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U.S. FOREIGN
INTELLIGENCE
SURVEILLANCE COURT

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

BRIEF OF AMICI CURIAE

18-CV-12131 (SDNY)(NSD)001773

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Introduction

On March 27, 2018, the Government submitted a 95-page brief in support of its request that the Court reauthorize the Government's surveillance activities conducted pursuant to section 702 of the Foreign Intelligence Surveillance Act of 1978 ("FISA"), codified at 50 U.S.C. § 1881a. The Government submitted [redacted] Certifications, verified by the Attorney General and the Director of National Intelligence ("DNI"), one for each [redacted] pursuant to that authority ("2018 Certifications"). With each of the [redacted] Certifications, the Government submitted four Affidavits (one from each of the relevant agency heads); eight sets of accompanying procedures governing targeting, minimization, and querying procedures for the agencies involved; and two proposed Orders (one for the current year and one for continuation of the authorizations from prior years). The 2018 Certifications are the first to be considered by the Court since Congress enacted the FISA Amendments Reauthorization Act of 2017 ("Reauthorization Act"), Pub L. No. 115-118, 132 Stat. 3 (Jan. 19, 2018).

On April 23, 2018, the Court issued an Order appointing Jonathan G. Cedarbaum and Amy Jeffress as amici curiae to address [redacted] specific issues, as set forth below. Order Appointing Amici Curiae (Apr. 23, 2018) ("April 23, 2018 Order"). On May 7, 2018, the Court appointed John Cella to assist. Appointing Order (May 7, 2018).

The Court's April 23, 2018 Order explained that the Court was initially presented with the 2018 Certifications in draft form between February 8 and February 15, 2018. Upon reviewing those drafts, the Court concluded that the matter would present "one or more novel or significant interpretations of the law," warranting appointment of amicus curiae under FISA section 103(i)(l). In order to provide for adequate time for briefing and consideration of the issues, the Court extended the normal period of review for ninety days, to July 25, 2018.

The April 23, 2018 Order directed amici to address the following issues:

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(a) Do the pre-conditions on acquiring "abouts communications" imposed by section 103(b) of the FISA Amendments Reauthorization Act of 2017, Public Law 115-118, 132 Stat. 3, apply only to forms of acquisition that the government discontinued under section 702 in March 2017?

(b) If the answer to (a) is "no," do any forms of acquisition to be conducted under the 2018 Certifications involve acquisition of abouts communications, with particular consideration of [redacted]

(c) Are the Querying Procedures consistent with the requirements of the Fourth Amendment, with particular consideration of:

(i) The exemptions in section III, in conjunction with the definition of "query" at section V.A; and

(ii) The provisions of section VII, as applied to queries intended to retrieve evidence of a crime that is not foreign intelligence information?

(d) Are the record-keeping provisions of the Querying Procedures consistent with the requirements of § 702(f)(1)(B) and the Fourth Amendment, with particular consideration of:

(i) FBI records that do not specify whether the recorded query terms are United States person query terms, *see* Querying Procedures § VII n.[4];
(ii) FBI use of United States person query terms without any statement of facts showing that the use of those terms is reasonably likely to retrieve foreign intelligence information or evidence of a crime; and
(iii) The circumstances under which section IV of the procedures permits agency personnel to use a U.S. person query term without an "electronic record" being created and maintained?

(e) Are the following provisions of the respective agencies' Minimization Procedures consistent with the definitions of "minimization procedures" at sections 101(h) and 301(4) of FISA, as appropriate (codified at 50 U.S.C. § 1801(h) and §1821(4) respectively), and with the requirements of the Fourth Amendment: NSA Minimization Procedures § 1; FBI Minimization Procedures §§ I.G, I.H, III.F.5, III.F.6; CIA Minimization Procedures §§ 6.g, 6.h; and NCTC Minimization Procedures §§ A.6.f, A.6.g?

Amici respectfully submit this Brief in response to the Court's April 23, 2018 Order.[1]

[1] Once appointed for a particular matter, "the amicus curiae shall provide to the court, as appropriate—
(A) legal arguments that advance the protection of individual privacy and civil liberties;

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I. Questions (a) and (b): Restrictions on Acquisition of "Abouts Communications"

These questions concern the scope of the category of "abouts communications" as defined in subsection 103(b) of the Reauthorization Act, now codified at subsection 702(b)(5) of FISA, 50 U.S.C. § 1881a(b)(5). More particularly, the questions probe whether the acquisition of certain types of electronic data that the Government has continued to acquire pursuant to section 702 are subject to the restrictions established in section 103. Before turning to the particular questions and our responses, we first briefly describe the relevant provisions of the Reauthorization Act and the portions of the Government's Ex Parte Submission of March 27, 2018, that explain the types of electronic data at issue.

Section 103 of the Reauthorization Act is titled, "Congressional Review and Oversight of Abouts Communications." Subsection 103(a) added a provision to subsection 702(b) of the FISA, now codified at 50 U.S.C. § 1881a(b)(5), stating that acquisitions authorized under subsection 702(a) "may not intentionally acquire communications that contain a reference to, but are not to or from, a target of an acquisition authorized under [subsection 702(a)], except as provided under section 103(b) of the [Reauthorization Act]." Subsection 103(b) in turn provides that "[t]he term 'abouts communication' means a communication that contains a reference to, but is not to or from, a target of an acquisition authorized under section 702(a) of [FISA] (50 U.S.C. 1881a(a))." Reauthorization Act, § 103(b)(1)(A).[2] Subsection 103(b) then establishes certain

(B) information related to intelligence collection or communications technology; or
(C) legal arguments or information regarding any other area relevant to the issue presented to the court." 50 U.S.C. § 1803(i)(5).

[2] This definition of "abouts communications" applies only to subsection 702(b) of FISA. A later provision in subsection 103(b) of the Reauthorization Act, which amends subsection 702(m) of FISA, uses the same definition. *See* Reauthorization Act, § 103(b)(5)(B)(4)(B)(i). Amici note that in most discussions of these types of communications before enactment of the Reauthorization Act, including in the Court's decisions, they are referred to as "about communications," not "abouts communications." Amici have not attempted to trace the origin of the

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preconditions on the Attorney General and the Director of National Intelligence's ("DNI") first "implement[ation] of the authorization of the intentional acquisition of abouts communications" after enactment of the Reauthorization Act. *Id.* § 103(b)(2)(A). Those preconditions are as follows. At least 30 days in advance of implementing the authorization of intentional acquisition of abouts communications, the Attorney General and the DNI must submit to the House and Senate Judiciary and Intelligence Committees "written notice of the intent to implement the authorization of such an acquisition, and any supporting materials in accordance with this subsection." *Id.* § 103(b)(2)(A). During the 30-day congressional review period, the Attorney General and the DNI "may not implement the authorization of the intentional acquisition of abouts communications," *id.* § 103(b)(2)(C), unless they make a determination pursuant to subsection 702(c) of FISA that "exigent circumstances" exist "with respect to the intentional acquisition of abouts communications." 50 U.S.C. § 1881a(c)(2); Reauthorization Act, § 103(b)(4). If the Attorney General and the DNI make a determination of exigent circumstances with respect to the intentional acquisition of abouts communications, they must notify the congressional oversight committee listed above "as soon as practicable, but not later than 7 days after the determination is made." Reauthorization Act, § 103(b)(4)(A).

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(perhaps regrettable) appearance of an "s" at the end of "abouts." We consider the terms "about communications" and "abouts communications" as interchangeable.

In the context of section 702, the term "target" may mean either of two things. As the Court explained long ago, a target is "'the individual or entity . . . about whom or from whom information is sought." *In Re DNI/AG Certification* [redacted] (FISC Sept. 4, 2008), at 18 n.16 (quoting *In re Sealed Case*, 310 F.3d 717, 740 (FISCR 2002) (quoting H.R. Rep. 95-1283, at 73 (1978))). But "target" may also be used to mean the "selectors (e.g., telephone numbers and email addresses) that are assessed to be used by such [a] non-U.S. person, group or entity." Office of the Director of National Intelligence, Office of Civil Liberties, Privacy, and Transparency, Statistical Transparency Report Regarding Use of National Security Authorities – Calendar Year 2017 (April 2018), at 10. "Under Section 702, the government 'targets' a particular non-U.S. person, group, or entity reasonably believed to be located outside the United States and who possesses, or who is likely to communicate or receive, foreign intelligence information, by directing an acquisition at—i.e., 'tasking'—selectors . . . that are assessed to be used by such non-U.S. person, group or entity." *Id.*

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In the Government's Ex Parte Submission of March 27, 2018 ("March 2018 Ex Parte Submission"), the Government describes changes made to all of the relevant agencies' minimization procedures in response to the restrictions on intentional acquisition of "abouts communications" established by section 103 of the Reauthorization Act. The Government also explains its view that certain forms of electronic data that the Government has historically acquired pursuant to section 702 do not fall within the scope of the statutorily defined category of "abouts communications" and so, in its view, are not subject to the section 103 restrictions. *See* March 2018 Ex Parte Submission 34-37. The Government describes this data as [redacted] data acquired pursuant to section 702 that is [redacted] communications [redacted] b3,7E (per FBI) The Government notes that the FBI's targeting procedures (and the accompanying FBI Director's affidavits) [redacted] The Government explains that it has also [redacted] Largely following the Government's lead, amici will refer to the types of data at issue as "[redacted] data." Amici omit the word [redacted] because, as explained more fully below, we understand that some of this data may also be acquired [redacted] pursuant to section 702 in certain circumstances.

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A. Question (a)

The first question the Court directed amici to address is:

(a) Do the pre-conditions on acquiring "abouts communications" imposed by section 103(b) of the FISA Amendments Reauthorization Act of 2017, Pub Law 115-118, 132 Stat. 3, apply only to forms of acquisition that the government discontinued in March 2017?

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Short Answer. In a general sense, "Yes," but in the strong sense the Government appears to suggest, "No." Amici recognize that there is considerable legislative history to suggest that Congress understood the statutory restrictions it was putting in place as covering the same universe of communications that the Government had discontinued intentionally acquiring in March 2017, and even some evidence that some legislators understood that universe as related to upstream Internet communications. In order to assist the Court, amici lay out that evidence in some detail below. What is missing from the legislative history record is any evidence that legislators had any specific awareness of the Government's ongoing acquisition of the types of [redacted] data now at issue. In the absence of such evidence, amici submit that the legislative history is not enough to support the Government's reading of section 103 as intended to leave untouched, as a categorical matter, acquisition of all of the forms of [redacted] data now at issue.

Amici find the Government's blanket contention that [redacted] data do not constitute "communications" unpersuasive, for several reasons, explained more fully below. First, the Government's current approach appears to be inconsistent with its prior view, including as expressed in representations to this Court, that at least some of the types of [redacted] data constitute communications and, indeed, abouts communications. Second, although FISA does not define the term "communication," the definition of "electronic communication" in a related statute, the Electronic Communications Privacy Act ("ECPA"), is broad enough to

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encompass all or nearly of the forms of [redacted] data now at issue. Third, and consistent with the approach under ECPA, even the current proposed FBI minimization procedures in at least one place fall back into the more natural understanding [redacted] b3,7E (per FBI) b3, 7E per FBI b3,7E (per FBI) [redacted] Fourth, although the Government appears to view these types of [redacted] data as a type of [redacted] as amici understand it, most, if not all, of the data at issue is conveyed in communications between [redacted] Fifth, the Government's adoption of another undefined and quite general term, "information," risks excluding from the category of "communications," a central and widely used category under FISA, a broad and uncertain swath of electronic data.

Path of Analysis. Our analysis of the question presented proceeds in the following steps. First, we describe the way in which the Government described to the Court (and shortly thereafter to the public) the scope of the acquisitions it was discontinuing in March 2017. Doing so requires reviewing the exchanges between the Government and the Court between 2011 and 2017. Second, we review the legislative history of the Reauthorization Act for evidence of congressional intent regarding the scope of the category of "abouts communications" in section 103 of the Reauthorization Act and, as an essential part of that, congressional understanding of the scope of acquisitions the Government had discontinued in March 2017. Third, we address more directly our view of the significance of these materials for the answer to question (a) and respond to the Government's arguments [redacted]

1. The Government's Discontinuance of Certain Acquisitions in March 2017 and this Court's Approval of the Amended 2016/2017 Certifications

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The Government's decision to cease acquiring "abouts communications" in March 2017 arose in response to concerns raised by the Court, in the course of reviewing the Government's 2016 702 certifications, about repeated failures by the Government to comply with elements of minimization procedures that the Court in 2011 had required the Government to adopt. Judge Collyer's April 26, 2017 decision ultimately approving the 2016 certifications, as amended for 2017 ("amended 2016/2017 certifications), reviews the relevant history. *See* Apr. 26, 2017 Mem. Op. at 14-30. We summarize that history here briefly.

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The Court first addressed the acquisition of "abouts communications" pursuant to section 702 in Judge McLaughlin's decision approving the first set of certifications submitted after section 702 was enacted in 2008. Sept. 4, 2008 Mem. Op. Judge McLaughlin distinguished "to/from communications" from "about communications" and described the latter as "communications that contain a reference to the name of the tasked account." *Id.* at 17. At that time, the Government represented to the Court and the Court accepted for purposes of its analysis, that "[t]hese communications fall into [redacted] categories."[3] The Court found the acquisition of these categories of "about communications" consistent with the statute, and in

[redacted]

Sept. 4, 2008 Mem. Op. at 17 n.14; *see also* Oct. 3, 2011 Mem. Op. at 15-16, 27-28.

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particular with the requirement that the Government not intentionally acquire communications "as to which the sender and all intended recipients are known at the time of acquisition to be located in the United States," 50 U.S.C. § 1881a(d)(1)(B) ("wholly domestic communication prohibition"), principally in light of the NSA's assurance [redacted] [redacted] Sept. 4, 2008 Mem. Op. at 19 (quoting 2008 NSA targeting procedures). The agencies' minimization procedures required the destruction of communications discovered after acquisition to involve a target that was in fact a U.S. person or a person in the United States, unless the agency head determined in writing that the communication was reasonably believed to contain significant foreign intelligence information, evidence of a crime, [redacted] The Court upheld these "special retention" provisions in the agencies' minimization procedures on the view that when the Government has "a reasonable, but mistaken, belief that the target is a non-U.S. person located outside the United States" its acquisition of communications to, from, or about that person is not intentional. *Id.* at 24-26.

In a Rule 13 letter submitted to the Court in May 2011, the Government "disclosed to the Court [redacted] NSA's 'upstream collection' of Internet communications includes the [redacted]

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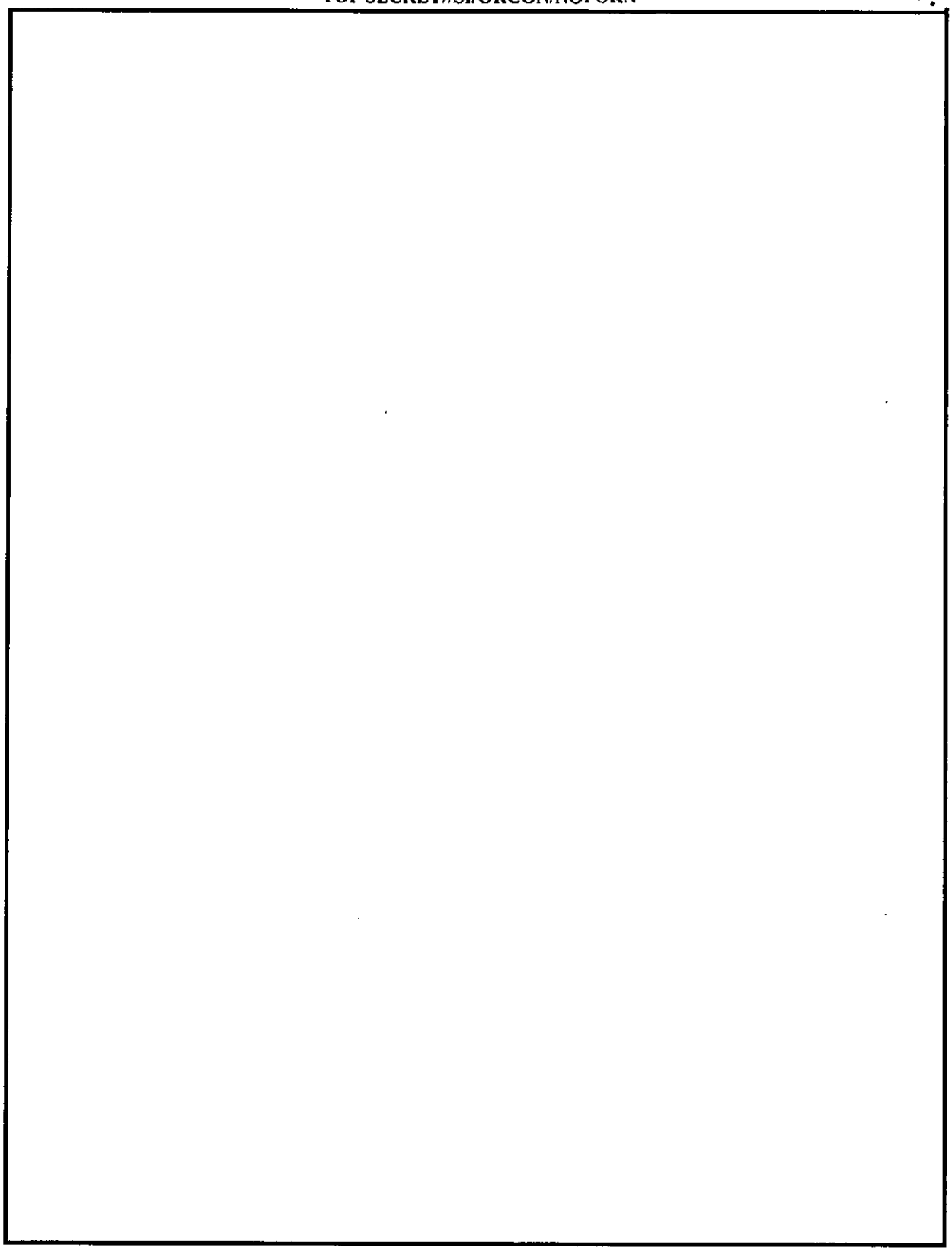

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Id. at 36.

Judge Bates divided MCTs into four categories:

1. MCTs as to which the active user is the user of the tasked facility (i.e., the target of the acquisition) and is reasonably believed to located outside the United States;
2. MCTs as to which the active user is a non-target who is believed to be located inside the United States;
3. MCTs as to which the active user is a non-target who is believed to be located outside the United States;
4. MCTs as to which the active user's identity or location cannot be determined.

Id. at 37-38. "With regard to the first category," Judge Bates reasoned, "if the target is the active user, then it is reasonable to presume that all of the discrete communication within an MCT will be to or from the target." *Id.* at 38. But that presumption would not be reasonable for the other three categories. As a result, acquisition particularly of MCTs in the third through fourth categories would predictable involve acquisition of communications that were not to, from, or about the target, including non-target communications of or concerning United States persons and communications (whether target or not) that were to or from United States persons. *Id.* at 38-40. As Judge Bates summarized his findings, "NSA's acquisition of Internet transactions likely results in NSA acquiring annually tens of thousands of wholly domestic communications, and tens of thousands of non-target communications of persons who have little or no relationship to the target but who are protected under the Fourth Amendment." *Id.* at 41.

Nonetheless, Judge Bates concluded that upstream collection of Internet transactions did not violate the prohibition on intentional acquisition of wholly domestic communications, essentially on the same theory as had Judge McLaughlin in 2008:

> Given that NSA's upstream collection devices lack the capacity to detect wholly domestic communications at the time an Internet transaction is acquired, the Court is

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inexorably led to the conclusion that that targeting procedures are 'reasonably designed' to prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of acquisition to be located in the United States.

[redacted]

Id. at 48. He thus concluded that NSA's targeting procedures remained permissible. But the minimization procedures were not because they failed to do enough to identify and restrict the retention of these communications of or concerning United States persons that were unlikely to have substantial foreign intelligence value. *Id.* at 58-80.

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In order to cure the deficiencies identified by Judge Bates, NSA revised its minimization procedures to require that, promptly following acquisition, analysts would [redacted]

[redacted] Finally, upstream acquisitions would be retained for two years rather than five. *Id.* at 12-13. With these changes, Judge Bates approved the revised minimization procedures, concluding that the new procedures for handling MCTs sufficient minimized the retention and use of information "not relevant to the authorized purpose of the

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acquisition," including "information of or concerning United States persons with no direct connection to the target," or "the destruction of such information promptly after acquisition." *Id.* at 14.

Issues related to those addressed in the Court's review of the 2011 702 certifications arose again in the Court's review of the 2015 and 2016 certifications. The Government brought to the Court's attention a number of substantial ways in which the Government had been failing to comply with elements of the minimization procedures established in the wake of the Court's 2011 decisions to address concerns about retention and querying of MCTs acquired through upstream collection.[4] As Judge Collyer explained in her opinion ultimately approving the 2016/2017 amended certifications,

April 26, 2017 Memorandum Opinion at 14-15. Judge Collyer then described the "historical background . . . necessary"

[4] Judge Bates had warned in 2011: "The effectiveness of the amended NSA minimization procedures will depend in substantial part on the training received by analysts The Court expects that the appropriate Executive Branch officials will ensure that this training is adequate and effective." *Id.* at 12 n.7.

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April 27, 2016 Mem. Op. at 16-17 (many citations omitted). Judge Collyer then described the minimization rules put in place to address this problem

The Government ultimately decided to address the Court's concerns

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March 29, 2017 Ex Parte Submission at 4.[5] "Historically," the Government explained, "NSA has been authorized to acquire communications to, from, or about persons targeted." *Id.* at 6. Going forward, "NSA's acquisition of foreign intelligence information pursuant to section 702 will . . . 'be limited to communications to or from persons targeted.'" *Id.* (quoting affidavit of NSA Director Rogers). Although some of the language in the Government's March 2017 Ex Parte Submission, such as that quoted in the prior sentence, refers to limiting section 702 acquisitions generally, the Ex Parte Submission repeatedly characterized the acquisitions being discontinued as ones from upstream collection.

Judge Collyer characterized the Government's March 2017 in the following way:

> As embodied in the March 30, 2017 Submission, the government has chosen a new course:

April 27, 2016 Mem. Op. at 23.

[5] The NSA also temporarily

[6] The retained records categories were

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The requirement in the amended NSA targeting procedures that only communications to or from a target would be acquired and the requirement in the amended minimization procedures that any communications discovered not to be to or from a target would be destroyed satisfied the Court's concerns. The Court noted that [redacted] *Id.* at 28. The Court thus concluded that "the removal of 'abouts' communications eliminates the types of communications presenting the Court with the greatest level of constitutional and statutory concern." *Id.*

The Court's April 26, 2017 decision approving the amended 2016/2017 702 certifications similarly understood the acquisitions the Government was discontinuing as part of NSA's upstream collection. [redacted]

[7] Shortly after the Court rendered its decision, NSA posted a statement on its website concerning the newly adopted restriction on acquisition of abouts communications: "Statement: NSA Stops Certain Section 702 'Upstream' Activities," (Apr. 28, 2017), available at https://www.nsa.gov/news-features/press-

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2. Reauthorization Act Legislative History

Amici have reviewed the legislative history of the Reauthorization Act and present the relevant findings of that review in essentially chronological order: first, hearings; second, committee reports; third, floor debate. From the review, amici draw three principal conclusions. First, there is considerable legislative history evidence to suggest that Congress understood the statutory restrictions it was putting in place as covering the same universe of communications that the Government had discontinued intentionally acquiring in March 2017, and even some evidence that some legislators understood that universe as related to upstream Internet communications. Second, what is missing from the legislative history record is any evidence that legislators had any specific awareness of the Government's ongoing acquisition of the types of [redacted] data now at issue. In the absence of such evidence, amici submit that the legislative history is not enough to support the Government's reading of section 103 as intended to leave untouched, as a categorical matter, acquisition of all of [redacted] data now at issue. Third, the concerns driving Congress's adoption of the restrictions on acquisition of abouts communications, like the concerns animating this Court's opinions addressing the issue, were that acquisition of abouts communications was problematic because these communications were more likely to contain information of or concerning U.S. persons

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room/statements/2017-04-28-702-statement-shtml. As its title indicates, the statement repeatedly characterized the restriction as relating to upstream collection. For example, the statement explained:

> Under Section 702, NSA collects internet communications in two ways: "downstream" (previously referred to as PRISM) and "upstream." Under downstream collection, NSA acquires communications "to or from" a Section 702 selector (such as an email address). Under upstream collection, NSA acquires communications "to, from, or about" a Section 702 selector. An example of an "about" email communication is one that includes the targeted email address in the text or body of the email, even though the email is between two persons who are not themselves targets . . . .
>
> After considerable evaluation of the program and available technology, NSA has decided that its Section 702 foreign intelligence surveillance activities will no longer include any upstream internet communications that are solely "about" a foreign intelligence target. Instead, this surveillance will now be limited to only those communications that are "to" or "from" a foreign intelligence target.

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that was not substantially related to the target of the acquisition and so was unlikely to be of foreign intelligence value. That combination meant that, both for statutory and constitutional purposes, the intrusion on protected privacy interests caused by the retention of these communications was much more likely to outweigh the strength of the foreign intelligence needs advanced by that retention than was the case for to/from communications.

a. Congressional Hearings

Congressional committees held three hearings in 2017 on the reauthorization of section 702: a House Judiciary Committee hearing on March 1, 2017, before the Government had decided to restrict acquisition of "abouts communications"; a Senate Intelligence Committee hearing on June 7, 2017; and a Senate Judiciary Committee hearing on July 27, 2017.[8]

No government witness appeared at the House Judiciary Committee hearing, and while the witnesses debated the virtues and vices of section 702, they made only brief reference to "abouts communications." Both witnesses who argued in defense of section 702 and those who were more critical understood "abouts communications" to be a kind of communication acquired only through upstream collection.[9]

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[8] As part of their hearings, the committees held both open and closed sessions. Amici have had access to materials only from the open sessions.

[9] *See* Section 702 of the Foreign Intelligence Surveillance Act: Hearing before the House Committee on the Judiciary, 115th Cong., 1st Sess. (Mar. 1., 2017) at 17 (Kosseff written statement) ("the FBI does not receive unminimized information obtained through NSA's upstream collection process [redacted]; 27 (Doss written statement) (section 702 collection "is effectuated by two means: 1) through PRISM collection in which electronic communications service providers assist the government in acquiring communications that are to or from targeted selectors, and 2) through 'upstream' collection in which telecommunications backbone providers assist the government in acquiring telephony communications to or from a targeted selector [redacted]; 39 (Goitein written statement) ("The government uses Section 702 to engage in two types of surveillance. The first is 'upstream collection,' whereby the content of communications flowing into and out of the United States on the Internet backbone is scanned for selectors associated with designated foreigners. As noted above, the acquired communications include not only communications include not only communications to or from the designated foreigners, but communications about them. . . . . The second type of Section 702 surveillance is "PRISM collection," under which the government provides selectors, such as email addresses, to U.S.-based electronic communications service providers, who must turn over any communications to or from the selector.").

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At the Senate Intelligence Committee Hearing, only government witnesses testified: DNI Coats; Deputy FBI Director McCabe; NSA Director Rogers; and Deputy Attorney General Rosenstein. DNI Coats described for the Committee the recent decision NSA had taken to restrict acquisition of "abouts communications" and the reasons for the decision. He stated that a "recent . . . compliance incident involving queries of U.S. persons' identifiers into Section 702-acquired upstream data" had "resulted in a significant change in how the National Security Agency conducts a portion of its FISA 702 collection."[10] He went on to state:

> NSA determined that a possible solution to the compliance problem was to stop conducting one specific type of upstream collection. . . . . It's called the "abouts" portion of upstream collection. And by "abouts collection," I'm referring to NSA's ability to collect communications where the foreign intelligence target is neither the sender nor the recipient of the communications that's made, but is referenced within the communication itself. The FISA Court agreed with our solution and approved the program as a whole on the basis of the NSA proposal."[11]

The Senate Judiciary Committee Hearing included both governmental and non-governmental witnesses. In their testimony, the government witnesses described the NSA's then recently-adopted restriction on acquisition of abouts communications as relating to upstream collection.[12] The longest discussion of the issue occurred during a colloquy between Senator Feinstein and the witnesses in which she raised the possibility of addressing abouts collection legislatively and the witnesses urged avoiding a legislative bar because they asserted that, in the

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[redacted]

[10] Open Hearing on FISA Legislation: Hearing before Senate Select Committee on Intelligence, 115th Cong., 1st Sess. (June 7, 2017), at 8.

[11] *Id.* DNI Coats noted that NSA Director Rogers and NSA staff would address this and other issues in greater detail in a classified section. *Id.* at 9.

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future, NSA might find a technical solution that would address the privacy concerns that the FISC had raised.[13] Senator Feinstein too described the restriction adopted by NSA as concerning a portion of upstream collection.[14] Elizabeth Goitein, from the Brennan Center, characterized abouts collection as "a small part of upstream collection" and she urged Congress to "codify the end of 'about' collection."[15]

b. Committee Reports

The Senate Intelligence Committee released its report on November 7, 2017. As the Government notes, *see* March 2018 Ex Parte Submission at 36, the reports section-by-section analysis characterizes the section of the bill that would become section 103 of the Reauthorization Act as "codif[ying] the Intelligence Community's (IC's) current prohibition on a subset of FISA collection under 50 U.S.C. § 1881a (hereinafter "section 702") known as 'Abouts' Upstream collection."[16] The report went on to explain that this section of the bill "further provides an exception that would permit" the DNI and AG "to recommence "'Abouts' collection if they followed certain review processes before this Court and congressional oversight committees."[17] Senator Wyden, in the Minority Views section of the report, criticized the bill on several grounds, including that "[i]t does not prohibit the 'abouts' collection, which can result in the government sweeping up communications that are entirely between Americans on whom there is no suspicion at all. The government stopped this form of collection due to

[13] *Id.* at 29-35.

[14] *Id.* at 30.

[15] CQ Part 2 Tr. 10.

[16] S. Rep. No. 115-182 (Nov. 7, 2017), at 1. In describing votes on amendments, the report stated: "By a vote of four ayes to eleven noes, the Committee rejected an amendment by Senator Wyden that would have codified the IC's current prohibition on "Abouts" Upstream collection without exception provided in Section 3." *Id.* at 4.

[17] *Id.* at 2. The bill addressed in the Senate Intelligence Committee report was S. 2010 (115th Cong., 1st Sess.) did not use the word "target" in defining "abouts communications." It defined "abouts communications" to mean "a communication that contains a reference to, but is not to or from, a facility, a place, a premises, or property at which an acquisition authorized under" section 702 "is directed or conducted. *Id.* at § 3.

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[redacted] compliance problems. Congress should insist that the government seek congressional approval before resuming 'abouts' collection."[18]

The House Intelligence Committee issued its report on December 19, 2017. The "Committee Statement and Views" section of the report characterizes the section of the bill that became section 103 of the Reauthorization Act as addressing NSA upstream collection.[19] The report then states:

> The Committee does not believe that "abouts" collection is outside the scope of FISA Section 702. However, due to a compliance incident of a technical nature that was reported to the FISC last year, the NSA proactively and temporarily halted its about communication collection in order to make necessary technical changes. The NSA has kept Congress fully and currently informed. . . . . The Committee understands that the targeting procedures currently used by the NSA to conduct acquisitions pursuant to FISA Section 702 prohibit the acquisition of communications that are not "to" or "from" a FISA Section 702 target. The new limitation established by Section 203 is intended to codify only current procedures and is not intended to affect acquisitions currently being conducted under FISA Section 702.[20]

A few pages later, in the "Section-by –Section Analysis and Explanation of Amendment" section, the report does not refer to upstream collection.[21] Representative Heck, in his

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[18] *Id.* at 9-10; *see also id.* at 11 (minority views of Sen. Heinrich) ("it has become disturbingly routine for the government to use this authority to search through the communications of Americans whose information has been inadvertently swept up under this surveillance program"). [The Senate Intelligence Committee reports mentions a Cornyn amendment that he withdrew "providing for electronic communications transactional records authorities." *Id.* at 6.]

[19] *See* H.R. Rep. No. 115-475 part I (Dec. 19, 2017), at 19 ("Under FISA Section 702, the National Security Agency (NSA) has the ability to collect communications in its so-called "upstream" collection (i.e., collection with the assistance of providers that control the telecommunications backbone. Because of the way communications are packaged and traverse the telecommunications backbone, the NSA was not only able to retrieve the communications 'to' or 'from' a FISA Section 702 target, but also 'about' a FISA Section 702 target, subject to procedures annually approved by the FISC.")

The bill addressed in the House report was H.R. 4478. That bill, in relevant part, used the same language as the bill addressed in the Senate report, S. 2010. See H.R. 4478, 115th Cong., 1st Sess., § 203.

[20] H.R. Rep. No. 115-475 part I, at 19.

[21] *Id.* at 22 ("Section 203 limits the collection of communications that contain a reference to, but are not to or from (i.e. 'abouts' collection), a FISA Section 702 foreign intelligence surveillance target. The section provides that the Government may initiate this collection only after obtaining approval from the FISC and submitting all supporting documents to the congressional intelligence and judiciary committees for review for no less than 30 days prior to recommencing this kind of collection.").

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"additional views," raised concerns about the possible resumption of "about collection," noting that "the practice has been discontinued by the NSA."[22]

c. Floor Debate

As some Members of Congress complained at the time, consideration of the Reauthorization Act by the full House and Senate was quite rushed.[23] In the course of the floor debate, some legislators discussed the restriction on acquisition of abouts communications, though much of the debate focused on broader issues or other elements of the bill, such as the new limitations on querying. A number of legislators described the restrictions as codifying the restrictions put in place by NSA earlier in 2017.[24] A smaller group characterized those

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[22] *Id.* at 114 ("The Committee has not sufficiently considered the serious legal and policy concerns associate with 'about collection' by the NSA, pursuant to Section 702. That form of surveillance has been troubled by compliance difficulties and inadvertent collection, and drawn criticism from the Foreign Intelligence Surveillance Court. Compounding the problem, 'about collection' was not explicitly authorized by the original text of Section 702 itself. Although the practice has been discontinued by NSA, issues implicated by it remain very real and have not been addressed. I am thus uncomfortable with provisions of H.R. 4478—which contemplate the resumption of 'about collection' in the future.").

[23] *See, e.g.*, 164 Cong. Rec. H105 (Jan. 10, 2018) (statement of Mr. Hastings) ("such a debate deserves to be lengthy and thorough, neither of which happened here. I was concerned to learn, if not a bit dismayed, that . . . the full [House Intelligence] committee did not even hold a single hearing on this important piece of legislation. . . . To add insult to injury, I am told that members of the committee were given 36 hours to read the bill before having to vote it out of committee."); *id.* at S224 (statement of Mr. Lee) ("Not long ago, the House handed us a bill that would reauthorize FISA section 702 for another 6 years, and I am sorry to report that many of my colleagues in the Senate are forcing this bill through as is . . . without any amendments"); *id.* at S237 (Jan. 17, 2018) (statement of Mr. Wyden) (complaining about restrictions on debate and floor amendments as violating "regular order"); *id.* at S439 (Jan. 22, 2018) (statement of Mr. Van Hollen) (complaining about refusal of Senate leadership to all consideration of floor amendments or more extensive debate).

[24] *See, e.g.*, 164 Cong. Rec. H105 (Jan. 10, 2018) (statement of Mr. Hastings) ("Today's bill also addresses what is known as 'abouts' collection. . . . . The NSA, itself, shut down this collection method earlier this year."); *id.* at H109 (Jan. 10, 2018) (statement of Ms. Jackson Lee) (bill exacerbates existing problems with Section 702 by codifying so-called 'about collection,' a type of collection that was shut down after it twice failed to meet Fourth Amendment scrutiny."); *id.* at H110 (Jan. 10, 2018) (statement of Mr. Hastings) (defending restrictions on acquisition of abouts communications: "'about collection' . . . is no longer being done and practiced. . . . It was because the agencies, the intelligence communities self-reported an issue that they needed to look at. . . . . [it was] the self-report that led to the unbalanced collection being stopped."); *id.* at H142 (Jan. 11, 2018) (statement of Mr. Stewart) (describing the bill as "[t]emporarily codifying the end of the NSA's section 702 upstream 'abouts' collection until the government develops new procedures and briefs the congressional Intelligence and Judiciary Committees"); *id.* at H143 (Jan. 11, 2018) (statement of Mr. Schiff) ("NSA self-reported a problem to the FISA court and decided to cease 'abouts communication' collection until a fix could be implemented and demonstrated to the court."); *id.* at H147 (Jan. 11, 2018) (statement of Mr. Sensenbrenner) ("I want to talk about the 'abouts' stuff that is reauthorized in this bill after the NSA itself stopped doing it earlier last year. . . . . this bill opens the door to something that the NSA has closed itself."); *id.* at S235 (Jan. 17, 2018) (statement of Mr. Cotton) ("Did the National Security Agency discontinue its 'about' collection at one point recently? Yes, but to me that is evidence this

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restrictions as related to upstream collection.[25] At least one legislator described the bill's definition of abouts communication as being broader than the Government's own definition.[26] Throughout the debate, both supporters and opponents of reauthorization characterized the restrictions as one element in the bill intended to ensure greater protection for the privacy interests of U.S. persons.[27]

3. Response to the Government's Arguments

In its March 2018 Ex Parte Submission, the Government makes essentially two arguments as to why [redacted] data should be understood to fall outside the definition of "abouts communications" adopted in the Reauthorization Act.

First, the Government contends that the types of [redacted] data at issue are not "communications." The Government notes that section 702 refers to the acquisition of "foreign intelligence information," 50 U.S.C. 1881a(a), and it quotes one sentence from a section-by-section analysis of the FISA Amendments Act of 2008 provided by the chairman of the Senate Intelligence Committee during floor debate that "the acquisition of foreign intelligence information pursuant to this title is meant to encompass the acquisition of [redacted]

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program works. . . . . The bill says the NSA can continue so-called 'about' collection only once it gets approval from the FISA Court and from Congress.").

[25] *See, e.g.* 164 Cong. Rec. at H142 (Jan. 11, 2018) (statement of Mr. Stewart) (describing the bill as "[t]emporarily codifying the end of the NSA's section 702 upstream 'abouts' collection until the government develops new procedures and briefs the congressional Intelligence and Judiciary Committees"); *id.* at H143; (statement of Mr. Schiff) ("'abouts communication' collection takes place in NSA's upstream collection"); *see also id.* at E80 (Jan. 19, 2018) (extension of remarks submitted by Mr. Nunes after the House vote) ("This type of communication is known as an 'about' communication, and takes place only in NSA's upstream collection.").

[26] *See* 164 Cong. Rec. S240 (Jan. 17, 2018) (statement of Mr. Wyden) ("But now, for the first time, when the government itself has suspended it—largely because they know it had been abused—what we are doing is essentially setting up what amounts to a fast-track process to write it back into the law. It defines 'abouts' collection broadly—broader even than the government—and it invites its resumption.").

[27] *See, e.g.*, 164 Cong. Rec. H105 (Jan. 10, 2018) (statement of Mr. Hastings) ("The legislation before us today will allow such collection to resume, but only if the NSA first devises a way of doing so that addresses privacy concerns"); *id.* at H106 (Jan. 10, 2018) (statement of Ms. Lofgren) (describing the Amash amendment as intended to "ban[] the 'abouts' collection and prohibit[] the collection of domestic communications"); id. at H108 (statement of Ms. Jackson Lee) (characterizing the bill as inadequately addressing "the core concerns of Members of Congress and the American public. The government's use of section 702 information against United States citizens in investigations that have nothing to do with national security");

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b3,7E (per FBI) March 2018 Ex Parte Submission at 36 (quoting 154 Cong. Rec. S6130 (daily ed. June 25, 2008)).[28]

Putting aside whether any particular form of b3,7E (per FBI) be thought not to qualify as a communication—an issue amici address when we consider particular types of b3,7E in response to question (b)—amici find the Government's blanket contention that b3,7E do not constitute communications unpersuasive, for several reasons.[29]

[28] The section-by-section analysis uses this language in two places. In describing the definitions section of the bill, the section-by-section analysis states: "Finally, section 701 defines a term, not previously defined in FISA, which has an important role in setting the parameters of Title VII: 'electronic communication service provider.'" This definition is connected to the objective that the acquisition of foreign intelligence pursuant to this title is meant to encompass the acquisition of communications and related data." 154 Cong. Rec. S6130 (June 25, 2008).

Amici do not find this quoted language persuasive for the position advanced by the Government. First, it appears not in the legislative history of the Reauthorization Act, but in the legislative history of a statute enacted 10 years earlier. Second, this one reference hardly suggests a clear understanding by the Congress that enacted the FISA Amendments Act of 2008 that there were two clear-cut categories of "communications" and "related data," let alone that the "related data" referred to in 2008 corresponds to the types of data now at issue.

[29] Amici agree with the Government that FISA uses both the term "information" and the term "communications." But the statute's uses of the two terms do not, in our view, clearly indicate that information is distinct from communications or that communications are a subset of information, as the Government seems to suggest. They might equally be read to suggest that Congress understood information as something that would be extracted from acquired communications. For uses of the terms in section 702, see 50 U.S.C. 1881a(a) (authorizing the targeting of persons reasonably believed to be located outside the United States "to acquire foreign intelligence information"); *id.* 1881a(d)(1)(B) (requiring targeting procedures reasonably designed to "prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States"); *id.* 1881a(f)(1)(A) (requiring adoption of querying procedures consistent with the Fourth Amendment "for information collected pursuant to an authorization under" section 702); *id.* 1881a(f)(2)(A), (D), (E) (restricting the FBI from accessing "the contents of communications acquired under" section 702 under certain circumstances, and providing for related court orders); *id.* 1881a(f)(2)(F)(i), (ii) (rule of construction that paragraph should not be construed as limiting the FBI's authority to conduct lawful queries of "information acquired under" section 702 or to review in certain circumstances the results of queries of "information acquired under" section 702 "that was reasonably designed to find and extract foreign intelligence information"); *id.* 1881a(h)(2)(A)(i)(II) (requiring 702 certifications to attest, among other things, that approved targeting procedures are in place that are reasonably designed to "prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States"); *id.* 1881a(h)(2)(A)(v), (vi) (requiring 702 certifications to attest, among other things, that a significant purpose of the acquisition is to obtain "foreign intelligence information" and that the acquisition involves obtaining "foreign intelligence information" from or with the assistance of an electronic communication service provider); *id.* 1881a(j)(2)(B) (requiring Court to review targeting procedures to ensure they are reasonably designed to "prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States"); *id.* 1881a(j)(3)(D)(i), (ii) (providing that, in the event the Court orders a correction in a deficiency in a certification or procedure, "no information obtained or derived from" from the deficient portion "concerning any United States person shall not be received in evidence or otherwise disclosed without the consent of the person).

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First, the Government's current approach appears to be inconsistent with its prior view, including as expressed in representations to this Court, that at least some of the types of [redacted] [redacted] b3,7E (per FBI) [redacted] For example, when the Government in 2008 described for the Court the [redacted] categories of "about communications" the Government would collect pursuant to section 702, it included "[t]he

[redacted]

The definition of "minimization procedures" with respect to electronic surveillance repeatedly refers to restrictions on the acquisition, retention, and dissemination of "information" or "nonpublicly available information." *See* 50 U.S.C. 1801(h).

While the statute defines "foreign intelligence information," *see* 50 U.S.C. 1801(e), it unfortunately does not define "information" or "communication."

[30] *See also* Letter from NSD to Judge John D. Bates, Re: Clarification of National Security Agency's Upstream Collection Pursuant to Section 702 of FISA (May 2, 2011), at 2 ("Protocol aware strong selection is used to collect some 'abouts,' for example, [redacted]

b3,7E (per FBI)

Second, although FISA does not define the term "communication," the definition of "electronic communication" in a related statute, the Electronic Communications Privacy Act ("ECPA"), is broad enough to encompass all or nearly all of the forms of b3,7 now at issue. ECPA defines "electronic communication" as "any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce," subject to certain exceptions. 18 U.S.C. 2510(12).[31] This broader definition of "electronic communication," on the books since 1986, would have been well-known to the Congress that enacted the Reauthorization Act. Indeed, another provision of the Reauthorization Act, which addresses querying procedures, incorporates a related definition from ECPA, the definition of "contents."[32] Reauthorization Act, § 101(a).

Third, and consistent with the approach under ECPA b3,7E (per FBI) even the current proposed FBI minimization procedures b3,7E (per FBI) b3,7E (per FBI) b3,7E (per FBI) b3,7E (per FBI) B3, 7E per FBI

[31] b3,7E (per FBI) b3,7E (per

[32] That definition, now codified at 50 U.S.C. 1881a(f)(3)(A), is "contents, when used with reference to any wire, oral or electronic communication, includes any information concerning the substance, purport or meaning of that communication." 18 U.S.C. 2510(8). FISA's own principal definitional section, 50 U.S.C. 1801, defines "electronic surveillance" as the acquisition of "the contents" of certain wire or radio communications or "the installation of use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication" under circumstances in which "a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes." *Id.* 1801(f). In that section, "contents" is defined as, "when used with respect to a communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication." *Id.* 1801(n).

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b3,7E (per FBI)

Fourth, as explained more fully in our response to question (b), although the Government appears to view these types of data as a type of as amici understand it, most, if not all, of the data at issue is conveyed in communications In that sense, too, they are properly understood as types of communications.

Fifth, the Government's adoption of another undefined and quite general term, "information," risks excluding from the category of "communications," a central and widely used category under FISA, a broad and uncertain swath of electronic data. The Government's submission makes clear that the categories of data mentioned there are only examples. Depending on the service provider involved, there may be other types of electronic data that would be included in the category of "information." For example, the directive excerpted at length in the Court's 2014 which the Government cites in its submission, requested several additional types of electronic data not mentioned in the list of examples given in the Government's submission or mentioned in the Court's order.[33] In the absence of a compelling justification to exclude data from the category of "communications" and to create a new category of

[33] b3,7E (per FBI)

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"information" with undefined boundaries, amici recommend that the Government acknowledge, as the proposed FBI minimization procedures do b3,7E (per FBI) b3,7E (per FBI) b3,7E (per FBI) (b) (1) (b) (3)-50 USC 3024(i)

The Government's second argument against including b3,7E in the statutory definition of "abouts communications" is that, in enacting section 103 of the Reauthorization Act, Congress sought to codify the restriction on upstream collection put in place by the NSA in March 2017 and thus, in the Government's view, intended to leave in place the acquisition of any other forms of data then being acquired. As the review of legislative history materials provided earlier indicates, there is considerable legislative history evidence to suggest that Congress understood the statutory restrictions it was putting in place as covering the same universe of communications that the Government had discontinued acquiring in March 2017, and even some evidence that some legislators understood that universe as related to upstream Internet communications. What is missing from the legislative history record is any evidence that legislators had any awareness of the Government's ongoing acquisition In the absence of such evidence, amici submit that the legislative history is not enough to support the Government's reading of section 103.

Indeed, it is not just the absence of discussion of the types of data now at issue that leaves amici skeptical of the Government's contention that the section 103 restrictions do not apply to downstream collection. It is the fact that downstream collection was repeatedly described during the course of the legislative process as limited to acquisition of communications to or from a target—a description that omits the a targeted selector method of collection now at issue. Thus, while the Government may point to references in the legislative history materials identifying section 103 as applying only to upstream collection in

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support of its view that downstream collection falls outside those restrictions, many of those same references include contrasting descriptions of downstream collection as limited to acquisition of communications to or from a target or targeted selector.[34]

B. Question (b)

The second question the Court directed amici to address is:

(b) If the answer to question (a) is "no," do any of the forms of acquisition to be conducted under the 2018 Certifications involve acquisition of abouts communications, with particular consideration of

For each of the types of data or identified in the Court's question, amici first describe what they understand to be the nature of the data and the circumstances in which the Government acquires the type of data pursuant to section 702. Amici then address whether, in light of the language, legislative history, and purpose of the section 103 restrictions, whether the acquisition of these types of data constitutes acquisition of "abouts communications" as defined in that section.

As reflected below, amici believe there is something of a mismatch between the categories used in the Court's question (and the Government's March 2018 Submission), on the

[34] *See, e.g., supra* n.7 (NSA April 28, 2017 public statement) ("Under downstream collection, NSA acquires communications "to or from" a Section 702 selector (such as an email address)."; n.9 (Doss written statement and Goitein statement); 164 Cong. Rec. at E80 (Jan. 19, 2018) (extension of remarks submitted by Mr. Nunes after House vote) ("NSA and other Intelligence Community agencies obtain so-called 'downstream collection,' which involves only the collection of messages "to" or "from" a Section 702 selectors.").

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one hand, and the issue presented by the terms of section 103 of the Reauthorization Act, on the other. The Court asks and the Government addresses whether certain ***kinds of data*** fall within the section 103 restrictions. But the section 103 restrictions are not defined in terms of types of data. They are defined with reference to a ***method of acquiring communications***. As the discussion in subsection 1.a below is intended to make clear,

1. Information Relating to Tasked Accounts

a. Nature of Data and Circumstances of Possible Acquisition

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[redacted]

[redacted]

We understand that this kind of data is acquired pursuant to section 702 in the circumstances [redacted]

[redacted]

[redacted]

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[redacted]

We understand that these kinds of data are acquired pursuant to section 702 in the following circumstances. [redacted]

[redacted]

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We understand that this kind of data is acquired pursuant to section 702 in the following circumstances.

b. Analysis

The proposed NSA targeting procedures and NSA and FBI minimization procedures, like the ones approved by Judge Collyer in 2017, b3,7E (per FBI)

b3,7E (per FBI)

b3,7E (per FBI)

i. Upstream Collection

Amici understand—but we respectfully suggest that the Court should have the Government confirm—that to the extent these types of data are collected via upstream collection;

[36] *See* Proposed NSA Targeting Procedures I.A, at 2 (fourth paragraph); Proposed NSA Minimization Procedures 3(c)(3); Proposed FBI Minimization Procedures b3,7E (per FBI)
b3,7E (per FBI)

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they would in any event be acquired only through the acquisition of what even the Government, on it more narrow proposed understanding of "communications," would consider communications.

[redacted]

As the Government re-tasks (or tasks new) categories of selectors, having the Government provide the Court with an explanation of how the Government determined that use of the selectors would not intentionally acquire communications that contain a reference to, but are not to or from, a target, and thus would not trigger the section 103 restrictions, should aid the Court in ensuring compliance with section 103's requirements.

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Second, and perhaps more important, the Court should ensure that the Government is systematically auditing its compliance with the prohibition on the acquisition and retention of abouts communications. Amici are aware that the Court receives quarterly reports on compliance with section 702 procedures, but we have not had the opportunity to review the reports submitted since March 2017.[37] Perhaps those reports already provide the Court with the information it needs. But the key, in amici's view, is not to rely simply on after-the-fact notices of compliance incidents that may be discovered in unsystematic ways, but to ensure that the Government has in place a regular, systematic and ongoing process to assess whether NSA's targeting and analysts' and agents' actual behavior in handling section 702-aquired information complies with the prohibitions established on paper (and thus would not trigger the section 103 restrictions).

ii. Downstream Collection

Interpreting how section 103 would apply to acquisition of the types of electronic data at issue when they are acquired through downstream collection presents additional complexities. Such interpretation is only necessary, of courses, if the Court rejects the Government's contention that the section 103 restrictions apply only to upstream collection.

An initial challenge derives from the fact that, as we understand it,

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[37] Amici hereby request the opportunity to review those reports before filing our reply brief.

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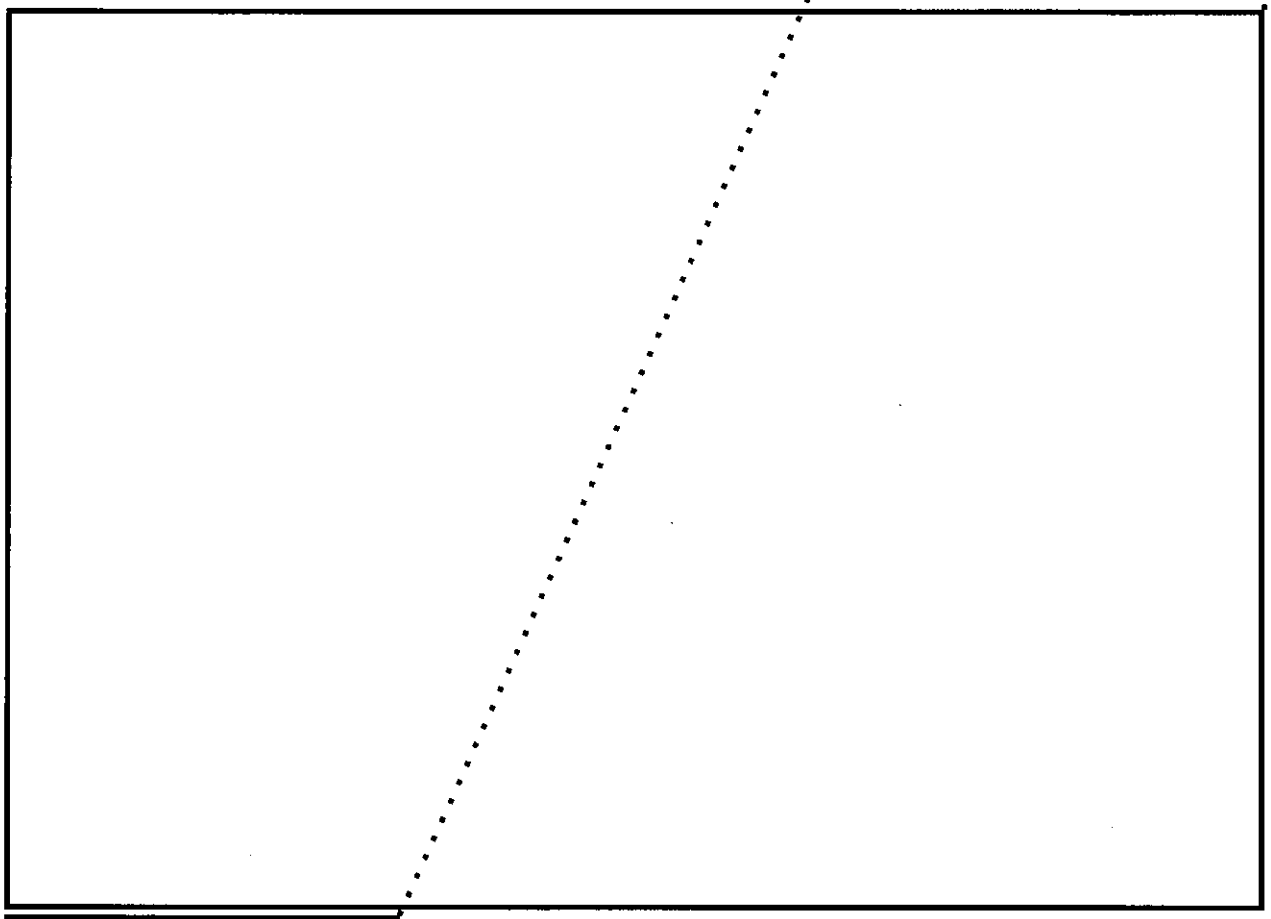
Based on our understanding of the types of [redacted] data at issue, we believe it is likely that most of these kinds of data are [redacted] That is most obviously true with respect to the kinds of data that are provided by the user. For example, much of the information that falls under the rubric of account registration information will have been communicated by the user to the service provider. [redacted]



[redacted] To the extent that these forms of data would all be transmitted in or as communications between the service provider and the targeted account, they would all

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qualify as communications to or from the targeted account and so would not trigger the section 103 restrictions.

[redacted]

In light of this analysis, amici respectfully make the following further recommendations.

First, the Government should provide the Court with a more complete list of the kinds of data that fall within the category b3, 7E [redacted] b3,7E That is, recognizing that there is considerable variation among service providers in the kinds b3, 7E [redacted] b3,7E (per they provide pursuant to down 702 collection, the Government should still provide a fuller list than the [redacted] categories given as examples.

Second, the Government should address in its responsive brief whether amici's factual understandings concerning the nature and methods of acquisition of the various kinds of electronic data at issue are accurate or not.

[redacted]

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Third, the Government in particular should address in its responsive brief whether each of the types of [redacted] b3,7E at issue would have been transmitted in a communication between the account user and the service provider.

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2. [redacted]

According to the Department of Justice, [redacted] is conducted using NSA's upstream collection techniques. [redacted] Having de-tasked selectors used for upstream collection in March 2017 as part of the process of ceasing acquisition of abouts communications, NSA began to re-task certain categories of upstream selectors. One of those categories consists of [redacted]

[redacted]

[39] The Government's submission states that, although this category of selector was re-tasked at some point after the Government informed the Court last year that it was ceasing acquisition of "abouts communications," this category of selector is not "currently tasked to upstream collection." *Id.* at 4.

[redacted]

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[redacted]

[40] The Government notes:

[redacted]

Id. at 6-7.

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[redacted]

Nonetheless, the Government offers what to us are persuasive arguments that [redacted] at least as currently undertaken, are limited to acquisitions of communications to or from targets and thus are not subject to the restrictions in section 103 of the Reauthorization Act. As noted above, in its submission in response to the Court's April 23, 2018 Order, the Government describes its judgment [redacted] undertaken since March 2017 under section 702 acquires only communications to or from targets

[redacted]

[redacted]

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[redacted]

[43] In the August 24, 2017 letter, the Government uses the term "pieces of traffic" as well as "communications" to describe what was acquired.

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The Government also notes that any communications acquired pursuant to [redacted] collection that contain a reference to, but are not to or from, a section 702 target, "such communications would be considered unauthorized collection and would be destroyed." [redacted]

The methods used by the Government to ensure that [redacted] collections do not intentionally acquire communications that contain a reference to, but are not to or from, a section 702 target appear reasonable to amici to prevent intentional acquisition of "abouts communications." The track record so far, as amici understand it, appears to confirm the effectiveness of those methods. And the requirement in the NSA minimization procedures that any communications acquired pursuant to section 702 that are determined to be abouts communications will be destroyed upon recognition as such provides an additional safeguard to ensure that [redacted] collection will avoid intentional acquisition of abouts communications.[45]

Having answered the Court's specific question about [redacted] collection, amici respectfully offer the following observations.

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[44] This destruction requirement, previously set out at subsection 3(b)(4)(b) of the NSA's amended 2017 minimization procedures, now appears at subsection 3(c)(3) of the proposed 2018 minimization procedures: "Any communications acquired pursuant to section 702 that contain a reference to, but are not to or from, a person targeted in accordance with section 702 targeting procedures are unauthorized acquisitions and therefore will be destroyed upon recognition." A footnote to this provision states: "In applying this provision, note that any user of a tasked selector is regarded as a person targeted for acquisition."

[45] Amici are not sure that this consideration is relevant to answering the Court's question, but we would note that it may be significant to understand what portions of the communications acquired pursuant to [redacted] collection are, as apparently was the case for the two communications identified in the Government's August 24, 2017 Rule 13(b) letter, [redacted] *Id.* at 2. As discussed above, amici understand the concern about acquisition of abouts communications as based on a concern about the risk of intrusions into the privacy of U.S. persons. To the extent that (i) communications acquired pursuant to [redacted] and (ii) that characteristic of the communications means that the risk of intrusions into the privacy of U.S. persons would be reduced, amici believe that it may be useful for the Court to understand more fully the characteristics of these communications. *Cf. In Re Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search Conducted under the Foreign Intelligence Surveillance Act*, Dkt. Nos. Multiple, including 08-1833 (FISC May 17, 2016), at 26 [redacted]

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First, our view that [redacted] collection does not intentionally acquire abouts communications rests to an important degree on what appears to be the very low incidence of acquisition of abouts communications through [redacted] collection so far. But, as noted above, the evidence for that conclusion is limited and not systematic. The Government's August 24, 2017 Rule 13 letter states [redacted] Particularly given the Government's likely (and understandable) intention to expand [redacted] collection, *see supra* n.27, we recommend that the Court require the Government to report on (i) the types of evidence the Government relies on and the analysis the Government undertakes to reach a judgment that [redacted] is likely to appear only in communications to or from a section 702 target, (ii) the methods the Government uses to audit in a systematic way and thus determine what percentage of communications collected through [redacted] turn out to be abouts communications, (iii) the results of such auditing. If no such auditing presently takes place, the Court should order the Government to establish a process for carrying it out.

Second, although amici agree with the Government that [redacted] collections, at least as currently undertaken, do not trigger the requirements of section 103 of the Reauthorization Act, we recommend that the Court nonetheless require the Government to brief the congressional oversight committees mentioned in subsection 103(b) on [redacted] collections undertaken since March 2017 and planned uses [redacted] collections at least

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annually. That will help ensure a degree of transparency that amici believe will place this important method of collection on a sure footing.

II. Questions (c): The Querying Procedures Are Unreasonable Under the Fourth Amendment

The Court has directed amici to address whether the Querying Procedures in the 2018 Certifications are consistent with the requirements of the Fourth Amendment, with a particular focus on 1) exemptions within the Querying Procedures that apply to all agencies and 2) FBI queries intended to retrieve evidence of a crime that is not foreign intelligence information. *See* April 23, 2018 Order at 4. While procedures governing the querying of 702-collected information have existed in previous certifications, this is the first time the Court has considered querying since the passage of the Reauthorization Act. Section 101 of the Reauthorization Act requires the Government to adopt constitutionally-permissible Querying Procedures separate and apart from Minimization Procedures and that those Querying Procedures receive judicial review by the FISC. *See* 50 U.S.C. § 1881a(f)(1).[46]

The Government has proposed Querying Procedures that contain definitions and exemptions generally applicable to all covered agencies, but which also provide separate, particularized requirements governing each agency. Sections I and II of the Querying Procedures indicate that the procedures for querying apply in conjunction with the agencies' Minimization Procedures and provide that any agency may depart from those procedures if necessary to protect against an "immediate threat to human life." Querying Procedures at 1. Section III sets forth a number of query categories that are exempt from any of the procedural restrictions. *Id.* at 1-2. Section IV requires that the covered agencies maintain electronic records

[46] Section 101 of the Reauthorization Act states, "The Attorney General, in consultation with the Director of National Intelligence, shall adopt querying procedures consistent with the requirements of the fourth amendment to the Constitution of the United States for information collected pursuant to an authorization under [section 702]."

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of U.S. person query terms and related information for five years. *Id.* at 2. Section V provides key definitions, including for "query" ("the use of one or more terms to retrieve the unminimized contents or noncontents (including metadata) of section 702-acquired information that is located in a covered agency's system") and "United States person query term" (a "term that is reasonably likely to identify one or more specific United States persons"). *Id.* at 3-5. Finally, sections VI-IX provide querying requirements specific to the NSA, FBI, CIA, and NCTC, respectively. *Id.* at 5-7.

As drafted, the Querying Procedures' exemptions (section III) and their provisions relating to the FBI's use of U.S. person query terms (section VII) lack sufficient privacy safeguards and are therefore unreasonable under the Fourth Amendment.

A. The Querying Procedures Must Balance the Government's Interest with the "Substantial" Privacy Concerns of U.S. Persons

The FISC has long recognized that section 702 implicates considerations under the Fourth Amendment. *See* Docket Nos [redacted] Memorandum Opinion and Order entered on Apr. 26, 2017 ("April 26, 2017 Opinion") at 59-60. While the targeting procedures aim to collect foreign intelligence information associated with non-U.S. persons, the nature and scale of the 702 program results in the incidental but predictable collection and retention of information associated with telephone conversations and electronic communications in which U.S. persons enjoy a constitutional right to privacy. *See Katz v. United States*, 389 U.S. 347 (1976); *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972); *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010); *see also United States v. Ackerman*, 831 F.3d 1292, 1306 (10th Cir. 2016) (Gorsuch, J.)("[A]n email is a virtual container, capable of storing all sorts of private and personal details…"). The FISC has held that the Fourth Amendment's warrant requirement does not apply to the acquisition of foreign

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intelligence information under section 702 even when U.S. persons' communications are implicated, but it has also held that the 702 program, as implemented, must be "reasonable" in light of this incidental collection. b3, b7E per FBI [redacted] b3,7E (per FBI) The Court's reasonableness inquiry has included an examination of how the Government makes use of the 702 information it acquires, including how the Government searches or "queries" that information. b3,7E (per FBI) [redacted] b3,7E [redacted] b3,7E (per FBI) [redacted] b3,7E (per FBI) [redacted]

The Court has evaluated the reasonableness of 702 querying procedures under the Fourth Amendment by considering the "totality of circumstances" while balancing the "degree of the government's intrusion on individual privacy" and the "degree to which that intrusion furthers the government's legitimate interest." b3,7E (per FBI) [redacted] b3,7E (per FBI) [redacted] 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." *Id.* at 20. The FISC has traditionally weighed the Government's interest "heavily," since foreign intelligence information includes "possible threats to national security." *Id.* at 32. Against that very significant interest, the Court has weighed the "substantial" privacy interests of U.S. persons whose communications will be collected under the 702 targeting procedures. November 6, 2015 Opinion at 38.

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When it comes to querying 702-acquired information, the constitutional balance between the Government's interests and U.S. persons' privacy interests depends on the covered agencies' different investigative purposes. The NSA, CIA, and NCTC are only permitted to perform queries designed to retrieve foreign intelligence information, so the potential for Government intrusion on the liberty interests of U.S. persons is more likely to be outweighed by the Government's interest in protecting national security and foreign relations. But given the FBI's domestic law enforcement role and its authorization to conduct queries designed to retrieve evidence of a crime, the balancing of the Government's interests with public privacy concerns presents a more difficult question. The Court has held that the FBI's use of query terms associated with U.S. person to retrieve evidence of a crime strikes a reasonable balance in light of the competing interests. November 6, 2015 Opinion at 39-45. In its fullest discussion of the topic, the Court in 2015 observed that even FBI queries designed to find criminal evidence could lead to valuable foreign intelligence information, if a "previously unknown connection" is made between a domestic criminal enterprise and a foreign threat to national security. *Id.* at 42. These circumstances "may arise only rarely," but provide "substantial" value. *Id.* On the privacy interest side of the scale, the Court assessed the "risk" that such queries would lead to the FBI's review of U.S. person communications for criminal investigations unrelated to national security to be "remote, if not entirely theoretical." *Id.* at 44. The FISC adopted the same reasoning when it upheld substantially similar FBI minimization procedures in 2017, without further discussion. April 26, 2017 Opinion at 65. Both of these decisions predate the passage of the Reauthorization Act in January 2018.

B. The Querying Procedures Must Be Reasonable Under the Fourth Amendment

1. The Reauthorization Act and Its Legislative History Suggest that the Querying Procedures Should Receive Independent Review

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Until now, the Court has looked to whether the "applicable targeting and minimization procedures, *viewed as a whole*," reach the proper balance when assessing the reasonableness of the Government's procedures for querying. November 6, 2015 Opinion at 41 (emphasis added). Similarly, the Court has rejected the idea that each query of 702-collected information was a separate "search" requiring its own reasonableness assessment under the Fourth Amendment. *Id.* at 40-41. The Court's analysis must change now that Congress has mandated that the intelligence community adopt a separate querying procedure that is constitutional in its own right and that places particular restrictions on querying by the FBI.

Whereas querying was previously addressed in the Minimization Procedures of each agency, stand-alone procedures for querying are now specifically required -- and restricted -- by section 101 of the Reauthorization Act. *See* 50 U.S.C. § 1881a(f). Section 101 requires the Attorney General, in consultation with the DNI, to establish Querying Procedures relating to 702-acquired information that comport with the Fourth Amendment. The Reauthorization Act also prohibits the FBI from "access[ing] the contents of communications acquired under [section 702] that were retrieved pursuant to a query made using a United States person query term that was not designed to find and extract foreign intelligence information" in any "predicate criminal investigation...that does not relate to the national security of the United States" without first applying for and receiving an order from the FISC. 50 U.S.C. § 1881(f)(2)(A)-(C). As in the case of a FISA Title I or Title III authorization, the FISC shall enter an order allowing the FBI to access the relevant contents upon a showing of probable cause. 50 U.S.C. § 1881a(f)(2)(C)(ii). The Reauthorization Act also requires that the covered agencies institute a "technical procedure" to record each U.S. person query term used for a query. 50 U.S.C. § 1881a(f)(1)(B). Thus, the Reauthorization Act recognizes the significance of querying -- and, in particular, viewing the

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contents of query results -- as a distinct and separate event warranting constitutional scrutiny, and in certain instances requiring a court order.

Queries based on U.S. person query terms received considerable attention in the debate leading up to the passage of the Reauthorization Act, which featured concerns about "backdoor" searches of 702-collected information concerning US persons. Indeed, imposing a warrant requirement that applied to all U.S. person queries was suggested by Senators on the Judiciary Committee who were dissatisfied with FISA's previously-existing privacy protections for U.S. persons. Senator Feinstein offered an amendment in committee that would have required the FBI to obtain a warrant to review the contents obtained from any query using a U.S. person query term, in an effort to "strike a reasonable balance between the public's constitutional right to privacy and the legitimate investigative needs of law enforcement." S. Rep. No. 115-182, at 8 (Additional Views of Senator Feinstein). Senator Wyden also expressed his concern that FISA "permits the government to conduct unlimited warrantless searches on Americans, disseminate the results of those searches, and use that information against those Americans, so long as it has any justification at all for targeting the foreign." *Id.* at 10 (Minority Views of Senator Wyden). Senator Heinrich echoed that concern, suggesting that the Senate bill did not adequately address the "real problem with the existing [FISA] statute: It contains a loophole that allows the government to effectively conduct warrantless searches for Americans' communications." *Id.* at 11 (Minority Views of Senator Heinrich).

Debate in the House featured a similar focus on U.S. persons' privacy and querying. The House Intelligence Committee indicated that the "Committee understands that certain lawmakers and privacy advocates worry about the ability of the Intelligence Community to query lawfully acquired data using query terms belonging to United States persons," and that in recognition of

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this worry, 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" that "must be submitted to the FISC for 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, at 17-18. Debates over the adequacy of the Reauthorization Act's querying requirements in light of privacy concerns continued during floor debate in both chambers, *see generally*, 163 Cong. Rec. H135 (daily ed. Jan. 11, 2018); 163 Cong. Rec. S173 (daily ed. Jan. 16, 2018), the record of which underscores the significance of querying, in and of itself, as an event Congress found independently worthy of constitutional scrutiny.

2. Government Reporting on U.S. Person Querying Suggests That It May Be Subject to Abuse

Information reported by the Government since 2015 concerning the scope and frequency of the actual privacy intrusion from FBI querying also suggests that its querying practices have been violating the legal restrictions on the use of 702-acquired information. When the FISC originally held that the FBI's querying procedures were reasonable under the Fourth Amendment, despite the lack of any requirement to keep a distinct record of any U.S. person query term used or a written statement of fact to support the term's use, the Court relied on an understanding that querying U.S. person data for garden variety criminal investigations was a "hypothetical problem." November 6, 2015 Opinion at 44. But to "reassure itself" for future certifications, the Court ordered the Government to report "any instance in which FBI personnel receive and review Section 702-acquired information that the FBI identifies as concerning a U.S. person in response to a query that is not designed to find and extract foreign intelligence information." *Id.* at 44; *see also* April 26, 2017 Opinion at 99 (imposing same reporting

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requirement). Since 2015, the Government has reported only one such instance to the Court. *See* Notice Regarding GBI Queries of Section 702-acquired Information Designed to Return Evidence of a Crime Unrelated to Foreign Intelligence (Jan. 23, 2017) at 2. In its last certification approval, the FISC found comfort in this lone report, April 26, 2017 Opinion at 65, but our understanding of the FBI's practices suggests that this figure vastly understates the potential intrusion on U.S. persons' privacy from FBI querying. The parameters of the Court's reporting requirement appear to exempt from reporting any query that may be partially designed to discover foreign intelligence information, even if an accompanying rationale was to discover evidence of the crime. For this reason, the FBI's report may not capture the vast majority of FBI queries in which FBI personnel use a term associated with a U.S. person to retrieve and then review the contents of U.S. persons' communications – communications that would otherwise be equivalent to the "papers" deserving Fourth Amendment protection. *See* Docket No. 702(i)-11-03, Memorandum Opinion and Order entered on Apr. 5, 2012 ("April 5, 2012 Opinion") at 17.

Although the FBI is not required to report the total number of queries its personnel conduct using U.S. person query terms,[47] the Government acknowledges that FBI agents are encouraged to "routinely" make use of systems containing raw 702-acquired information and to conduct queries to identify such information at the earliest stages of an investigation.[48] The

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[47] The NSA, CIA, and NCTC have reported that in 2017, the personnel of all three agencies conducted queries using a total of 7,512 query terms that are associated with U.S. persons. See ODNI 2017 Transparency Report at 16.

[48] *See* Privacy and Civil Liberties Oversight Board Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act, issued on July 2, 2014 ("PCLOB Section 702 Report") at 137; FBI 2015 Minimization Procedures, Section III.D, n.3: "[I]t is a routine and encouraged practice for the FBI to query databases containing lawfully acquired information, including FISA-acquired information, in furtherance of the FBI's authorized intelligence and law enforcement activities, such as assessments, investigations and intelligence collection...Examples of such queries include, but are not limited to, queries reasonably designed to identify foreign intelligence information or evidence of a crime related to an ongoing authorized investigation or reasonably designed queries conducted by FBI personnel in making an initial decision to open an assessment concerning a threat to the national security, the prevention of or protection against a Federal crime, or the collection of foreign intelligence, as authorized by the Attorney General Guidelines," *cited by* November 6, 2015 Opinion at 29, n.27.

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FBI's single report in response to the FISC's November 2015 order does not include the many queries the FBI presumably conducts in these systems that return information concerning US persons where "foreign intelligence information" is one purpose of the query, even if not the primary purpose. Moreover, the lack of a written justification requirement makes retrospectively counting such FBI queries impossible. The FBI is not subject to the same reporting requirements as the other covered agencies when it comes to U.S. person queries, but the 702 data the Government has reported for the other agencies suggests the sheer volume of 702-collected information subject to FBI querying has grown. The DNI's most recent Transparency Report, for example, indicates that the number of targets and collected communications has substantially increased since the FISC's 2015 order, b3,7E (per FBI) b3,7E (per 2017 Transparency Report at 14. This growth in 702 targets suggests a greater likelihood that FBI queries b3,7E (per FBI) b3,7E (per FBI) (b) (1) (b) (3)-50 USC 3024(i) b3,7E (per FBI) b3,7E (per FBI) b3,7E (per FBI) In the FBI's

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b3,7E (per FBI) Two months later, the Government discovered and reported that in a separate incident, b3,7E (per FBI) b3,7E (per FBI) b3,7E (per FBI) Just these b3,7E incidents from the FBI alone, exceed the b3,7E (per FBI) b3,7E (per FBI) April 27, 2018 Notice, at 2; February 26, 2018 Preliminary Notice, at 2. No matter how well-intentioned, appears to have been fishing expeditions into U.S. persons' information.

These incidents raise several concerns that support a renewed consideration of the FBI's querying procedures under the Fourth Amendment. First, they reveal the extent to which even personnel temporarily detailed to the FBI may have access to the contents of raw FISA information and may easily retrieve and view such information by performing queries. Amici have not been furnished with data regarding the number of FBI personnel authorized to access 702 material, but this report indicates that even temporarily-detailed law enforcement personnel from the agencies with which the FBI collaborates are cleared to participate in the "routine"

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practice of querying these databases. Second, the reported "bulk query" functionality allows law enforcement agents to query the FBI's systems and review the 702 information associated with U.S. persons in ways that bear more resemblance to mass surveillance than to targeted threat assessment. While such a purpose contravenes the relevant Minimization Procedures and the Querying Procedures if there is no reasonable likelihood of returning foreign intelligence information or evidence of a crime, the Querying Procedures provide no requirements or limitations that might prevent these types of noncompliant queries. Since the FBI does not require written statements of fact to justify U.S. person queries, there is no safeguard to ensure 702 information is retrieved and reviewed for a permissible purpose at the time a query is conducted. Imposing a requirement of a written statement to support such queries would provide an additional check on the system. In the [redacted] field office examples, the agents would have had to provide justification for each searches – and in doing so may have realized that those searches could not be justified.

These particularly egregious bulk queries were discovered by NSD during an oversight review in early 2018, but NSD does not conduct such oversight at every field office. NSD has the resources to conduct periodic reviews at selected field offices, suggesting that the potential for abuse is greater than what NSD is able to detect. Moreover, the FBI's current procedures and the Querying Procedures under review do not require the FBI to delineate its records of U.S. person query terms as a distinct category, Querying Procedures at 6, rendering it virtually impossible for NSD, or the Court, to ascertain how many U.S. person queries have been run by FBI personnel. Even if such records of U.S. person query terms were appropriately categorized, the lack of any written justification requirement would make review a hollow exercise since contemporaneous indications of the actual purposes for any U.S. person query would be lacking.

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The FISC must weigh the intrusion on U.S. persons' privacy from the FBI's apparently routine and largely-unfettered practice of querying with U.S. person query terms against the actual and appropriate governmental interests at stake. Previously, the Government has focused on hypothetical examples in which the FBI's U.S. person queries could uncover connections between domestic criminal activity and foreign terrorist groups seeking to attack the U.S. homeland, *see* Transcript of Proceedings Held Before the Honorable Thomas F. Hogan on Oct. 20, 2015, at 20-21, *cited by* November 6, 2015 Opinion at 42,[50] but it is worth noting that "foreign intelligence information" targeted for collection pursuant to section 702 describes a much broader category, one that includes any information relating to U.S. foreign affairs.[51] The types of communications collected may involve those that occur between U.S. persons and an array of non-U.S. persons relevant to foreign policy but who do not pose a national security threat, such as journalists, religious leaders, business people, and many foreign diplomats.[52] During the Senate Judiciary Committee hearings on the Reauthorization Act, Senator Graham requested that the testifying intelligence community officials inform him whether his own communications with foreign government officials had been collected and, also, whether he would have the right to know, if so. The testifying officials could not provide the Senator with a

[50] FBI Director Christopher Wray testified concerning the value of 702-collected information in a similar way during the Senate Judiciary Committees hearing on the Reauthorization Act: "So the real value of 702 to the FBI, and to the protection of the American people, is at the front end, at the very early stages, when a tip comes in. And we're in an environment right now for – as you've heard from every member of this panel – where there's a high volume of threats, and there are so few dots, in many cases, to connect with these smaller, more contained more loosely organized situations." *See Worldwide Terror Treats: Hearing Before the H. Comm. on Homeland Security*, CQ Part 1 at 68 (statement of FBI Director Christopher Wray).

[51] "Foreign intelligence information" includes "information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to...the conduct of the foreign affairs of the United States." 50 U.S.C. § 1801(e)(2).

[52] Communications collected under Section 702 also include those that implicate the First Amendment rights of U.S. persons related to freedom of speech and association. The Court must weigh the existence of those communications even more heavily in its Fourth Amendment reasonableness analysis. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) (requiring "scrupulous exactitude" when considering the Government's seizure of materials that "may be protected by the First Amendment").

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clear answer during their testimony, presumably because such communications could fall within the definition of "foreign intelligence information" targeted under 702. Even the targeting of "foreign intelligence information" at the point of acquisition is not a strict limitation, since section 702 requires only that obtaining foreign intelligence information be a "significant purpose" of the collection, 50 U.S.C. § 1881a(h)(2)(A)(v), not necessarily the "primary purpose."

The failure to obtain meaningful data regarding the b3,7E (per FBI) queries the FBI has conducted since the Court's approval of the 2015 certifications, as well as the mandate for stand-alone Querying Procedures established by the Reauthorization Act, counsel in favor of re-evaluating the framework under which the Querying Procedures are reviewed by the FISC. First, it is clear that the reporting measures the FISC directed in 2015 have not led to the transparency that would provide reassurance that b3,7E (per FBI) queries of 702-collection information for reasons b3,7E (per FBI) b3,7E (per FBI) The single reported instance of a b3,7E (per FBI) query for a non-foreign intelligence information purpose may simply demonstrate the limitation of the reporting requirement, which appears to exclude queries FBI agents conduct that retrieve 702-collected information for purposes that may have little or nothing to do with national security threats. Given the unique concerns that querying presents independent from the initial acquisition and retention of 702-acquired information, Congress has now specifically required that separate querying procedures be established and reviewed by the FISC in relation to the requirements of the Fourth Amendment. By including these query-related requirements in the Reauthorization Act, Congress has acknowledged the reality that FBI agents querying databases containing raw

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702 information for a variety of purposes are, in effect, undertaking new "searches," some of which now require a court order.

3. Evaluating Querying as a "Search" Is Consistent with Other Fourth Amendment Precedent

Reviewing querying as an independent Fourth Amendment event warranting judicial scrutiny would also bring the FISC's consideration of the Government's practices in line with Fourth Amendment case law, particularly as it has evolved in the digital age. The Government is not normally permitted to perform searches of digital devices simply because those devices were lawfully seized, *see Riley v. California*, 134 S.Ct. 2473, 2493 (2014) (requiring law enforcement to obtain a warrant before searching a cell phone lawfully seized incident to arrest). And with the proliferation of highly-personal data that is frequently shared with third parties electronically, the Supreme Court has suggested that notions of privacy under the Fourth Amendment deserve re-evaluation.[53] While the Government has argued in the past that the FBI is free to search all 702-collected information in its possession since the acquisition of that information was court-approved, *see* November 6, 2015 Opinion at 40, that argument fails to acknowledge the expanding amount of private data that U.S. persons share electronically, data which remains susceptible to incidental collection in the section 702 program even though it would be improperly acquired otherwise. The Government's argument that it may search 702-collected information just as it would any other data repository also ignores the basis for the Court's approval of the targeting procedures in the first place. When approving those targeting

[53] *See id.*; *United States v. Jones*, 565 U.S. 400, 417-18 (2012) (Sotomayor, J., concurring) ("[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. . . This approach is illsuited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or test to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their internet service providers; and the books, groceries, and medications they purchase to online retailers").

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procedures, the FISC determines that the precautions taken are reasonably designed to limit section 702 acquisition to information of or concerning non-U.S. persons reasonably believed to be located outside the United States. It does not follow that since the Court has approved the acquisition of that information for one purpose, it has approved the subsequent review of the underlying contents of that information for other purposes.

Courts have also held in other contexts that even when law enforcement comes into possession of an object lawfully because it has been seized or searched by a private party, subsequent actions taken by law enforcement to inspect or review the object's contents constitute separate events for purposes of the Fourth Amendment. For example, in *Walter v. United States*, 447 U.S. 649, 654 (1980), a business that received a set of misaddressed film reels by mail turned those films over to the FBI. The films were contained in boxes marked in a way that suggested the films depicted obscene material, prompting suspicion. Although the FBI's initial receipt of the boxes of film did not trigger the Fourth Amendment, the Supreme Court held that the FBI's subsequent use of a projector to screen the films constituted a "search" requiring a warrant. *Id.* at 654; *see also*, *United States v. Mulder*, 808 F.2d 1346 (9th Cir. 1987) (DEA's chemical testing of tablets found and seized by a private party in defendant's hotel room was a search); *United States v. Bowman*, 215 F.3d 951 (9th Cir. 2000) (viewing contents of a videotape and examining sides of videotape for fingerprints constituted a search, even when a private party delivered the videotape to ATF); *United States v. Runyan*, 275 F.3d 449, 461 (5th Cir. 2001) (government's review of contents of computer disks delivered, but not reviewed, by a private party constituted a search). As in the case of the boxes of film in *Walter*, the raw 702-acquired information stored in the FBI's databases may have been acquired in a way consistent with the Fourth Amendment based on approved targeting procedures, but follow-on review of that

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information's contents by law enforcement must be reasonable independent of the circumstances of acquisition.

To acknowledge that querying 702-collected information using a U.S. person query term is a separate event implicating the Fourth Amendment is not to say that each individual query requires a court order. But it does suggest that the Querying Procedures must contain protections commensurate with the different purposes of queries conducted by each covered agency, given that under the Fourth Amendment, the Government's interests will weigh differently depending on a query's underlying aim and the privacy interests affected. It is with this understanding that amici address the specific provisions of the Querying Procedures discussed below.

C. The Exemptions in the Querying Procedures Relating to "Lawful Training" and "Lawful Oversight" Are Overly Broad

The Court has asked amici to address whether certain exemptions contained in section III of the Querying Procedures are consistent with the requirements of the Fourth Amendment. April 23, 2018 Order at 4. Section III contains a number of exemptions that eliminate any restrictions for certain categories of queries, including queries related to "lawful training functions," "lawful oversight functions," and "to comply with a specific congressional mandate."[54] While two of these section III exemptions reference "lawful oversight functions," one is tailored toward oversight conducted by Executive Branch actors outside of the relevant covered agency ("lawful oversight functions of NSD or ODNI, or the applicable Offices of the Inspectors

[54] Section III of the Querying Procedures exempts queries related to 1) the "lawful oversight functions of NSD or ODNI, or the applicable Offices of the Inspectors General"; 2) a covered agency's "performance of lawful training functions of its personnel or creating, testing, or maintaining its systems"; 3) a covered agency's "performance of lawful oversight functions of its personnel or systems," which itself contains six enumerated subcategories; 4) "comply[ing] with a specific congressional mandate or order of a court within the United States"; 5) "comply[ing] with the requirements of the Freedom of Information Act...or the Privacy Act"; 6) "conduct[ing] vulnerability or network assessments...in order to ensure that [a covered agency's] systems are not or have not been compromised"; and 7) "identify[ing] information that must be produced or preserved in connection with a litigation matter." Querying Procedures at 1-2.

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General"), whereas the other contemplates oversight conducted by the covered agency, itself ("...nothing in these procedures shall restrict a covered agency's performance of lawful oversight functions of its personnel or systems"). Most of the enumerated exemptions in those procedures are constitutionally reasonable, but given the sweeping introductory language ("Nothing in these procedures shall restrict..."), the exemptions related to "lawful training functions" and "lawful oversight functions of its personnel and systems" are insufficiently defined and circumscribed. The exemption relating to compliance with "a specific congressional mandate" is inadequately defined as well. As worded, these three exemptions invite the risk of intrusion on U.S. persons' privacy that is unreasonable in light of the underlying Government interests at stake. We recommended that, consistent with the Fourth Amendment, these exemptions be amended to avoid such risks.

1. The Querying Procedure Exemptions that Existed in Previous Minimization Procedures Are Reasonable

According to the Government, the exemptions in section III are meant to provide greater clarity and specificity regarding the covered agencies' current practices necessitating deviation from the restrictions that would otherwise apply. March 2018 Ex Parte Submission at 7-11. We agree that the exemptions that have remained unchanged from previous Minimization Procedures are straight-forward and appropriately allow the Government to comply with its obligations under FISA, as well as those under the Freedom of Information Act, the Privacy Act, and federal records requirements. Some reflect considerations that the Court has previously upheld as permissible reasons for the Government's departure from minimization requirements, including the Government's obligation to preserve material relevant to a litigation matter, *see* November 6, 2015 Opinion at 16, and the Government's need to assess covered agencies' networks for vulnerabilities. *See* Docket Nos. [redacted] b3,7E (per FBI)

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b3,7E (per FBI) [redacted] Thus, when weighed against the potential governmental intrusion on U.S. persons' Fourth Amendment interests, we believe those exceptions are reasonable, particularly in light of the Querying Procedures' requirement that any query performed by the Government in reliance on these exceptions be recorded and ultimately reported to the FISC. Querying Procedures at 2. In contrast, the exemptions related to "lawful training functions," "lawful oversight functions," and "congressional mandate[s]" should be revised to ensure that they are appropriately limited given the actual interests at stake.

2. The "Lawful Training Functions" Exemption is Overly Broad

While training agency personnel is an important function, and one that should help advance the protection of privacy interests, the Querying Procedures need more precision in identifying what deviations are necessary in support of "lawful training functions." As written, the procedures do not assign any responsibility for training, provide any guidance as to what it should entail, or describe how it must be designed to achieve the purpose of ensuring the necessary proficiencies of agency personnel. In fact, there is no requirement apparent to amici that training queries, including those that use U.S. person query terms, be pre-approved or even documented. Given the extent to which the querying of 702-acquired information might intrude on the privacy of U.S. persons, this latitude afforded to the covered agencies for training is unreasonable.

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[redacted]

b3,7E (per FBI) [redacted]

b3,7E (per FBI) [redacted] Based on our understanding, b3,7E (per FBI) [redacted]

b3,7E (per FBI) [redacted] While the Government has suggested a need to run b3,7E (per FBI) [redacted]

b3,7E (per FBI) [redacted]

b3,7E (per FBI) [redacted]

[redacted]

[redacted]

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b3,7E (per FBI) [redacted]

b3,7E (per FBI) [redacted]

Even beyond the use of specific query terms, the Court should not approve the sweeping language of this exemption without some assurance that training exercises which include queries of raw 702-acquired information receive prior approval from NSD or the relevant oversight officials within the covered agencies. b3,7E (per FBI) [redacted] b3,7E (per FBI) [redacted] b3,7E (per FBI) [redacted] As currently worded, the exemption in the Querying Procedures for "lawful training functions" lacks any such requirement. "Lawful training functions" should be explicitly limited b3,7E (per FBI) [redacted] b3,7E (per FBI) [redacted] We recommend that the Government revise the wording of this exemption to incorporate these requirements, or that the Court otherwise interpret the "lawful training functions" exemption in such a fashion in its order.

3. The "Lawful Oversight Functions" Exemption Lacks Sufficient Specificity

The Querying Procedures also include an exemption for queries conducted by a covered agency in "performance of lawful oversight functions of its personnel and systems," a category that was included in previously approved Minimization Procedures, but which has been unpacked with additional examples. Querying Procedures at 1-2. The Querying Procedures list [redacted] in support of these "lawful oversight functions" for which queries may be run

[56] The Court may view the enumeration of particular "lawful oversight" categories in the Querying Procedures favorably, given that it provides increased transparency into the Government's anticipated oversight functions. However, section III of the Querying Procedures requires the covered agencies to advise NSD, which must promptly notify the FISC, only for exempted "lawful oversight" queries that do not fit one of those enumerated examples. Querying Procedures at 2. Section III of the Querying Procedures indicates, "Should a covered agency intent to rely on the provision regarding lawful oversight functions of its personnel or systems, in whole or in part, to deviate from an aspect of these procedures and the purpose of such deviation is not listed above, the covered agency shall consult with NSD and ODNI prior to conducting such a query. NSD shall then report the deviation promptly

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without any prior approval of NSD:

The Court may view the enumeration of particular "lawful oversight" categories in the Querying Procedures favorably, given that it provides increased transparency into the Government's anticipated oversight functions. However, section III of the Querying Procedures requires the covered agencies to advise NSD, which must promptly notify the FISC, only for exempted "lawful oversight" queries that do not fit one of those enumerated examples.[57] *Id.* at 2:

While these enumerated examples illustrate some "oversight" purposes for which queries may be run, we believe that even greater specificity is necessary to prevent unreasonable intrusions into U.S. persons' privacy. In particular, neither the Minimization Procedures nor the

[57] Section III of the Querying Procedures indicates, "Should a covered agency intent to rely on the provision regarding lawful oversight functions of its personnel or systems, in whole or in part, to deviate from an aspect of these procedures and the purpose of such deviation is not listed above, the covered agency shall consult with NSD and ODNI prior to conducting such a query. NSD shall then report the deviation promptly to the FISC."

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Querying Procedures specify who at each covered agency is responsible for the oversight necessitating these queries and whether that oversight may be undertaken in conjunction with other parts of the Executive Branch, or even Congress. Given that the "lawful oversight" category allows for a full departure from any of the procedures that would otherwise restrict covered agency personnel seeking to query and review 702 information associated with U.S. persons, it is reasonable for the Court to demand specificity greater than the additional language proposed by the Government offers.

The last two subcategories of "lawful oversight" are particularly vague and susceptible to multiple interpretations. The exception for "authorized work conducted in systems used solely for audits and oversight" appears to allow for each agency to accommodate regular oversight by NSD and ODNI that is necessary for the government to fulfill its reporting obligations to the FISC, but this "audits and oversight" language might also be interpreted to extend to oversight by Congress. Indeed, the Government has already interpreted the "lawful oversight function" exemption within the previously-approved Minimization Procedures to allow the NSA to provide information obtained from querying to members of the House Judiciary Committee in response to specific requests. April 26, 2017 Opinion at 54. The Court has countenanced such an interpretation, but required that the Government report all instances in which it relied upon this exemption to respond to congressional inquiries. The Court also suggested that "these provisions could more clearly address responses to requests from congressional overseers." *Id.* at 55. The exemption at issue does not provide such clarity. [redacted]

[redacted]

Congress has an appropriate and important oversight role in the section 702 program, [redacted]

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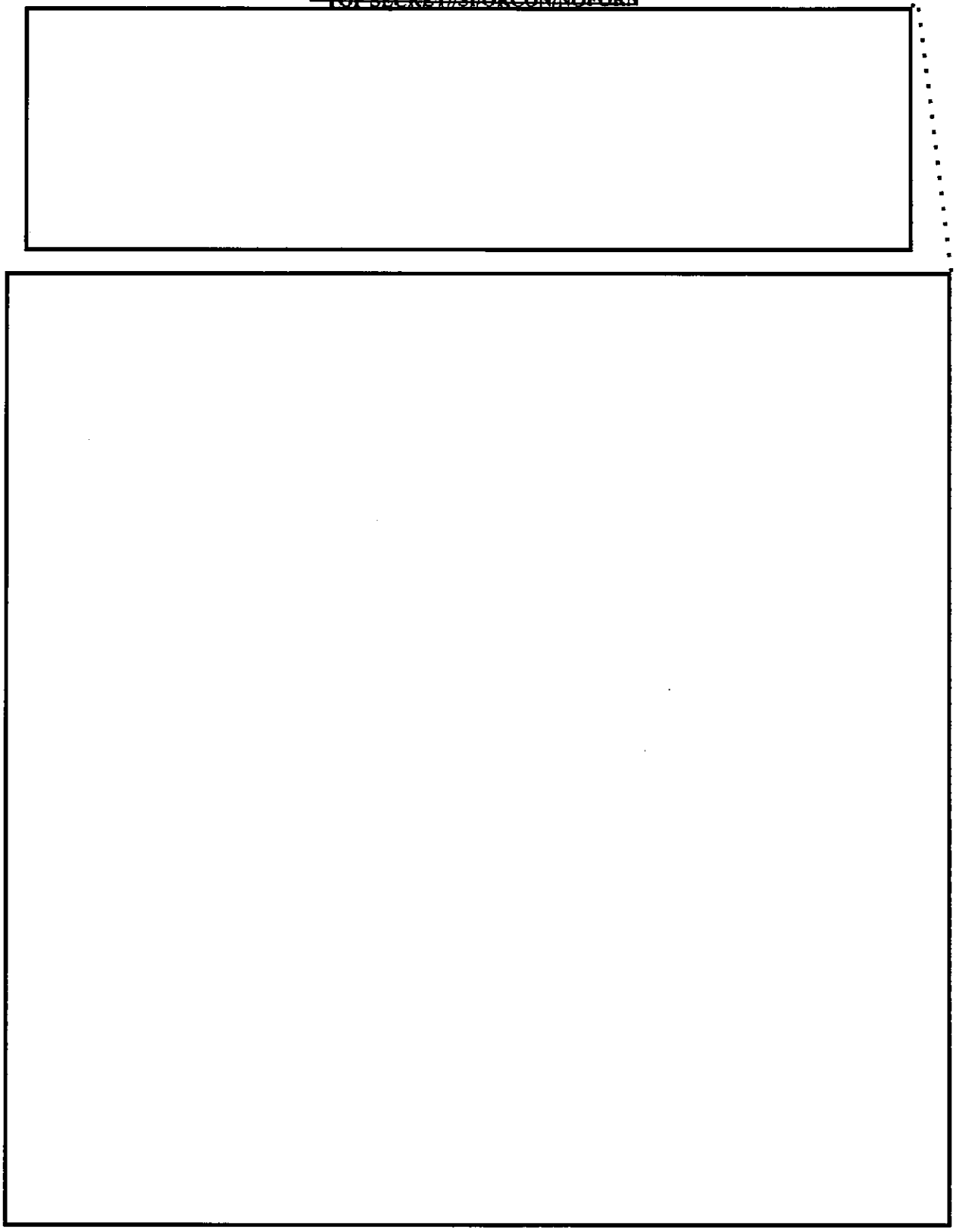

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[redacted] The Court should require the Government to tailor this language to the misconduct investigations that it may permissibly conduct without further authorization, or otherwise interpret this exemption narrowly.

4. The Exemption "To Comply with a Specific Congressional Mandate" Should Be Narrowed or Eliminated

The third exemption that does not adequately protect privacy interests is the exemption allowing covered agencies to run queries in order to "comply with a specific congressional mandate or order of a court within the United States." Querying Procedures at 2. The procedures no definition of "congressional mandate" and, as with the "lawful oversight" exemption discussed above, [redacted]

[redacted]

This "congressional mandate" language is the same, facially broad language in the NSA and CIA Minimization Procedures that the FISC considered, with some concern, in its review of the amended 2016-2017 procedures. April 26, 2017 Opinion at 52-53; *see also*, November 6, 2015 Opinion at 21-22. The Court feared that by relying on "unspecified 'mandates,'" the Government might avoid the protections otherwise provided in the Minimization Procedures, creating a significant loophole. April 26, 2017 Opinion at 53. Although the FISC upheld this language, it did so only after adopting a narrow interpretation that cabined the exception to

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"mandates containing language that clearly and specifically requires action in contravention of an otherwise applicable provision of the requirement of the minimization procedures." *Id.* at 53-54, quoting November 6, 2015 Opinion at 23. The Court also indicated that the term "mandate" is limited to a specific directive that takes "the form of a subpoena or other legal process." April 26, 2017 Opinion at 54.

The Court's narrow interpretation of this "congressional mandate" exception should be embodied in the Querying Procedures. However, given that the Government, with the Court's blessing, has previously indicated its intent to rely on the "lawful oversight function" exception[58] discussed above to respond to congressional requests for information that do not amount to legal process, the "congressional mandate" exception appears to be superfluous. The Government did not address this particular exemption in its bricf and it remains unclear what "mandates" covers that would not already be covered as a function of an agency's "performance of lawful oversight functions." The Court should direct the Government to either remove the "specific congressional mandate" exemption language from the Querying Procedures or to limit the exemption in a way that would be distinct from "lawful oversight" and yet still permissible under the Fourth Amendment.

D. A Written Justification Requirement Should Apply to All FBI U.S. Person Queries Conducted to Retrieve Evidence of a Crime That is Not Foreign Intelligence Information

The Court has also asked amici to consider the constitutional reasonableness of the FBI-specific provisions of the Querying Procedures in section VII. April 23, 2018 Order at 4. In the view of amici, section VII does not comply with the Fourth Amendment in that it allows FBI

[58] The "lawful oversight" exemption the Government stated it would rely on in order to respond to requests for information from members of the House Judiciary Committee also incorporated oversight by "NSD, ODNI, or relevant Inspectors General." *See* April 26, 2017 Opinion at 54.

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personnel to query for and review the contents of U.S. person communications without instituting any restrictions or safeguards, except in a narrow subset of U.S. person queries. We believe the Fourth Amendment demands that section VII be amended to require a written justification in order for FBI personnel to view the contents of 702-acquired information returned from any U.S. person query term. We understand this to be a requirement that already exists for all other covered agencies and one which would not be unduly burdensome to FBI personnel in the course of their actual querying practices.

1. The FBI Is Less Restricted Than Other Covered Agencies by the Government's Proposed Querying Procedures, Including with Regard to U.S. Person Queries

The Querying Procedures specific to the NSA (section VI), the CIA (section VIII), and the NCTC (section IX) are substantially similar to procedures approved by the FISC in previous certifications. *Compare* Querying Procedures at 5-7, *with* NSA 2016/2017 Minimization Procedures at 5; CIA 2016/2017 Minimization Procedures at 3; and NCTC 2016/2017 Minimization Procedures at 7. The Querying Procedures for the NSA, CIA, and NCTC also continue to be more restrictive than those governing queries by the FBI. Any queries conducted by these three agencies must be "reasonably likely to retrieve foreign intelligence information" and any U.S. person query term used to retrieve raw 702 metadata or contents must be accompanied by a written statement of facts supporting such a determination.[59] Querying Procedures at 5, 7. In the case of the NSA, any U.S. person query term used to identify raw 702-acquired contents must also receive approval by the NSA Office of the General Counsel. *Id.* at 5. Although all three agencies previously required an accompanying written justification for any

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U.S. person query used to retrieve 702 contents, the Querying Procedures under review have extended that written justification requirement to U.S. person queries by the CIA and NCTC that seek 702 metadata as well. *Id.* at 5 and 7; *see* March 27, 2018 Ex Parte Submission at 32-34.

b3,7E (per FBI) [redacted] Despite this broader power to conduct queries b3,7E (per FBI) [redacted] the FBI's querying procedures do not require that FBI personnel prepare any written statements of fact to support U.S. person queries, nor do they require the FBI to keep a record of U.S. person query terms separate from other non-U.S. based query terms used by FBI personnel.[60] *Id.* at 6. b3,7E (per FBI) [redacted]

For a subset of U.S. person queries "in connection with a predicated criminal investigation that does not relate to the national security of the United States" and that are "not designed to find foreign intelligence information," section VII of the Querying Procedures implements the Reauthorization Act's requirement that the FBI obtain court approval before viewing those communications' contents. *See id.* at 6; 50 U.S.C. § 1881a(f)(2)(A). However,

[60] The Querying Procedures indicate that the FBI will maintain records of all queries conducted that retrieve information collected under the 702 program, without separately delineating any queries that employ "U.S. person query terms."

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the procedures allow FBI personnel to review the contents of U.S. person queries "reasonably designed to find and extract foreign intelligence information" without a court order regardless of whether such foreign intelligence information might also be evidence of a crime. Querying Procedures at 6. This limits the procedures' requirement for a court order to U.S. person queries in a predicated criminal investigation when there is no conceivable connection to foreign intelligence information. The procedures also allow FBI personnel to "access the results of queries that were conducted when evaluating whether to open an assessment or predicated investigation related to the national security of the United States." *Id.* at 6. Importantly, since the restriction on the FBI's use of U.S. person queries related to predicated criminal investigations applies only to the viewing of contents, the FBI is permitted to view the 702-collected metadata retrieved from any U.S. person query without a court order, let alone a written justification internal to the agency itself.

2. Section VII of the Querying Procedures Should Require a Written Statement of Fact Before FBI Personnel Can View the Contents of 702-Acquired Information Returned from a U.S. Person Query

As described above, the 702 program as whole must be reasonable under the Fourth Amendment, but the Querying Procedures must also account for the fact that querying is a separate governmental intrusion that needs to be independently balanced with adequate privacy protections. During the debate over the Reauthorization Act, some argued that any U.S. person query term used by a covered agency should require an order from the FISC, a recommendation also made by two of the PCLOB members in 2014. PCLOB Report, Annex A, at 151-152. Requiring a separate FISC order for each U.S. person query would certainly comply with the Fourth Amendment, but short of such a requirement, we believe that the FBI should be subject to requirements similar to those that are in place for the NSA, CIA, and NCTC. Given that the NSA, CIA, and NCTC may conduct queries only to retrieve foreign intelligence information and

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that those agencies' personnel must prepare written justifications for any U.S. person query term used, we believe that sections VI, VIII, and IX of the Querying Procedures are reasonable under the Fourth Amendment. The requirement in the Querying Procedures relating to the NSA, CIA, and NCTC that each U.S. person query be supported by written justification appropriately balances those agencies' purpose of obtaining and analyzing foreign intelligence information against the privacy intrusions involved in such queries.

On the other hand, we believe that as currently constructed, section VII of the Querying Procedures, governing the FBI, insufficiently protects U.S. persons' privacy and is therefore not reasonable under the Fourth Amendment. To achieve the proper constitutional balance, the FBI-specific Querying Procedures should require a written statement of facts setting forth a justification before FBI personnel can view the contents of any communications retrieved through the use of a U.S. person query term, especially in the case of any query that might reasonably retrieve information that could be evidence of a crime.[61] Such a written-justification requirement would help to ensure that the rationale for any U.S. person query was legitimate, preventing the type of inappropriate "bulk queries" that have occurred at the FBI's [redacted] field office. It would also allow for more effective oversight by both NSD and this Court.

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Unlike the more restricted querying procedures adopted by the NSA, CIA, and NCTC, a requirement that FBI personnel provide a written justification prior to viewing the contents of any 702 information returned from a U.S. person query would not prevent the FBI from conducting the query in the first place. The written-justification requirement would apply only

[61] Although amici believe that a written justification should be provided before the FBI views the contents of information retrieved from any U.S. person query, U.S. person queries designed to retrieve evidence of a crime are particularly worthy of this safeguard given that the FBI's criminal investigatory purpose falls outside the targeting procedures' stated rationale, to obtain foreign intelligence information.

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to those cases where the FBI conducted a U.S. person query, discovered that responsive 702-collected information existed, and then sought to examine the contents of that information. Note also that our recommendation for a written-justification requirement would apply b3,7E (per FBI) b3,7E (per FBI) b3,7E (per FBI) As the Government has stated to this Court and to Congress, the most compelling governmental interest to be balanced in the Fourth Amendment analysis of the FBI's querying procedures is the FBI's ability to "connect the dots" and trace otherwise unknown links among U.S. persons and foreign powers or organizations that present a threat to national security. November 6, 2015 Opinion at 42. b3,7E (per FBI) b3,7E (per FBI) b3,7E (per FBI) The written justification requirement that we recommend would provide the greater protection necessary when it comes to the comparatively greater privacy interest a U.S. person has in the contents of any communication.

Our recommendation that the FBI be required to provide a written justification in order to view the contents of 702-collected communications returned by a U.S. person query would present a fairly minimal burden considering the operation of the FBI's normal investigative

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practices. b3,7E (per FBI) [redacted]

b3,7E (per FBI) [redacted]

b3,7E (per FBI) [redacted]

[62] Amici also understand that in accordance with its Minimization Procedures, the FBI maintains raw 702 information on "ad hoc" and "special purpose" systems outside of these federated database systems. These ad hoc and special purpose systems may also be queried by authorized personnel.

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b3,7E (per FBI)

[redacted]

b3,7E (per FBI)

[redacted] *See* FBI Domestic Investigations and Operations Guide ("FBI DIOG") (released Oct. 16, 2013) at 5-1 (indicating that "[a]ssessments...do not require a particular factual predication but do require an authorized purpose and clearly defined objective(s)"). But the Fourth Amendment's protections do not begin only when a criminal investigation is opened or when law enforcement formalizes its investigative interest. U.S. persons enjoy those protections regardless of the stage of the FBI's investigative process and even U.S. person queries at the assessment stage must be reasonable. According to the FBI's Domestic Investigations and Operations Guide, some of the potential purposes for U.S. person queries conducted at the assessment stage include detecting criminal activities that do not relate to national security, obtaining information concerning individuals or groups that may be victimized or targeted by a criminal or national security-related threat, and identifying individuals who may have value to the FBI as human sources.[63] FBI DIOG at 5-2. The Government's interest in these and other purposes of assessments are comparatively smaller, but the privacy interests that U.S. persons hold in 702-collected communications that might result from such queries remain significant. While the Fourth Amendment may not require a

[63] The FBI DIOG provides that assessments "may...be undertaken proactively with such purposes as detecting criminal activities; obtaining information on individuals, groups, or organizations of possible investigative interest, either because they may be involved in criminal or national security-threatening activities or because they may be targeted for attack or victimization in such activities; and identifying and assessing individuals who may have value as confidential human sources." FBI DIOG at 5-2.

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warrant to view the contents of such communications at the assessment stage, it demands a written justification just as any U.S. person query conducted by the NSA, CIA, or NCTC does.

Notwithstanding its court-order requirement, section VII allows the FBI to view the "results of any query" of 702-collected information in order 1) to review foreign intelligence information, even if that information could also be considered evidence of a crime, or 2) to evaluate "whether to open an assessment or predicated investigation relating to the national security of the United States." Querying Procedures at 6. This language in the Querying Procedures is drawn directly from the Reauthorization Act. *See* 50 U.S.C. § 1881a(f)(2)(F)(ii)-(iii). In light of our foregoing constitutional analysis and recommendations, the reasonableness of these allowances turns on the interpretation of query "results," a term that has a different meaning than "contents" in the context of the Reauthorization Act and the Querying Procedures. Although "results" is not defined by the Querying Procedures, the Court should read "results" to refer only to the existence or non-existence of any responsive 702-collected information retrieved pursuant to an FBI query, which may also include the associated metadata for that responsive information. "Results" should not be understood to include the underlying "contents" of any responsive information, which, as we have argued, is a more protected category. Such an interpretation of section VII of the Querying Procedures would be consistent with the plain meaning of the terms, as well as with the use of both terms within section 101 of the Reauthorization Act, itself. *Compare* 50 U.S.C. § 1881a(f)(D) ("...the Court shall enter an order approving the accessing of the *contents* of communications...if the Court finds probable cause to believe that such *contents* would provide any of the evidence"), *with id.* § 1881a(f)(F)(ii) ("Nothing in this paragraph may be construed as limiting the authority of the Federal Bureau of Investigation to review, without a court order, the *results* of any query information...")

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(emphasis added). Read properly, this provision of section VII of the Querying Procedures is reasonable.

III. Question (d): The Reauthorization Act Requires a Separate FBI Record of b3,7E (per FBI) Query Terms

In addition to requiring the adoption of Querying Procedures, section 101 of the Reauthorization Act directs that those procedures include a "technical procedure whereby a record is kept of each b3,7E (per FBI) query term used for a query." 50 U.S.C. § 1881a(f)(1)(B). b3,7E (per FBI) [redacted] b3,7E (per FBI) [redacted] b3,7E (per FBI) [redacted] in the case of an NSA b3,7E (per FBI) query to access contents, the approving official in NSA's Office of General Counsel and duration of approval. Although the Reauthorization Act does not impose a retention time requirement on these records, the Querying Procedures require that the covered agencies maintain the records for five years from the date the query term was originally used or approved. There is also a presumptive requirement that records will be maintained electronically, but the Querying Procedures allow the covered agencies to create written records when generating an electronic record would be "impracticable." Querying Procedures at 2.

We believe that the record-keeping provisions of the Querying Procedures as applied to the NSA, CIA, and NCTC are consistent with the Reauthorization Act and the Fourth Amendment. The Querying Procedures require that those covered agencies maintain separate records of b3,7E (per FBI) query terms used, as well as the associated information about the approval of those terms, allowing for effective oversight concerning the impact of those agencies' querying practices on b3,7E (per FBI) privacy interests. We are also satisfied that when

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circumstances demand, the creation of written records as opposed to electronic records is in keeping with the statute and constitutionally reasonable given that the Reauthorization Act does not specify whether the "technical procedure" for record-keeping be electronic. *See* April 23, 2018 Order at 5. So long as the relevant records are maintained in a fashion that allows for effective oversight, the particular format of the records should not affect the Court's analysis under the Fourth Amendment.

The FBI's record-keeping procedures, however, do not meet the demands of the Reauthorization Act. A footnote in section VII of the Querying Procedures indicates that the FBI, unlikely the other covered agencies, will not store or categorize U.S. person query term records separately. Querying Procedures at 6, n.4. Instead, the FBI intends to satisfy its statutory obligations by keeping a single set of records that includes *any* query conducted by FBI personnel that returns 702-collected information. *Id.* In effect, the Querying Procedures allow the FBI to maintain its current practice of not keeping U.S. person query records, rendering it virtually impossible to determine which FBI queries used terms reasonably likely to identify U.S. persons. Adopting a strained interpretation of the statutory language, the Government argues the Reauthorization Act does not require the FBI to alter its historical record-keeping practice so as to maintain records of U.S. person queries separately. March 2018 Ex Parte Submission. The Government also asserts that effective oversight of FBI's queries will remain possible even without a separate record of U.S. person query terms. *Id.* at 26. In light of the underlying purposes of the Reauthorization Act and the Fourth Amendment's reasonableness requirement, we disagree.

Section 101's demand for a "technical procedure" to keep records specifically of U.S. person query terms indicates that Congress sought the implementation of new record-keeping

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procedures, not the codification of those already in existence. Amici do not dispute the Government's contention that Congress had an understanding of the FBI's current record-keeping practices when enacting the Reauthorization Act. But it was precisely because Congress understood that the FBI was the only covered agency that lacked a "technical procedure" to record U.S. person query terms that section 101 included this new requirement. Rather than exempting the FBI from instituting any additional measures, section 101 is best read as a mandate that the FBI, in particular, improve its procedures so that U.S. person query terms are kept as a distinct category of records. Particularly since the Reauthorization Act allows for a single set of querying procedures to be adopted by the Attorney General for all covered agencies, it makes sense that the same subsection of the Reauthorization Act also requires that all covered agencies keep U.S. person query terms as a delineated category of records. See 50 U.S.C. § 1881a(f)(1)(A).

The Government's interpretation of section 702(f)(1)(B) reads the FBI out of this requirement and in practical terms, would allow the FBI to forgo maintaining the very type of records that Congress has directed all covered agencies to create. Under the Querying Procedures submitted by the Government, the FBI would continue keeping records of all queries performed by its personnel, but with no means of determining which and how many of those terms were believed to be reasonably likely to identify U.S. persons absent a manual tally and individual analysis of every record kept. Such a manual tally is clearly not the "technical procedure" that section 702(f)(1)(B) contemplates.

The legislative history of the Reauthorization Act supports amici's reading, since it suggests congressional intent to improve oversight by requiring that the covered agencies, including the FBI, enhance their record-keeping of U.S. person query terms. Along with

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restrictions on "abouts" collection and the court order requirement for certain FBI queries discussed above, section 101's record-keeping requirement was one of the "key reforms to further protect U.S. personal privacy" that led the Reauthorization Act's proponents to endorse it as a "bipartisan compromise bill." 163 Cong. Rec. H135, at H143 (daily ed. Jan. 11, 2018) (statement of Rep. Conaway). The law's directive to maintain U.S. person query term records was a new "reform," not a codification of existing practice. Indeed, the minority statement in the Senate Judiciary Committee report from Senator Heinrich points out that the Reauthorization Act is a "modest improvement on the statute it would replace" since, among other things, it would "require the Director of National Intelligence and the Attorney General to ensure 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." S. Rep. No. 115-182, at 11 (Minority Views of Senator Heinrich). The House Intelligence Committee Report's description of the record-keeping provision points to the same requirement, stating that section 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*." H.R. Rep. 115-574, at 18 (emphasis added). Records that clearly distinguish query terms as "U.S. person query terms" are the "appropriate records" referred to in the House Intelligence Committee Report, records which are necessary for "subsequent oversight."

Section 112 of the Reauthorization Act, which requires the Inspector General of the Department of Justice to assess the FBI's query practices a year after the next 702 certification approval, is linked to section 101's record-keeping requirement, but not in the way that the Government argues. Like section 101, section 112 indicates Congress' intent to conduct further

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oversight of the FBI's querying practices, an endeavor that will rely on the U.S. person query records that section 101 separately requires. Section 112 is not, as the Government argues, Congress' concession that the FBI is incapable of separately collecting records of U.S. person queries. Instead, the mandated study it requires was meant to provide for additional review of the FBI's implementation of section 101's requirements, including the record-keeping requirement and any "operational, technical, or policy impediments" to that implementation. Pub. L. No. 115-118, §112(b)(8), 132 Stat. 3. During the Senate floor debate, Senator Wyden, an opponent of the Reauthorization Act, described his frustration that the "FBI is conducting these searches [of 702 information] so frequently that they don't even count." 163 Cong. Rec. S173, at S176 (daily ed. Jan. 16, 2018) (statement of Sen. Wyden). In response, Senator Warner pointed to the Reauthorization Act's mandate for the Inspector General study. *Id.* at S178-79 (statement of Sen. Warner). As he stated, the Inspector General report "will finally put the FBI on record answering questions that I deserve to know and that I believe [Senator Wyden] and other Members deserve to know." *Id.* at S179. The Reauthorization Act's requirement that all covered agencies maintain query records differentiating U.S. person query terms was a demand that records be kept so as to allow those questions to be answered.

IV. Question (e): Minimization Procedure Exemptions

A. Exemptions to the Minimization Procedures Relating to "Lawful Training" and "Lawful Oversight" Are Not "Reasonably Designed" and Are Not Consistent with the Fourth Amendment

In addition to extracting the Querying Procedures, the Government has proposed adding a series of exemptions to the Minimization Procedures for each covered agency that govern the retention, dissemination, and disclosure of 702 information. The new exemptions in the Minimization Procedures mirror the "lawful oversight" and "lawful training" exemptions contained in section III of the Querying Procedures, discussed above. Specifically, § 1 of the

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NSA Minimization Procedures, § I.G of the FBI Minimization Procedures, § 6.g of the CIA Minimization Procedures, and § A.6.f of the NCTC Minimization Procedures have been revised to indicate that "nothing in these procedures shall restrict [the covered agency's] performance of lawful training functions of its personnel or activities undertaken for creating, testing, or maintaining its systems." Additionally, § 1 of the NSA Minimization Procedures, § I.H of the FBI Minimization Procedures, § 6.h of the CIA Minimization Procedures, and § A.6.g of the NCTC Minimization Procedures now state that "[n]othing in these procedures shall restrict [the covered agency's] performance of lawful oversight functions of its personnel or systems," with enumerated examples that are worded in relation to each agency, but which appear substantively identical in terms of the exempted oversight activities they allow.[64] The Court has asked amici to address these "lawful training" and "lawful oversight" exemptions. April 23, 2018 Order at 5.

The Government's proposed Minimization Procedures must be consistent with the statutory definition of "minimization procedures" contained in subsections 101(h) and 301(4) of FISA (codified at 50 U.S.C. §§ 1801(h) and 1821(4)), which require that such procedures be "reasonably designed in light of the purposes and technique of the [particular surveillance/particular physical search], to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons." Given that they necessarily implicate U.S. persons' information collected and retained under section 702, the Minimization Procedures must also be "reasonable" under the Fourth Amendment. For reasons that are substantially similar to those given above in our discussion of these broadly-worded exemptions in the Querying Procedures (*see* discussion in section II.C

[64] For example, FBI Minimization Procedure § I.H lists the "FBI's investigation and remediation of a possible compliance incident" as one "lawful oversight function[] of its personnel or systems," while CIA Minimization Procedure § 6.h enumerates "CIA's investigation and remediation of a possible compliance incident."

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above) we believe that the "lawful training" and "lawful oversight" exemptions in the Minimization Procedures meet neither the statutory definitions nor the constitutional requirements.

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

[redacted] Similarly, the "lawful oversight" exemptions of the Minimization Procedures, with their enumerated, expansively-worded examples do not provide sufficient definition in light of the privacy interests at stake. Moreover, without greater specificity regarding what training and oversight functions require the Government to abrogate otherwise applicable restrictions on retention and dissemination of 702 information, these exemptions cannot be considered "reasonably designed" to meet the statutory definitions in sections 101(h) and 301(4). The Court should require that these exemptions in the

[65] *See, e.g.*, section C.1.c of the FBI's Minimization Procedures: "Before using FISA-acquired information for further investigation, analysis, or dissemination, the FBI shall strike, or substitute a characterization for, information of or concerning a United States person, including that person's identity, if it does not reasonable appear to be foreign intelligence information, to be necessary to understand or assess the importance of foreign intelligence information, or to be evidence of a crime."

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Minimization Procedures be amended to provide the necessary specificity with regards to "lawful training" and "lawful oversight" that the Government anticipates at each covered agency.

b3,7E (per FBI)

[redacted]

4(i)

[redacted]

b3,7E (per FBI)

[redacted]

[redacted]

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b3,7E (per FBI)

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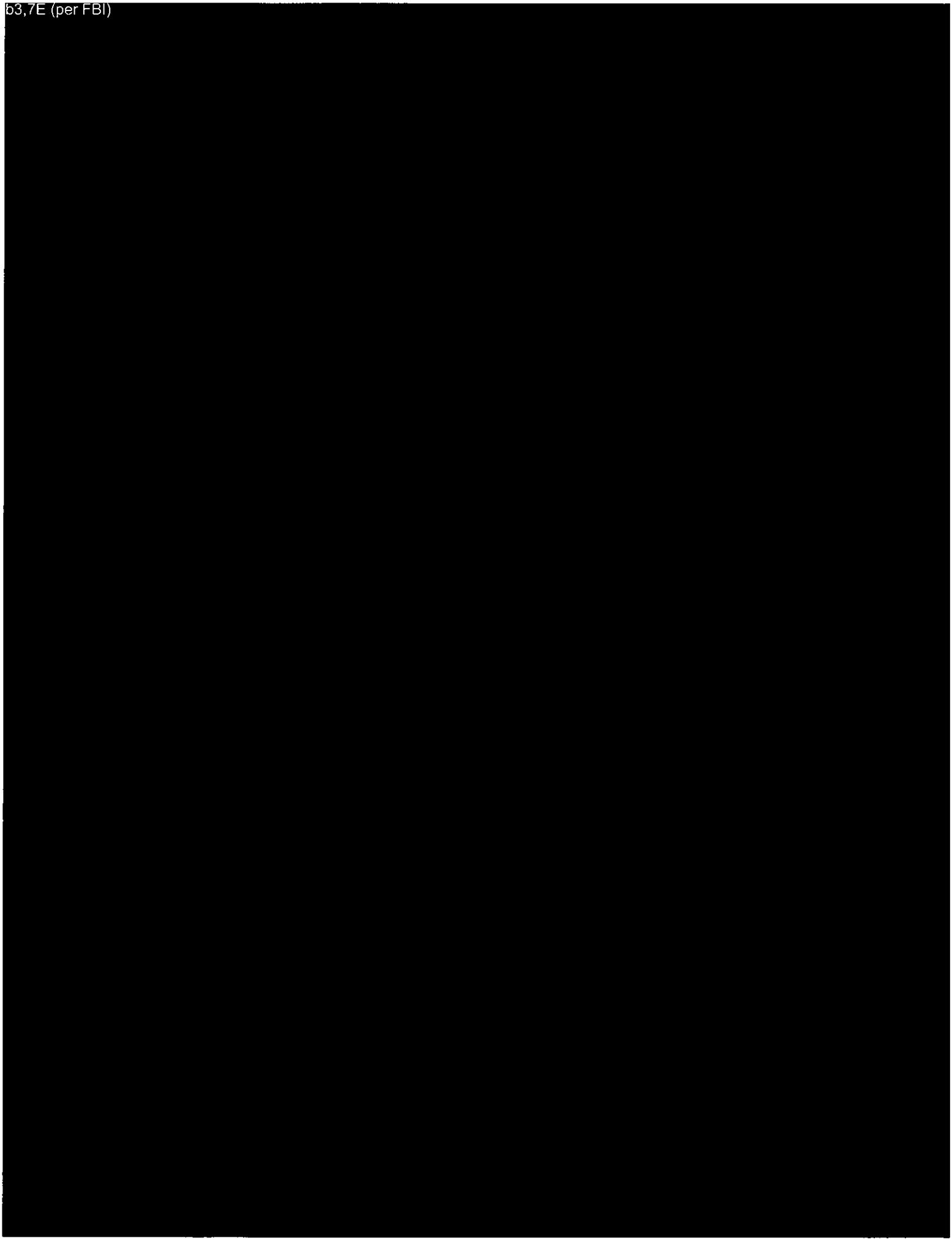
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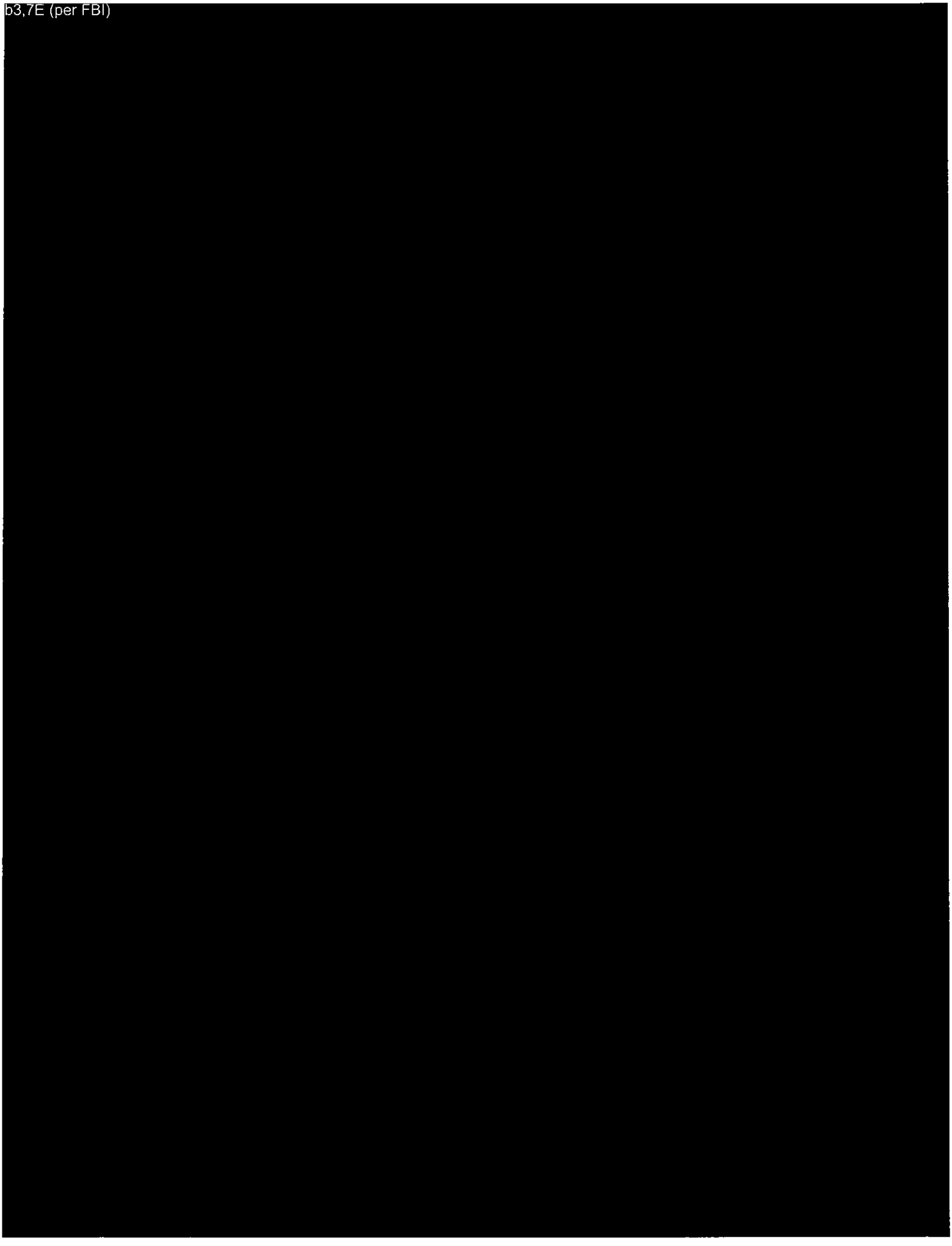
b3,7E (per FBI)

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b3,7E (per FBI)

[redacted]

Two of the elements of satisfactory minimization procedures under FISA are (1) "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 nonconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information" and (2) "procedures that require that nonpublicly available information, which is not foreign intelligence information . . . shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information of assess its purpose." 50 U.S.C. § 1801(h)(1), (2). While the Court has interpreted the phrase "reasonably designed" in the first of those elements as giving the Government some leeway in light of technical obstacles, even taking that into account amici are concerned that the proposed minimization procedures do not meet the statutory test. Similar concerns arise in assessing these procedures under the Fourth Amendment.

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

[redacted]

b3,7E (per FBI)
b3,7E (per FBI)

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[redacted]

Second, the purposes for which these systems may be used are not defined precisely enough. b3,7E (per FBI) [redacted] b3,7E (per FBI) [redacted] The types of activities involved under these general terms should be spelled out.

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

Third, and relatedly, if it is possible to define more precisely the personnel who will make use of these systems for the authorized purposes, the minimization procedures should do so, and the FBI should continue to work to limit the size of that population, as its June 2017 Raw FISA Report indicates it has already been trying to do.

Fourth, it is not clear to amici what the justification is for the exemption of these systems from the requirements in subsections III.C.1.c and III.C.1.f concerning the masking of U.S.-person identities and the handling of sensitive information. As noted above, such masking is required as a core element of statutorily adequate minimization procedures.

Fifth, the language concerning recordkeeping for these systems should be revised to include the language in subsection III.D.1 requiring not only maintenance of accurate records of persons who have access to the systems, but also regularly auditing those access records to ensure that the systems are being accessed only by authorized personnel. That is essential to ensure that access is properly limited.

b3,7E (per FBI) [redacted]

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Sixth, another way to ensure that access to and use of these systems is being restricted as much as reasonably possible consistent with the need to use them for statutorily legitimate purposes would be to require a statement of reasons to be written and submitted for approved by a senior official before these systems could be used for the purposes authorized.

b3,7E (per FBI)

[redacted]

b3,7E (per FBI)

[redacted]

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

b3,7E (per FBI)

[redacted]

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I, b6,7C Chief Deputy Clerk, FISC, certify that this document is a true and correct copy of the original.
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