimization procedures, in conjunction with the corresponding querying procedures, satisfy [Section] 1801(h)(1)." App. 49. When the minimization procedures and the querying procedures are properly assessed in their entirety and in conjunction with each other, it is clear that the definition in Section 1801(h) is satisfied.

~~(S//NF)~~ The FBI's querying procedures provide that, subject to narrow exceptions, "[e]ach query ... must be reasonably likely to retrieve foreign intelligence information, as defined by FISA, or evidence of a crime." App. 234. As the FISC correctly recognized, that standard is consistent with the definition of

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minimization procedures because queries conducted in accordance therewith "contribute to the minimization of private U.S.-person information, consistent with foreign-intelligence needs, as contemplated by [Section] 1801(h)(1)." App. 67-68; *see* App. 97-110 (approving exceptions). Amici do not argue otherwise. Instead, like the FISC, amici take the view (Br. 23-24) that the FBI's procedures nevertheless fail to satisfy the definition of minimization procedures because of "the FBI's repeated non-compliant queries of Section 702 information." App. 62. That view is incorrect.

~~(S//NF)~~ Amici point to the compliance incidents cited by the FISC (*see* App. 68-71) as evidence 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." Amici Br. 32. But, as established in the government's opening brief (Br. 44-45, 55), NSD audits of the FBI's querying practices, which involve the review of the justifications for [b3, 7E per FBI] queries each year, establish that misapplications of the query standard and other instances of noncompliance with the applicable requirements are, in fact, extremely rare. Those reviews have nevertheless proved effective in identifying areas of concern that warrant remediation through enhanced guidance, additional training, or, where appropriate, revised procedures.

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Id. at 55.

~~(S//NF)~~ Again referring to the compliance incidents cited by the FISC, amici contend that the government's oversight is inadequate because "misapplications of the querying standard have previously gone undetected for significant lengths of time." Amici Br. 27. Amici further speculate that "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 [FISC]." *Id.* at 28-29. Amici are wrong on both counts.

~~(S//NF)~~ Most of the incidents cited by the FISC and amici were promptly identified and reported to the FISC as actual or potential compliance incidents that were under investigation, in accordance with the FISC's rules and the government's longstanding practice. It is true that it took the government time to investigate and to file final reports with the FISC for some of the incidents.[8] But investigations of compliance instances can be time-consuming for a number of reasons. Some incidents are factually complex, and it takes time to gather and process the relevant information. Some involve assessments as to which

[8] ~~(S//NF)~~ For the two incidents discussed in the FISC's opinion as to which a final notice had not yet been submitted (*see* App. 70, 77), final notices have since been filed.

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reasonable minds can disagree, and it takes time to reach a final determination. Both of those factors were present in the set of investigations at issue here.

~~(S//NF)~~ Contrary to amici's speculation, the investigations of the incidents identified by the FISC were not delayed due to the lack of contemporaneous records of written justifications for the queries at issue. In fact, as discussed in the government's opening brief (Br. 56), the FBI personnel involved in the incidents in question had no difficulty recalling the justifications for their queries. *See also* App. 441-42. Indeed, NSD's oversight audits over the past several years have established that FBI personnel typically have no difficulty recalling query justifications.[9] Accordingly, amici's supposition that the availability of contemporaneous records of justifications would "significantly improve" the government's ability to conduct oversight of queries is simply not supported by the facts. *See* Amici Br. 22; *id.* at 27. The written justification remedy endorsed by

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[9] ~~(S//NF)~~ NSD conducts audits by identifying FBI personnel who have access to unminimized Section 702 information and who have run queries in systems containing unminimized FISA information, including unminimized Section 702 information. *See* App. 439. During such audits, the auditors and FBI personnel view a chronological list containing information logged at the time of each query. *See id.* The information includes, *inter alia*, the dates and times of the queries under review, the query terms used, and the systems queried. *See id.* Because individual personnel often perform multiple related queries in succession, and because audits cover all queries made during a specified time frame (typically 90 days), the log information provides context that likely aids personnel in recalling the justifications for the listed queries. Amici are therefore incorrect in arguing that oversight depends solely on "imperfect memories." Amici Br. 26.

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amici and the FISC would have neither prevented the incidents in question nor expedited the government's investigation thereof. Indeed, even with contemporaneous written justifications for the queries at issue, NSD still would have engaged in the same investigation.

~~(S//NF)~~ The government's oversight of the FBI's querying practices led to the adoption of other remedial measures that are in fact reasonably designed to reduce the risk of future misapplications of the query standard like those identified by the FISC. As discussed in the government's opening brief (Br. 57-59), the FBI has issued guidance and undertaken enhanced training on application of the query standard, both generally and in the context of batch queries, which were the focus of the FISC's concern. The government also added a provision to the querying procedures generally requiring FBI personnel to obtain attorney approval before reviewing the contents of communications returned through categorical batch queries. App. 235. Additionally, the FBI reworded the query standard as it appears in the querying procedures to clarify and to emphasize that each query must be *reasonably likely to retrieve* foreign intelligence information or evidence of a crime. App. 234. The language of the standard as previously articulated in the FBI's minimization procedures could have led FBI personnel, including those who conducted the batch queries discussed in the FISC's opinion, to design their

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queries *for the purpose* of extracting foreign intelligence information or evidence of a crime, regardless of whether such queries were in fact *likely to retrieve* such information. *See* Gov't Op. Br. 59-60. Amici ignore this clarification of the standard.

~~(S//NF)~~ Regarding categorical batch queries, amici's concern (Br. 32-33) that FBI personnel will be unable to distinguish such queries from individual queries and that the new provision will incentivize queries using more U.S. person query terms is unfounded. The FBI issued detailed guidance on querying requirements in June 2018. *See* Gov't Op. Br. 58. Among other things, that guidance defined the term "categorical batch query" as a query of identifiers related to multiple persons in reliance on a categorical or common justification, rather than an individualized assessment of each identifier queried. *See* App. 166-71, 378, 442.[10] The guidance explained that such queries must be reasonably likely to retrieve foreign intelligence information or evidence of a crime and cannot be unduly broad (*i.e.*, likely to return excessive volumes of non-pertinent information) under the circumstances. *See id.* Finally, the guidance provided examples of permissible and impermissible categorical batch queries. *See id.* The guidance, together with

[10] ~~(S//NF)~~ The government described the guidance to the FISC in its response brief and during the hearings, but the FISC did not request a copy of the document itself. The document is therefore not in the record. The government will submit a copy of the guidance document at this Court's request.

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the attorney-approval provision and ongoing training, is more than adequate to address the concerns raised by amici, particularly in the context of the additional protections discussed below.[11]

~~(S//NF)~~ Amici's minimization argument also ignores the fact that the FBI's querying procedures apply in the context of an established framework of additional restrictions on the acquisition, retention, use, and dissemination by the FBI of U.S. person information that has been incidentally obtained through Section 702 acquisitions. Those protections, which are described more fully in the government's opening brief (Br. 51-55), serve to mitigate the impact of the relatively rare instances in which FBI personnel deviate from the query standard.

~~(S//NF)~~ In summary, application of the targeting procedures—which work in conjunction with the FBI's minimization procedures, *see* App. 263—directs collection toward communications of non-U.S. persons that are likely to yield foreign intelligence information. *See* Gov't Op. Br. 50 & n.17. Moreover, the FBI receives only a very small percentage of the government's total Section 702 collection, and the portion it receives is limited to acquisitions from facilities that

[11] ~~(S//NF)~~ Amici's hypothetical query (Br. 33-34) using identifiers associated with [redacted] [redacted] would not be reasonably likely to retrieve foreign intelligence information. Similarly, their hypothetical query (*id.* at 36) using identifiers of all U.S. persons would be unduly broad in any conceivable set of circumstances and therefore impermissible.

(b)(1)
(b)(3)-50 USC 3024(i)

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are deemed to be relevant to an ongoing full national security investigation. *See id.* at 51. Those limitations serve to minimize the FBI's acquisition of U.S. person information consistent with the definition of minimization procedures. *See* 50 U.S.C. § 1801(h)(1).

~~(S//NF)~~ Access to unminimized Section 702 information in the FBI's possession is limited to personnel who require access to perform their official duties or to assist in a lawful and authorized government function. App. 264. Even if FBI personnel retrieve information through a query that is not reasonably likely to return foreign intelligence information or evidence of a crime, the minimization procedures limit their review of that information to determining whether it constitutes foreign intelligence information, is necessary to understand foreign intelligence information or to assess its importance, or is evidence of a crime. App. 268-69. And the minimization procedures prohibit the use and dissemination of U.S. person information that does reasonably appear to meet that standard and impose other restrictions on dissemination. App. 268-69, 297-303. Finally, FISA also imposes additional statutory use restrictions that, together with the minimization procedures, enhance the protection of U.S. person information that has been acquired under Section 702. *See* Gov't Op. Br. 53-54 (discussing several statutory restrictions).

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~~(S//NF)~~ This framework of protections—the application of which is itself subject to rigorous oversight—greatly reduces the risk that information retrieved through a noncompliant query will be indiscriminately or improperly reviewed, used, or disclosed.

B. (U) The FBI's Procedures Are Reasonable Under the Fourth Amendment

~~(S//NF)~~ Amici contend that the government has "reiterate[ed] 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 . . . is confusing and fallible in practice." Amici Br. 38-39; *see also id.* at 44 (incorrectly describing FBI querying as "unfettered"). That is not an accurate description of the government's position or of the FBI's querying practices. As discussed above, amici ignore the government's clarification of the query standard in the FBI's querying procedures and the guidance and training the government has provided FBI personnel about the proper application of that standard. Amici also fail to account for the fact that the querying standard is only one part of a multi-layered framework of restrictions on the FBI's acquisition, review, and use of U.S. person information that is acquired under Section 702. Properly viewed in context, the FBI's querying and minimization procedures are reasonable under the Fourth Amendment.

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~~(S//NF)~~ Amici concede, as they must, that the government has "a compelling interest in protecting national security, including by 'connecting the dots' to uncover hidden threats." Amici Br. 39. Amici assert, however, that "the Government has not demonstrated that this compelling interest would be undermined by Amici's proposed requirement that a written justification of fact . . . be provided before an agent can review the contents returned from U.S.-person queries." *Id.* Contrary to amici's contention, however, the government does not bear the burden of demonstrating that amici's proposed written justification remedy would interfere with national security.

~~(S//NF)~~ Under FISA, it is the responsibility of the Executive Branch to adopt the targeting, minimization, and querying procedures that it intends to use to implement Section 702. *See* 50 U.S.C. § 1881a(d)(1), (e)(1), (f)(1)(A). The government must submit those procedures to the FISC for review to determine whether they comply with enumerated statutory requirements and the Fourth Amendment. *See id.* § 1881a(j). FISA imposes relatively few specific requirements as to the particular provisions that the government must include in its procedures, and the written justification provision proposed by amici is not among those enumerated in the statute. Instead, FISA and the Fourth Amendment give the government substantial flexibility to craft procedures that reasonably balance its

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important national security interest in implementing Section 702 with the privacy interests of U.S. persons who are affected by its implementation. *See* 50 U.S.C. § 1801(h)(1); *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (explaining that the Fourth Amendment's "flexible requirement of reasonableness" should not be read to mandate "rigid rule[s]" that fail to adequately account for countervailing governmental interests). The pertinent question is whether the procedures adopted by the government and submitted to the FISC reasonably strike the necessary balance; it is not whether one can conceive of alternative procedures that amici believe would represent an improvement. For the same reasons that the FBI's querying and minimization procedures satisfy the definition of minimization procedures, they also are reasonable under the Fourth Amendment.

~~(S//NF)~~ In response to concerns about misapplications of the query standard, the government adopted good-faith remedial measures—*i.e*, clarifying the query standard in the FBI's querying procedures; providing additional guidance and training on application of that standard, with an emphasis on categorical batch queries; and adding a provision to the querying procedures requiring FBI personnel to obtain attorney approval before viewing contents returned through categorical batch queries. Those measures are better designed to reduce the risk of misapplications of the query standard, both in the context of categorical batch

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queries and more generally, than amici's proposed written justification requirement. Amici's proposal would have neither prevented the incidents identified by the FISC nor aided in subsequent oversight reviews of those incidents.

~~(S//NF)~~ Amici's claim (Br. 44) that the Reauthorization Act and *Carpenter v. United States*, 138 S. Ct. 2206 (2018), "demand a re-balancing of the interests and a different result" also lacks merit. Initially, amici err in asserting (Br. 45) that the Reauthorization Act requires the FISC and this Court to review the querying procedures in isolation rather than in conjunction with the targeting and minimization procedures. Section 702, as amended by the Reauthorization Act, directs the FISC to assess whether "the targeting, minimization, and querying procedures adopted in accordance with subsections [702](d), (e), and (f)(1) are consistent with the requirements of those subsections and with the [F]ourth [A]mendment." 50 U.S.C. § 1881a(j)(3)(A). That language indicates that the procedures are to be assessed together under the Fourth Amendment. Moreover, the separate procedures all state that they are to be applied in conjunction with one another. *See* App. 232, 258, 263, 273, 283, 705. Finally, as this Court has recognized, it is "bedrock" law that review for reasonableness under the Fourth Amendment requires consideration of the "totality of the circumstances." *In re*

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Directives Pursuant to Section 105B of [FISA], 551 F.3d 1004, 1012 (FISA Ct. Rev. 2008).

~~(S//NF)~~ Equally flawed is amici's argument that the Reauthorization Act has altered Fourth Amendment law. As amici concede (Br. 45), "Congress does not have the power to direct this Court's constitutional jurisprudence." Indeed, the Supreme Court has rejected the notion that the Fourth Amendment incorporates subsequently enacted statutes. *See, e.g., Virginia v. Moore*, 553 U.S. 164, 168-69 & n.3 (2008). Moreover, in enacting the Reauthorization Act, Congress, with knowledge of the FBI's existing querying practices, considered and *rejected* imposing stricter rules on FBI querying. *See, e.g.*, S. Rep. No. 115-182, at 4 (listing rejected amendments). And the paragraph of the House Report cited by amici (Br. 45) expresses the Intelligence Committee's view that "the [querying] procedures and processes currently in place satisfy the Fourth Amendment, and do not impede on United States person privacy." H.R. Rep. No. 115-475, pt. 1, at 17.

~~(S//NF)~~ Finally, amici's reliance on *Carpenter* is unavailing. *See* Amici Br. 44-52. In *Carpenter*, the Supreme Court held that the government's acquisition, during a criminal investigation, of historical cell-site information from a phone company for an extended period of time was a Fourth Amendment "search" subject to the warrant requirement. 138 S. Ct. at 2219. The Court rejected the

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argument that the phone user lacked a reasonable expectation of privacy in the location information, which was logged merely "by dint of [the cell phone's] operation," either because it was part of the company's business record or because the user had voluntarily disclosed it by making calls. *See id.* at 2219-20. The Court emphasized the "unique nature of cell phone location records." *Id.* at 2217.

~~(S//NF)~~ *Carpenter* addressed the government's *acquisition* of cell site location information from the carrier. The queries at issue here do not result in the acquisition of new information; rather, they merely aid FBI personnel in retrieving information that has already been acquired by the government and that the government is already authorized to review. Moreover, the Court in *Carpenter* emphasized that its decision was "narrow" and "d[id] not consider other collection techniques involving foreign affairs or national security." 138 S. Ct. at 2220. Accordingly, *Carpenter* has no application here. *See* App. 86-87 (rejecting amici's reliance on *Carpenter* in support of their argument that queries of lawfully acquired information are distinct Fourth Amendment events).

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(U) CONCLUSION

~~(S)~~ For the foregoing reasons and the reasons set forth in the Opening Brief of the United States, this Court should reverse the FISC's determinations that the FBI's querying and minimization procedures are deficient under FISA and the Fourth Amendment.

Respectfully submitted,

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(U) CERTIFICATE OF COMPLIANCE

(U) 1. This reply brief complies with the Order of this Court dated December 17, 2018, and the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 6,498 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

(U) 2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point font size and Times New Roman type style.

b6, 7C per NSD

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Dated: January 29, 2019

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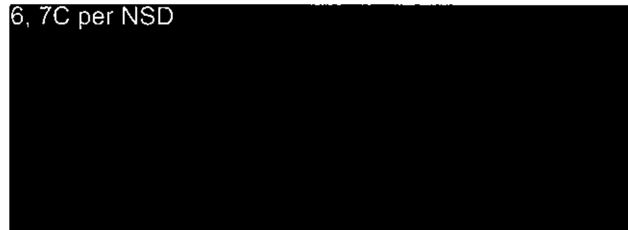
(U) CERTIFICATE OF SERVICE

~~(S)~~ I hereby certify that on January 29, 2019, I served the foregoing Reply Brief for the United States by providing two true and correct copies thereof to the Clerk of the Court to be made available to amici curiae Jonathan Cedarbaum, Amy Jeffress, and John Cella.



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