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

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

(U) GOVERNMENT'S RESPONSE TO THE BRIEF OF AMICI CURIAE

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Classified by: Deputy Assistant Attorney General, OI, NSD, DOJ
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(b) (1)
(b) (3)-50 USC 3024(i)

~~(S//NF)~~ On March 27, 2018, pursuant to subsection 702(h) of the Foreign Intelligence Surveillance Act of 1978, as amended (hereinafter "FISA" or "the Act"), 50 U.S.C. § 1881a(h), the government filed [redacted] reauthorization certifications in the above-captioned docket numbers, [redacted]

On April 23, 2018, the Foreign Intelligence Surveillance Court (FISC or "the Court") issued an Order appointing amici curiae and setting forth a briefing schedule for amici and the government in relation to those certifications (hereinafter "April 2018 Order"). On May 31, 2018, amici filed a brief addressing the specific issues set forth in that Order (hereinafter "amici's brief" or "Amici Br."). In accordance with the April 2018 Order, the government respectfully submits this response to amici's brief.

I. (U) "ABOUTS COMMUNICATIONS"

A. ~~(S//NF)~~ **The Scope of the Restrictions on "Abouts Communications."** In response to question (a) in the April 2018 Order, as a statutory matter, the restrictions on "abouts communications" apply not only to those forms of acquisition the government discontinued in March 2017, but also any future forms of acquisition that the government may seek to conduct under section 702 of FISA (hereinafter "section 702"), where such activity involves the intentional acquisition of communications that contain a reference to, but are not to or from, a person targeted in accordance with section 702. The government maintains, however, that the statutory framework and legislative history plainly reflect Congress's intent to leave intact the other, ongoing forms of section 702 acquisition that began before and have continued since March 2017. *See* H. Rep. No.115-475, pt. 1, at 19–20 (2017) ("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 [the Reauthorization Act] is intended to codify only current procedures *and is not intended to affect acquisitions currently being conducted under FISA Section 702*.") (emphasis added); S. Rep. No. 115-182, at 4 (2017) (characterizing that the restriction that ultimately became 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"). As discussed below, the totality of the record concerning the government's longstanding and well-established acquisition of the forms of [redacted] data" now at issue in question (b) of the April 2018 Order, coupled with the language of the statute itself, demands this conclusion.

~~(S//NF)~~ Amici reject this conclusion. According to amici, the legislative history of the FISA Amendments Reauthorization Act of 2017 (hereinafter "Reauthorization Act"), Pub. L. No. 115-118, § 103(b)(1)(A), 132 Stat. 3, 10 (2018), lacks "any evidence that legislators had any awareness of the Government's ongoing acquisition" of such data. Amici Br. at 28. While the government's acquisition of such data, and Congress's awareness of it, is not clearly reflected in the legislative history record of the Reauthorization Act itself, this is hardly surprising given that the sole purpose of the abouts limitation was to codify the National Security Agency's (NSA) existing, self-imposed—and publicly known—prohibition on upstream acquisition of "abouts communications," whereas the precise details of other ongoing forms of section 702 collection remain classified and are thus not easily susceptible to public discussion. Moreover, the Reauthorization Act's legislative history is only the most recent addition to a more than ten-year long record reflecting the nature of the government's acquisitions under section 702, its predecessor, the Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (Aug. 15, 2007) (hereinafter "PAA"), and the pre-PAA FISC orders that those two statutes were intended to

replace. As discussed below, this record, the individual portions of which have been provided to Congress at various times over the course of the past decade,[1] clearly reflects the government's longstanding acquisition of the types of [redacted] data now at issue.

~~(S//NF)~~ First, the government's acquisition of [redacted] data was encompassed

[redacted]

[1] (U) Specifically, as noted below, these documents were produced to Congress pursuant to 50 U.S.C. § 1871(c), which requires the government to submit to the House and Senate intelligence and judiciary committees any FISC or Foreign Intelligence Surveillance Court of Review (hereinafter "FISC-R") opinions "that include[]*significant* construction or interpretation" of law, as well as any associated "pleadings applications, or memoranda of law." (emphasis added).

[2] ~~(S//NF)~~ [redacted]

[redacted]

[3] (U) This opinion, as well as other documents concerning this litigation, were provided to Congress on November 20, 2014, in accordance with 50 U.S.C. § 1871(c), and again on June 30, 2015, and July 1, 2015, pursuant to 50 U.S.C. § 1871(a)(4).

[redacted]

(~~S//NF~~) As this Court is aware, prior to the passage of the PAA in 2007, the government frequently sought orders of this Court for authority to conduct electronic surveillance and physical search of email accounts used by non-U.S. persons located overseas. The Court's jurisdiction to issue such orders pursuant to Title I and III of FISA, respectively, as well as the scope of collection permissible under those orders, was the subject of proceedings before the FISC that also contributed to Congress's understanding of this issue. [redacted]

[redacted]

[4] (~~S//NF~~) [redacted]

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

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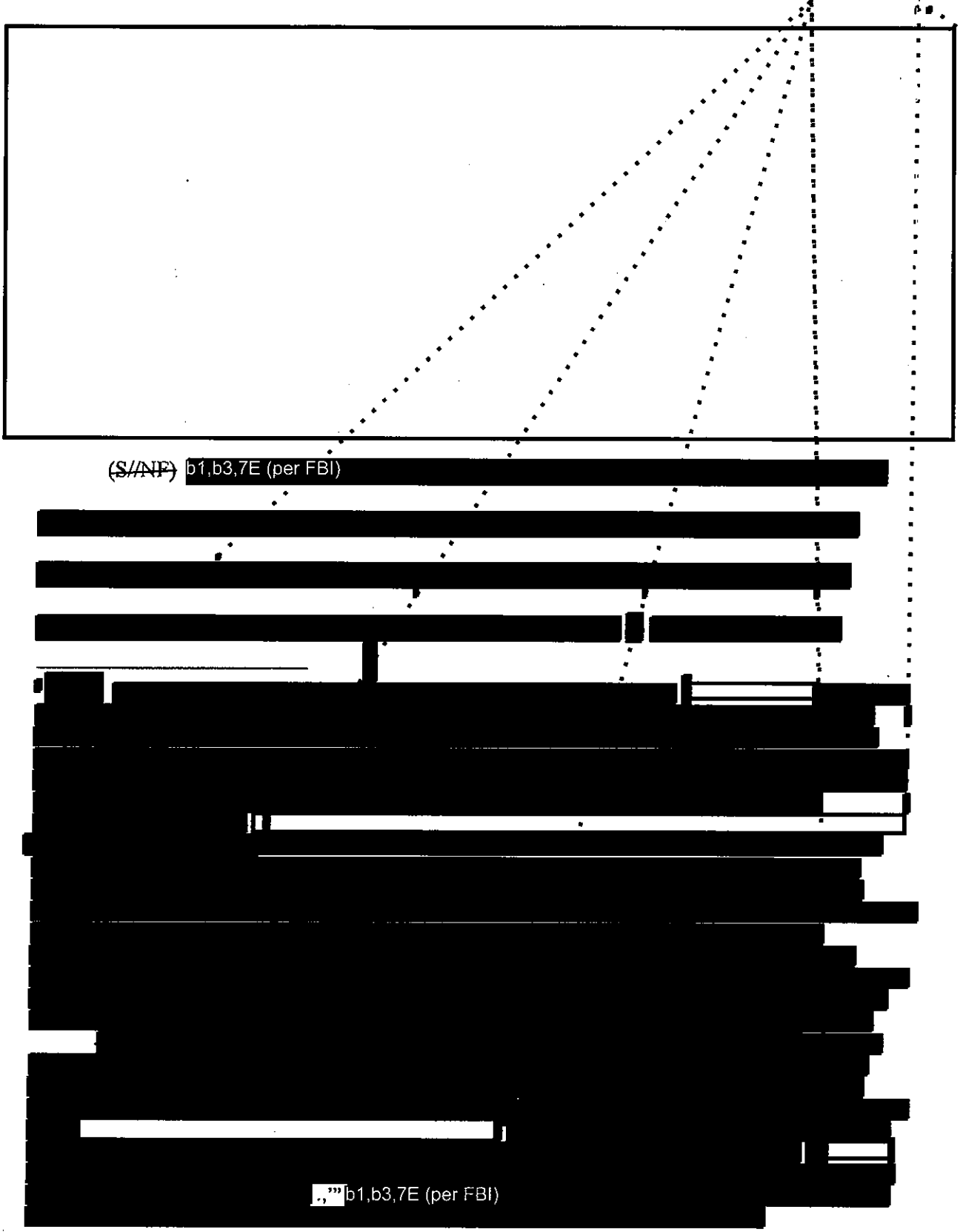
(b)(3)-50 USC 3024(i)



ongoing forms of section 702 acquisition that began before and have continued beyond March 2017.

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

B. ~~(S//NF)~~ None of the Forms of Acquisition to be Conducted Under the 2018 Certifications Involve the Acquisition of "Abouts Communications."[7] As with the issue addressed in question (a), for this question it is important to view the Reauthorization Act's prohibition on "abouts communications" in the broader historical context surrounding the government's longstanding acquisition of the types of [redacted] data now at issue. As explained in the government's response to question (a), the government has been acquiring under FISA [redacted] communications [redacted] *See* Jurisdiction Brief at 15 n.7. Section 702, like the PAA before it, was enacted to provide the government with an alternate means of obtaining the compelled assistance of U.S.-based providers in conducting acquisitions against facilities used by non-U.S. persons located outside the United States that previously could be secured only through probable cause-based FISC orders under Titles I and III of FISA.[8] When viewed in that broader historical perspective, it is clear that interpreting the Reauthorization Act's "abouts communications" prohibition that to remove from section 702's reach data that the government has since at least 2003 been acquiring under FISC orders would frustrate this core purpose of section 702. Interpreting the Reauthorization Act in this way would also do nothing to further the congressional intent behind the Reauthorization Act's "abouts communications" prohibition, which was to restrict a unique type of acquisition previously

[7] ~~(TS//SI//NF)~~ As amici appear to agree with the government's position with respect to [redacted] the discussion that follows focuses solely on [redacted]

[8] (U) *See Privacy and Civil Liberties Oversight Board Report on the Surveillance Program Operated Pursuant to Section 702 of FISA* 16–20 (Jul. 2, 2014) (hereinafter "PCLOB 702 Report").

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

acquired under section 702. [redacted]

~~(S//NF)~~ Consistent with the prohibition and its purpose, the government's procedures limit its acquisition of communications to only those that are to or from a person targeted under section 702. [redacted]

~~(S//NF)~~ Amici appear to believe that the government's view of whether information falls within the scope of the "abouts communications" prohibition turns solely on whether the government deems the information at issue to be a "communication" or "data." That is not the government's view.[9] What makes an acquisition of information permissible under section 702,

[9] ~~(TS//SI//NF)~~ Amici also suggest that the government is being "inconsistent" in how it approaches the acquisition [redacted] Amici Br. at 25. Amici's criticism, however, appears to be grounded in a misunderstanding of the language amici quote from the government's 2008 representations concerning the acquisition of "abouts communications." With respect to [redacted] as the language quoted by amici makes clear, those representations concerned the NSA's upstream collection of [redacted] Amici Br. at 25 (citing Sept. 4, 2008 Op. at 17 n.14) (emphasis added). Thus, such [redacted] is the "abouts communications" in that earlier context. The government believes that [redacted]

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

as amended by the Reauthorization Act, is whether the information is contained in a communication [redacted] *See, e.g.*, NSA Targeting Procedures, attached as Exhibit A in the above-captioned matters, at 2; FBI Targeting Procedures, attached as Exhibit C in the above-captioned matters, at 2.[10] Accordingly, for the reasons described above, the government respectfully suggests that none of the forms of acquisition to be conducted under the b1,b3,7E (per FBI) involve acquisition of "abouts communications."

II. (U) QUERYING AND MINIMIZATION PROCEDURES

A. ~~(S//NF)~~ The Section 702 Querying Procedures Are Consistent With the Fourth Amendment. The relevant differences between the new querying procedures and the querying provisions previously approved by this Court when they were part of the agency minimization

[redacted]

~~(TS//SI//NF)~~ b1,b3,7E (per FBI) [redacted]

procedures reflect either: 1) greater specificity about certain limited exceptions; or 2) increased protections for U.S. persons as required by the Reauthorization Act. Importantly, the querying procedures incorporate the same query standard that this Court has previously approved as constitutionally reasonable—*i.e.*, the covered agencies may query section 702 information only if such queries are reasonably likely to retrieve foreign intelligence information or, in the case of the FBI only, evidence of a crime. Like the querying provisions previously approved by the Court, the querying procedures submitted with the 2018 Certifications are consistent with the requirements of FISA and the Fourth Amendment.[11]

~~(S//NF)~~ **General Section 702 Fourth Amendment Framework.** This Court has recognized—and amici do not dispute—that the Fourth Amendment's warrant and probable cause requirements do not apply to foreign intelligence collection under section 702, which targets non-U.S. persons outside the United States.[12] Furthermore, several courts—including this Court and the FISC-R—have confirmed that section 702 acquisitions fall within the foreign intelligence exception to the warrant requirement.[13] Nevertheless, because the communications of U.S. persons may be incidentally acquired under section 702, the program as a whole must

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

[11] ~~(S//NF)~~ Because in addressing the Court's question amici determined that "sections VI, VIII, and IX of the Querying Procedures," which apply to the NSA, Central Intelligence Agency (CIA), and National Counterterrorism Center (NCTC), respectively, "are reasonable under the Fourth Amendment," Amici Br. at 72, the government does not separately address those provisions in this filing.

b1,b3,7E (per FBI)

[redacted]

[13] ~~(S//NF)~~ *See* Aug. 26, 2014 Op. at 38; *In re Directives*, 551 F.3d at 1012; *see also [Caption Redacted]*, 2011 WL 10945618, at *24 (FISA Ct. Oct. 3, 2011) ("The [FISC] has previously concluded that the acquisition of foreign intelligence information pursuant to Section 702 falls within the 'foreign intelligence exception' to the warrant requirement of the Fourth Amendment."); *United States v. Mohamud*, 2014 WL 2866749, at *18 (D. Or. June 24, 2014) ("[T]he foreign intelligence exception applies" to section 702 collection and therefore "no warrant is required.").

comport with the reasonableness requirement of the Fourth Amendment.[14] The querying procedures, therefore, should not be evaluated in isolation but rather as part of the overall section 702 program's reasonableness. *See* 50 U.S.C. § 1881a(f)(1)(A).

~~(S//NF)~~ The foreign intelligence exception is grounded in the "special needs" doctrine, whereby "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).[15] It is clear that the government's programmatic purpose in obtaining section 702 information goes beyond routine law enforcement, and, as amici recognize, "[t]he government's national security interest in conducting [section 702] acquisitions 'is of the highest order of magnitude.'" Sept. 4, 2008 Op. at 37 (quoting *In re Directives*, 551 F.3d at 1012); *see also* Amici Br. at 46 (noting government's "very significant interest").[16]

~~(S//NF)~~ Nevertheless, the government recognizes the important privacy interests at stake and, consistent with Congress's efforts, has implemented multiple layers of protection for U.S. persons whose communications might be incidentally acquired, including at the acquisition stage through the targeting procedures and through the minimization procedures, which "nearly replicat[e] the protection afforded [U.S.] persons in cases involving search or surveillance

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[14] ~~(S//NF)~~ Nov. 6, 2015 Op. at 40 (observing that "the [section 702] program as a whole . . . [must] be reasonable under the Fourth Amendment").

[15] (U) In applying the doctrine to foreign intelligence collection, courts have reasoned that the "programmatic purpose" of obtaining foreign intelligence information goes "beyond any garden-variety law enforcement objective," and that "requiring a warrant would hinder the government's ability to collect time-sensitive information and, thus, would impede the vital national security interests that are at stake." *In re Directives*, 551 F.3d at 1011; *see also United States v. Bin Laden*, 126 F. Supp. 2d 264, 273 (S.D.N.Y. 2000). In this context, courts "emplo[y] a balancing test that weigh[s] the intrusion on the individual's interest in privacy against the 'special needs' that suppor[t] the program." *Ferguson* v. *City of Charleston*, 532 U.S. 67, 78 (2001). In doing so, courts must consider "the nature of the government intrusion and how the intrusion is implemented. The more important the government interest, the greater the intrusion that may be constitutionally tolerated." *In re Directives*, 551 F.3d at 1012.

[16] (U) On the other side of the balance, several courts have recognized that individuals have a diminished expectation of privacy in communications—including emails—delivered to third parties. *See United States v. Mohamud*, 843 F.3d 420, 442 (9th Cir. 2016) (U.S. person's expectation of privacy was "diminished" in email incidentally collected under section 702 that was sent to third party).

intentionally targeting U.S. persons," Sept. 4, 2008 Op. at 37, such as by imposing strict limitations on access and dissemination.[17] *See In re Directives*, 551 F.3d at 1016 (in analyzing overall PAA framework, noting that "effective minimization procedures are in place").[18] And, as discussed herein, the querying procedures impose additional requirements that provide protection for information of or concerning U.S. persons.[19]

~~(S//NF)~~ **The Querying Procedures.** Amici appear to contend that because Congress imposed a requirement to implement querying procedures, queries of section 702 information constitute a separate Fourth Amendment event and, as a result, certain aspects of the querying procedures "lack sufficient privacy safeguards and are therefore unreasonable under the Fourth Amendment." Amici Br. at 45. On this basis, amici claim that three exemptions in the querying procedures and the provisions relating to the FBI's use of U.S. person query terms render the querying procedures unreasonable. Amici's argument is based on two premises that undermine their specific contentions.

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[17] ~~(S//NF)~~ *See* Nov. 6, 2015 Op. at 42 ("With respect to the intrusiveness of the querying process, the FBI Minimization Procedures impose substantial restrictions on the use and dissemination of information derived from queries").

[18] ~~(S//NF)~~ *See also Muhtorov*, 187 F. Supp. 3d 1240, 1256 (D. Colo. 2015) ("Relevant to balancing of [U.S. persons'] privacy interest against the government's interest in detecting and preventing acts of terrorism, is the fact that the government's use of [section 702]-acquired communications is carefully controlled under FISA.").

[19] ~~(S//NF)~~ Moreover, this Court has recognized that the incidental collection of communications involving non-targeted U.S. persons does not undermine the reasonableness of the section 702 program. *See* Nov. 6, 2015 Op. at 36–41 (declining to depart from reasonableness framework, despite arguments about incidental collection under section 702); *see also Mohamud*, 843 F.3d at 440-41 (holding that incidental collection of U.S. person communications with a foreign target pursuant to section 702 is "lawful," even with the potential for incidental collection of large numbers of U.S. person communications); *In re Directives*, 551 F.3d at 1015. Moreover, as discussed further below, Congress was well aware of the incidental collection of U.S. person communications when it reauthorized section 702 in 2012 and again in 2017, and in both cases, Congress rejected efforts to impose the types of limits suggested by amici on the government's ability to collect or query such communications. *See* 158 Cong. Rec. S8413 (daily ed. Dec. 27, 2012) (statement of Sen. Saxby Chambliss) (noting in connection with 2012 reauthorization that, when Congress enacted section 702, it "understood that this incidental collection would likely provide the crucial lead information necessary to thwart terrorists like the 9/11 hijackers who trained and launched their attacks from within the United States"); PCLOB 702 Report at 82–83 ("The incidental collection of communications between a U.S. person and a non-U.S. person located outside the United States, as well as communications of non-U.S. persons outside the United States that may contain information about U.S. persons, was clearly contemplated by Congress at the time of drafting" section 702.).

~~(S//NF)~~ First, amici contend that analyzing queries as separate Fourth Amendment events would bring this Court's consideration of the government's query practices in line with Fourth Amendment law "as it has evolved in the digital age." Amici Br. at 57. To the contrary, the Court's prior holdings regarding queries were correctly grounded in relevant Fourth Amendment doctrine and remain so today. Indeed, following the query-related FISC litigation in 2015, other courts that have examined the query issue have supported this Court's conclusion that the section 702 querying regime "strike[s] a reasonable balance between the privacy interests of [U.S. persons] . . . and the government's national security interests." Nov. 6, 2015 Op. at 44. Courts that have considered the issue have held that "subsequent querying of [section] 702 collection, even if U.S. person identifiers are used, is not a separate search and does not make [section] 702 surveillance unreasonable under the Fourth Amendment." *Mohamud*, 2014 WL 2866749, at *26 (D. Or. 2014); *see also United States v. Muhtorov*, 187 F. Supp. 3d 1240, 1256 (D. Colo. 2015) (holding in section 702 context that "[a]ccessing [redacted] records in a database legitimately acquired is not a search in the context of the Fourth Amendment because there is no reasonable expectation of privacy in that information"); *United States v. Hasbajrami*, 2016 WL 1029500, at *12 n.20 (E.D.N.Y Mar. 8, 2016) ("That the government is able to query information . . . [in] lawfully-obtained communications . . . does not render the [section 702] minimization procedures inadequate.").

~~(S//NF)~~ As the government explained in its briefing on the b1,b [redacted] certifications, once communications are lawfully obtained pursuant to section 702's targeting procedures, agency personnel are permitted to review those communications to assess whether they reflect foreign intelligence or, in the case of the FBI, evidence of a crime. *See In re* [redacted] *Docket Nos.* [redacted]

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

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b1,b3,7E (per FBI) [redacted] (The government "must review information lawfully collected to decide whether to retain or disseminate it under the minimization procedures."). Thus, incidentally collected U.S.-person information is, by necessity, already subject to review by the government. This review may be accomplished on a communication-by-communication basis or through the use of tailored queries, which allow agency personnel to more efficiently identify communications of interest while filtering out irrelevant communications that may contain non-pertinent information of or concerning U.S. persons.[20] The government submits—and courts have agreed—that "[i]t would be perverse to authorize the unrestricted review of lawfully collected information but then [] restrict the targeted review of the same information in response to tailored inquires." *Hasbajrami*, 2016 WL 1029500, at *12 n.20.

~~(S//NF)~~ The handful of cases cited by amici, Amici Br. at 57–59, do not support amici's argument that section 702 queries are independent Fourth Amendment events. As an initial matter, each of the cases cited by amici predates the holdings by this Court—and by the district courts in *Mohamud*, *Muhtorov*, and *Hasbajrami*—that section 702 queries do not constitute separate Fourth Amendment events, and thus the cases fail to demonstrate any relevant change in applicable law. Moreover, most of the cases arise in the distinct "private search" context, in which a government search is considered a Fourth Amendment event requiring a warrant only if it exceeds the scope of a previous search conducted by a private party.[21] In such cases, the

[20] ~~(S//NF)~~ By filtering out irrelevant communications that need not be reviewed by an agency, queries actually afford greater privacy protections by eliminating the need to review every single communication.

[21] ~~(S//NF)~~ *Walter v. United States*, 447 U.S. 649, 657 (1980) ("[T]he government may not exceed the scope of the private search unless it has the right to make an independent search."); *United States v. Runyan*, 275 F.3d 449, 458 (5th Cir. 2001) ("[A] police view subsequent to a search conducted by private citizens does not constitute a 'search'

government "comes into possession of an *object* lawfully" but lacks the authority "to inspect or review the object's *contents*" absent further judicial authorization or exigency. Amici Br. at 58 (emphases added). As stressed in the central case cited by amici, "it is settled that [the government's] authority to possess a package is distinct from [the] authority to examine its contents." *Walter v. United States*, 447 U.S. 649, 654 (1980) (cited in Amici Br. at 58). Thus, the private search context is entirely distinct from the section 702 program at issue. Here, the government *has* the lawful authority, pursuant to judicially approved targeting and minimization procedures, to *collect and review communications* to assess whether the *information contained therein* (*i.e.*, "contents") should be retained or disseminated as reflecting foreign intelligence information or evidence of a crime. This crucial distinction applies with equal force to the Supreme Court's decision in *Riley v. California*, which held that the government may not search the contents of a cell phone obtained as incident to an arrest without prior judicial approval. 134 S.Ct. 2473, 2493 (2014) (cited in Amici Br. at 57). Unlike the government in *Riley* and in the other cases relied on by amici,[22] the government here has judicial approval to obtain and review information. As such, and as was the case in 2015, the above cases do not undermine the Court's conclusion that section 702 queries are not independent Fourth Amendment events.[23]

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within the meaning of the Fourth Amendment so long as the view is confined to the scope and product of the initial search."); *United States v. Bowman*, 215 F.3d 951, 963 (9th Cir. 2000) ("[T]he agent's search is permissible, and constitutional, to the extent that it mimicked the private search."); *United States v. Mulder*, 808 F.2d 1346, 1348 (9th Cir. 1987) (The police's conduct is evaluated "to determine whether [it] exceeded the scope of the private search.") (all cited in Amici Br. at 58).

[22] ~~(S//NF)~~ *See Walter*, 447 U.S. at 654 (warrant required to screen film reels turned over to FBI); *Mulder*, 808 F.2d at 1348 (warrant required for chemical testing of suspected drug tablets); *Runyan*, 275 F.3d at 462 (warrant required to review contents of computer disks).

[23] ~~(S//NF)~~ Amici also rely on Justice Sotomayor's concurrence in *United States v. Jones*, which similarly predates this Court's 2015 decision. Although Justice Sotomayor urged reconsideration of "the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties," 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring), the *Jones* majority chose not to undertake this effort, and instead rested its decision on a trespass theory that has no bearing on the issues before this Court, *id.* at 404–11.

~~(S//NF)~~ Second, amici contend that this Court must reverse its previous holdings on queries based on Congress's mandate in the Reauthorization Act "that the intelligence community adopt a separate set of querying procedures that is constitutional in its own right and that places particular restrictions on querying by the FBI." Amici Br. at 48. However, Congress expressly considered and *rejected* amendments that would have required additional restrictions on querying by the FBI, such as a requirement to obtain prior judicial approval before conducting U.S. person queries, *see* Amici Br. at 49–50; S. Rep. No. 115-182 at 7–10, which indicates that Congress declined to embrace amici's position that queries are "independent Fourth Amendment event[s] warranting judicial scrutiny." Amici Br. at 57. This understanding is directly supported by the Act's legislative history. As expressed in the report by the House Permanent Select Committee on Intelligence ("HPSCI"), Congress's actions in mandating the querying procedures and adopting a narrow statutory warrant requirement "*do not reflect the Committee's disagreement with past court opinions, or a view that lawfully collected FISA Section 702 data should be subject to a different Fourth Amendment analysis than other lawfully collected data.*" H.R. Rep. No. 115-475 at 19 (emphasis added).[24] Indeed, the HPSCI report stresses the committee's belief that "*the procedures and processes currently in place satisfy the Fourth Amendment,*" and notes that the IC should adopt separate querying procedures primarily to "*documen[t] their current policies* and practices related to . . . querying." *Id.* at 17–18 (emphases added). Here, amici ask the Court to engage in a legislative function, displacing the

[24] (U) *See also* 164 Cong. Rec. E81 (Jan. 19, 2018) (statement of Rep. Devin Nunes) (in discussing the court order requirement to access the contents of section 702-acquired information as a result of a U.S. person query conducted solely for evidence of a crime based on a predicated investigation, the Chairman of HPSCI noted that "the order requirement should not be construed to mean—and it is not the Committee's intent—that law enforcement access to lawfully acquired information constitutes a separate 'search' under the Fourth Amendment . . . even if such access was pursuant to a query using a U.S. person identifier . . .[T]he agreement to institute this limited order requirement is intended as a legislative accommodation to provide additional statutory protections for U.S. person information that is incidentally collected under Section 702.").

choices Congress has made in the comprehensive legislative scheme at issue. *Cf. Mohamud*, 2014 WL 2866749, at *26 ("[J]ust because a practice might better protect Americans' privacy rights does not mean the Fourth Amendment requires the practice."). If amici believe that additional querying restrictions beyond those mandated by the Fourth Amendment and the Reauthorization Act are warranted, the legislative process is the appropriate mechanism by which to advocate for them.

B. (~~S//NF~~) The Exemptions in Section III of the Querying Procedures. As discussed above, this Court has determined that the section 702 program in its entirety must "strike a reasonable balance between the privacy interests of United States persons and persons in the United States, on the one hand, and the government's national security interests, on the other." Nov. 6, 2015 Op. at 44. "If the protections that are in place for individual privacy interests are sufficient in light of the governmental interests at stake, the constitutional scales will tilt in favor of upholding the government's actions. If, however, the protections are insufficient to alleviate the risks of government error and abuse, the scales will tip toward a finding of unconstitutionality." *In re Directives*, 551 F. 3d at 1012; *see also id.* at 1016 (noting surveillance is constitutionally reasonable where, *inter alia*, "the risks of error and abuse are within acceptable limits and effective minimization procedures are in place"); *Mohamud*, 843 F.3d at 443 ("An important component of the reasonableness inquiry is whether the FISC-approved targeting and minimization measures sufficiently protect the privacy interests of U.S. persons."). Because this Court must assess the "combined effect" of the framework formed by the agencies' targeting, minimization, and querying procedures, Nov. 6, 2015 Op. at 39, each Section III exemption need not be demonstrably privacy enhancing when considered in isolation in order for the procedures as a whole to be reasonable.

~~(S//NF)~~ When viewed in this light, the Section III exemptions clearly strike a reasonable balance between important government interests, on the one hand, and the privacy interests of U.S. persons on the other. Because amici concluded the majority of Section III exemptions are reasonable, *see* Amici Br. at 60–61, the government will focus on the three exceptions that amici contend are overbroad: 1) lawful training functions; 2) certain lawful oversight functions; and 3) compliance with a specific congressional mandate.[25] As an initial matter, as described in footnote 25, there are existing consultation and oversight regimes that are designed to prevent any potential misuse of these provisions.

~~(S//NF)~~ The Exemption for Lawful Training. Queries conducted for training purposes promote both the government interest in ensuring an effective workforce while simultaneously protecting the interests of U.S. persons by reducing the risk of non-compliant use or disclosure of sensitive data.[26] For instance, this exemption permits covered agencies to demonstrate to

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[25] ~~(S//NF)~~ Amici initially argue that the lawful oversight functions exemption in both the querying and minimization procedures is unreasonable because the covered agencies could avoid FISC review of oversight activities "by listing more [than the six] enumerated 'purposes' of 'lawful oversight'" in the procedures and that "the covered agencies may avoid FISC review to the extent those enumerated 'purposes' may be interpreted broadly." Amici Br. at 64 & n.37. Additions to the enumerated list could not be done unilaterally by the government and would require amendments to the querying or minimization procedures, which would be subject to review by the Court. The currently applicable version of this exception in each agency's minimization procedures does not enumerate *any* purposes; the government decided to restructure this provision precisely to increase transparency and inform the Court which specific types of activities the government believes fit within this exception. By listing such purposes in the proposed querying and minimization procedures, the government has narrowed the application of the currently applicable procedures to particular activities that are lawful oversight functions of agency personnel or systems. If a proposed activity does not fit within an enumerated example, the government's intended use of the provision will have to be reported to the Court. For example, should one of the covered agencies intend to rely on the general provision regarding lawful oversight functions in support of congressional oversight activities that do not otherwise fall within the subcategory regarding a specific congressional mandate, to the extent it implicates information acquired pursuant to section 702, the covered agency must first consult with the Department of Justice's National Security Division (NSD) and Office of the Director of National Intelligence (ODNI), and NSD would then promptly report the deviation to this Court. *Querying Procedures*, Section III at 2.

[26] ~~(S//NF)~~ *See, e.g., Quarterly Report to the Foreign Intelligence Surveillance Court Concerning Compliance Matters Under Section 702 of the Foreign Intelligence Surveillance Act* at 49 (Mar. 2014) (describing incident in which NSA analyst conducted overly-broad query while trying to familiarize herself with the query programs she had seen as part of NSA's training program), b1,b3,7E (per FBI) [redacted]

employees how to properly construct and document[27] a query. This Court has previously acknowledged that training reduces the likelihood of non-compliance with the section 702 minimization procedures. *See, e.g., In re* [redacted] Nos. [redacted] B3, 7E per FBI [redacted] b1,b3,7E (per FBI) b1,b3,7E (per FBI) [redacted] (noting that NSA had redoubled training on querying requirements after discovering non-compliant queries, and that steps taken to educate analysts on proper use of query tool had, in conjunction with other remedial efforts, brought the NSA minimization procedures in line with Fourth Amendment).[28]

~~(S//NF)~~ Amici argue that this exemption is overbroad because it does not specify what activities constitute "lawful training functions." This argument rests on two observations. First, amici state that the querying procedures do not prescribe, among other things, "what [training] should entail [or] how [training] must be designed." Amici Br. at 61–63. Amici's argument implicates policy decisions made by the agencies with relevant experience, and this Court has never required that the applicable targeting or minimization procedures specify the exact protocols for training personnel. Indeed, mandating particular training protocols in the querying procedures would deprive covered agencies of the flexibility to design training to their specific needs, tools, and employees, and hamper their ability to revise training protocols continuously in response to feedback and evolving mission demands.

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b1,b3,7E (per FBI) [redacted]).

[27] ~~(S//NF)~~ Prior sets of section 702 minimization procedures and the proposed querying procedures contain certain documentation requirements for queries of raw section 702 information.

[28] (U) *See also, e.g.*, 17th *Semiannual Assessment of Compliance with Procedures and Guidelines Issued Pursuant to Section 702 of the Foreign Intelligence Surveillance Act, Submitted by the Attorney General and the Director of National Intelligence* (Jan. 2018) at 28 (finding that training, in addition to other factors, has contributed to the low compliance incident rate for the section 702 program).

~~(S//NF)~~ Second, amici argue that the exemption for lawful training functions is overbroad because it permits the covered agencies to conduct U.S. person queries for instructional purposes. *See id.* at 61-62. In most cases, the covered agencies expect to use b1,b [redacted] (per FBI) b1,b3,7E (per FBI) [redacted] b1,b3,7E (per FBI) Amici also incorrectly assert that the querying procedures "lack . . . any clear oversight mechanism . . . that apply [sic] to queries for training purposes." *Id.* To the contrary, NSD conducts oversight of queries conducted by FBI personnel during field office oversight reviews. That oversight includes review of queries run for training purposes in systems containing raw FISA information. In fact, the compliance incident reported to the Court regarding FBI's queries for training purposes was discovered by NSD during its query audits.

~~(S//NF)~~ The Exemption for Lawful Oversight Functions. Internal agency oversight enhances compliance with the covered agencies' targeting and minimization procedures. This Court has concluded that agency procedures were reasonable under the Fourth Amendment, despite instances of non-compliance, "in large measure [due to] the extensive oversight conducted within the implementing agencies" and by NSD and ODNI. April 26, 2017 Op. at 67; *see also id.* at 67-68 ("Due to [oversight] efforts, it appears that compliance issues are generally identified and remedied in a timely and appropriate fashion."). As with the training exemption, there is a strong government interest in supervising personnel to mitigate the risk of non-compliance by government employees accessing raw section 702 information, and the narrowly tailored lawful oversight functions exemptions are reasonably designed to do just that.

~~(S//NF)~~ The subcategory permitting queries for "investigations of potential [redacted] is not overbroad.[29] Federal courts examining Fourth Amendment claims have long recognized the governmental interest in ensuring the efficient and proper operation of the workplace. *Cf. City of Ontario v. Quon*, 560 U.S. 746, 764–65 (2010). Further, such investigations are integral to identifying potential error and abuse. A covered agency's obligation to ensure a secure, functional work environment is heightened due to the sensitive nature of the information handled by these agencies.[30] In addition, amici's argument that the [redacted] subcategory contains a loophole undermining FISA Title I or Title III requirements, *see* Amici Br. at 66–67, is misplaced. [redacted]

[redacted]

[29] ~~(S//NF)~~ As an initial matter, the subcategory of queries at issue here (*i.e.*, queries in support of agency investigations of potential [redacted] that otherwise would not meet the query standards detailed for each agency) are not intended to be conducted in the agencies' main raw repositories containing section 702 information. Rather, the intent of the provision is to permit, for example, queries of information compiled from [redacted] (which might incidentally include raw section 702 information) in the course of an investigation without a foreign-intelligence nexus, such as one involving suspected [redacted] This provision is particularly important for NSA, CIA, and NCTC, none of which are permitted to conduct queries for evidence of a crime.

[30] ~~(S//NF)~~ As the Government acknowledged in its cover filing accompanying the 2018 certifications, the covered agencies to varying degrees engage in insider threat monitoring activities that may or may not implicate the section 702 querying and minimization procedures before the court. Indeed, Executive Order 13587, *Structural Reforms to Improve the Security of Classified Networks and the Responsible Sharing and Safeguarding of Classified Information* (Oct. 7, 2011), and the National Insider Threat Policy and Minimum Standards for Executive Branch Insider Threat Programs (Nov. 21, 2012) issued pursuant to that Executive Order, require, *inter alia*, that agencies establish an integrated capability to monitor and audit information for insider threat detection and mitigation, including monitoring user activity on classified computer networks controlled by the federal government. As noted in the cover filing, the government continues to assess these activities. 2018 Cover Filing at 11. As such, the government does not interpret this subcategory permitting queries for "investigations of potential [redacted] to include all of the covered agencies insider threat monitoring activities. Accordingly, should one of the covered agencies intend to rely on the general provision regarding lawful oversight functions to engage in [redacted] to the extent it implicates information acquired pursuant to section 702, the covered agency must first consult with NSD and ODNI, and NSD would then promptly report the deviation to this Court. *Querying Procedures*, Section III at 2 (2018). In addition, the querying procedures, including the exemptions as currently written, would not permit bulk, suspicionless queries of raw section 702 information in the agency repositories where raw section 702 data is stored using identifiers of individuals who have access to the agency and its facilities or systems, where the agency had no reasonable basis to expect that the identifiers queried would retrieve foreign-intelligence information, or in the case of FBI, evidence of a crime. *See Notice of a Compliance Incident Regarding the [redacted] Querying of Raw FISA-Acquired Information, Including Information Acquired Pursuant to Section 702 of FISA*, filed November 22, 2017.

[redacted]

~~(S//NF)~~ Amici also argue that excluding queries for "authorized work conducted in systems used solely for audits and oversight" could be interpreted to extend to oversight by members of Congress. *Id.* at 65. This argument misinterprets the language of the provision in Section III of the querying procedures, which refers to "a covered agency's performance of lawful oversight functions of *its* personnel or systems, which includes queries performed . . . in support of authorized work conducted in systems used solely for audits and oversight." All of the categories enumerated in this sentence in Section III describe activities of the covered agencies' internal oversight. b1,b3,7E (per FBI) [redacted] b1,b3,7E (per FBI) [redacted] This provision thus narrowly tailors the exception for internal agency use only.

~~(TS//SI//NF)~~ The Exemption for Specific Congressional Mandates. The exemption for queries conducted in response to a specific congressional mandate is reasonable, given the

[31] ~~(S//NF)~~ b1,b3,7E (per FBI) [redacted] b1,b3,7E (per FBI) [redacted]

government's long-standing interpretation of the phrase "specific congressional mandate." As amici acknowledge, this Court considered the same language in NSA and CIA's section 702 minimization procedures in April 2017, and concluded that the language as interpreted by the Court and understood by the government is reasonable. *See* Amici Br. at 67–68 (citing April 26, 2017 Op. at 52–53 and Nov. 6, 2015 Op. at 21–22). In its April 26, 2017 Opinion, the Court discussed its prior decision to "appl[y] an interpretive gloss . . . to the effect that such provisions would be invoked sparingly and applied only to directives specifically calling for the information at issue, and not to Executive Branch orders or directives." April 26, 2017 Opinion at 53. After acknowledging that interpretive gloss, the Court declined to narrow an exemption in the minimization procedures for departures "necessary to comply with a specific congressional mandate . . . ." *Id.* at 54. The government understands that those same limitations apply to the querying procedures.[32] In addition, the record reflects that the government has not used this provision to evade "the protections of the procedures" despite Amici's suggestion otherwise, *Amici Br.* at 67, and, instead, has narrowly interpreted it. Indeed, the government has not utilized this exemption since it appeared in agency minimization procedures. In fact, in response to a congressional request that required NSA to query raw Section 702 data to determine if it could calculate the number of incidentally acquired U.S. person communications, the government consulted with the FISC on whether this request fell within the congressional mandate exception. As a result of that consultation, NSD notified the Court of NSA's use of the lawful oversight

[32] ~~(S//NF)~~ Amici also argue that this exemption is superfluous because queries in response to congressional mandates could be justified under the first exemption, permitting covered agencies to query when "providing the assistance necessary" for "lawful oversight functions." *See* Amici Br. at 68. Amici misread the first exemption, which permits queries only in assistance of "these entities," meaning queries to assist NSD, ODNI, and the Offices of the Inspectors General to perform their lawful oversight functions. In addition, as noted above, the exemptions enumerated for the lawful oversight functions of the covered agencies would not include responding to congressional requests, and any query conducted in support of a covered agency's lawful oversight functions that was not enumerated would need to be reported to the Court.

exception in its minimization procedures to respond to this congressional request. As a result, despite Amici's suggestion that this provision hypothetically could be used to "evade…review by the FISC," *Amici Br.* at 67, consistent with past practice, covered agencies intend to promptly report action in reliance on this provision, including a written justification, to the Court.

C. ~~(S//NF)~~ b1,b3,7E (per FBI) [redacted]

[redacted]

b1,b3,7E (per FBI)

[redacted]

[34] (U) b3and7E (per FBI)

[redacted]).

October 2017, FBI Director Christopher Wray reported that FBI received section 702 communications for approximately 4.3% of the targets under section 702 coverage. Remarks by FBI Director to The Heritage Foundation, *Defending the Value of FISA Section 702* (Oct. 13, 2017), *available at* https://www.fbi.gov/news/speeches/defending-the-value-of-fisa-section-702. In addition, as currently written, FBI's relevant Attorney General Guidelines only allow FBI to acquire foreign intelligence information pursuant to Title VII of FISA in furtherance of an ongoing full investigation. *Attorney General's Guidelines for Domestic Operations*, Parts II.B.4.b.ii and V.A.13 (2008). Furthermore, only appropriately trained and designated FBI personnel, with a need-to-know such information for their job functions, may view the results of queries conducted in systems containing section 702 information to "assess whether [the] information reasonably appears to be foreign intelligence information . . . [or] evidence of a crime." Querying Procedures, Section III, at 6. In the Reauthorization Act, Congress chose to extend additional protections in this context by imposing a narrowly tailored requirement that the FBI obtain a court order from the FISC post-query but before accessing the contents of communications returned as the result of a U.S. person query that was 1) not designed to find and extract foreign intelligence information; and 2) made in connection with a predicated criminal investigation. 50 U.S.C. § 1881a(f)(2)(A). Relatedly, Congress adopted separate limitations regarding the use of U.S. person information obtained through section 702 acquisitions in a criminal proceeding. 50 U.S.C. § 1881e(a)(2). As discussed above, Congress adopted this change as a matter of policy, and not because they believed it was required by the Fourth Amendment. *See supra,* H.R. Rep. No. 115-475 at 19. The government submits that these restrictions, when combined with the substantial protections for U.S. persons in the section 702 targeting, minimization, and querying procedures, are more than sufficient to meet the

requirements of the Fourth Amendment. As a result, the further restrictions proposed by amici are unnecessary and, in fact, unreasonable, considering the compelling government interests at stake.

D. ~~(S//NF)~~ The Record-Keeping Provisions of the Querying Procedures Are Consistent With the Requirements of § 702(f)(1)(B) and the Fourth Amendment.

~~(S//NF)~~ **FBI Records of Queries Need Not Distinguish Between U.S. and Non-U.S. Person Query Terms.** The Act, as amended, provides that the querying procedures "shall . . . include a technical procedure whereby a record is kept of each United States person query term used for a query." 50 U.S.C. § 1881a(f)(1)(B). For the reasons specified in the government's cover filing accompanying the b3, b7E per FBI at issue, *see pp.* 26-31, by keeping records of all queries, FBI is complying with the Act. Amici's contrary conclusion misinterprets and/or ignores 1) the plain text of the Reauthorization Act's record requirement, and 2) other parts of the FISA statute and Reauthorization Act that confirm the government's reading. As detailed below, consideration of the Act as a whole sheds light on Congress's intent with respect to the record-keeping requirement for the querying procedures adopted pursuant to § 702(f)(1) and supports the government's position that by keeping records of all queries, FBI is complying with the Act.[36]

(U) **The Plain Language of the Reauthorization Act Supports FBI's Current Record-Keeping Practice.** Section 702(f)(1)(B) plainly imposes a requirement that "a record [be] kept of each U.S. person query term," and does not include any additional language

[36] ~~(S//NF)~~ As noted in their brief, and pursuant to the April 2018 Order at (d)(iii), amici agreed that the provision in the querying procedures allowing agency personnel to keep a written rather than electronic record of U.S. person queries is reasonable. Specifically, amici state, "[w]e are also satisfied that when circumstances demand, the creation of written records as opposed to electronic records is in keeping with the statute and constitutionally reasonable." Amici Br. at 78. As a result, the government has not further addressed this issue.

specifying that U.S. person query terms must be retained separate and apart from other queries. *See Caminetti v. United States*, 242 U.S. 470, 485 (1917) (stating that courts must first look to the language of the statute to understand its meaning). FBI intends to satisfy this requirement by continuing its longstanding practice of keeping records of all queries, which includes "each U.S. person query," of raw section 702-acquired information. The FBI's implementation of this provision is thus consistent with the plain reading and common sense understanding of the statutory text.

(U) **Other Parts of FISA and the Reauthorization Act Support the Government's Reading.** There is ample other evidence in the statutory text to confirm the government's position – specifically, certain provisions codified as a result of the 2015 USA FREEDOM Act and maintained today, and the Reauthorization Act's section 112. First, as part of the 2015 USA FREEDOM Act, Pub. L. 114-23, 129 Stat. 268 (2015), Congress required for the first time that the Director of National Intelligence publicly report on an annual basis certain statistics, including, for information acquired pursuant to section 702, 1) the number of search terms concerning a known U.S. person used to retrieve unminimized contents, and 2) the number of queries concerning a known U.S. person of unminimized non-contents information. *See* 50 U.S.C. § 1873(b)(2)(B), (C). However, Congress explicitly provided that those reporting requirements "shall not apply to information or records held by, or queries conducted by, the Federal Bureau of Investigation," *id.* at § 1873(d)(2)(A), explaining that "[t]he FBI is exempted from reporting requirements that the agency has indicated it *lacks the capacity to provide*." H.R. Rep. No. 114-109, pt. 1, at 26 (2015). As such, Congress clearly understood FBI's limitations with respect to distinguishing between the types of queries. Despite enacting further amendments to § 1873's reporting requirements in the Reauthorization Act, including adding

additional reporting requirements for the FBI (*see, e.g.*, § 1873(b)(2)(D)) and re-numbering the sections in the FBI exemption paragraph in § 1873(d)(2), Congress consciously left intact FBI's exemption from the above reporting requirements. It would make no sense for Congress to leave those exemptions intact if, as amici claim, "[t]he law's directive was to maintain U.S. person query term records [as] a new 'reform' not a codification of existing practice." Amici Br. at 80.

(U) Second, Congress continued to recognize the FBI's existing practice as applied to section 702 and the limitations of FBI systems' technical record-keeping functions by including section 112 of the Reauthorization Act, which requires a Justice Department Inspector General (IG) report to include, *inter alia*, a discussion of "[a]ny impediments, including operational, technical, or policy impediments for the [FBI] to count . . . the total number of . . . queries [of section 702 information] that used known United States person identifiers." §112(b)(8)(B). If, as amici claim, the Reauthorization Act newly mandates that FBI separately track U.S. person query terms, a new statutory directive requiring an IG report discussing "impediments, including operational, technical, or policy impediments" to do that very thing would be pointless.

(U) The plain text of the statute, particularly when combined with FISA's existing transparency provisions and the upcoming IG report requirements, supports the government's position that the FBI's current record-keeping practice meets the requirements of the Reauthorization Act.

~~(S//NF)~~ **FBI Need Not Document a Statement of Facts for U.S. Person Queries.** Amici contend 1) that the querying procedures for NSA, CIA, and NCTC are more restrictive than those governing queries by the FBI because those agencies are required to document a statement of facts to justify a U.S. person query of raw section 702 information, and 2) that FBI "should [be] require[d]" to document a justification post-query, but prior to accessing the

contents of a raw section 702 communication, "to achieve the proper constitutional balance." Amici Br. at 72. To the contrary, the Fourth Amendment does not require that U.S. person queries of information lawfully acquired by the government pursuant to section 702 be accompanied by a later-written statement indicating that the query is likely to retrieve foreign intelligence information or evidence of a crime, and amici cite no case law suggesting otherwise. Nor does the Fourth Amendment require that documentation of such a statement of facts precede or accompany such a query. Indeed, it must again be noted that, as this Court and others have found, the querying of lawfully acquired section 702 information is not itself a search under the Fourth Amendment. Rather, the analysis is whether the procedures taken as a whole are reasonable under the Fourth Amendment. Again, amici cite no case law to the contrary.

~~(S//NF)~~ Moreover, as noted above, Congress, with full knowledge of FBI's existing querying practices, considered and rejected imposing stricter rules on FBI's querying. For example, the Senate rejected an amendment to the Reauthorization Act that "would have required the government to show probable cause and obtain a warrant from the FISC *before* undertaking certain Section 702 queries." S.R. Rep. No. 115-182 at 4 (emphasis added). Indeed, the ultimate compromise provisions in the Reauthorization Act were intended primarily to require agencies to formally "*documen[t] their current policies* and practices related to . . . querying," H.R. Rep. No. 115-475 at 17 (emphasis added), and designed specifically to not interfere with FBI's mission. *See* H.R. Rep. No. 115-475 at 19. Amici propose including a stricter requirement, *i.e.*, drafting a written statement of facts, not mandated by either the

Reauthorization Act or the Fourth Amendment. In the absence of some mandate, the Court must reject amici's proposal.[37]

~~(S//NF)~~ Further, the requirement for NSA, CIA, and NCTC to document a statement of facts for U.S. person queries of section 702 information is a policy decision by the government and not one that was necessitated by statutory or constitutional requirements. Indeed, each of the agencies' minimization procedures reflect not only statutory and constitutional requirements, but also individual policy decisions that are reflective of the differing roles and missions of each agency.[38] For example, for agencies primarily focused overseas, it is a less common event that NSA and CIA encounter U.S. person subjects of investigative interest, whereas FBI conducts such investigations daily. As such, b1, b3 [redacted] NSA, CIA, and NCTC's are not. The querying practices reflect these differences. For example, during 2017, NSA, CIA, and NCTC combined conducted only 7,512 U.S. person queries of content, *ODNI 2017 Transparency Report* at 16, whereas at FBI, such queries are conducted on a daily basis as a routine and encouraged practice. *See In re* [redacted] b3, b7E per FBI Transcript of Hearing at 33 (FISA Ct. Oct. 20, 2015) (hereinafter "2015 702 Hearing"). In short, these policy differences have no effect on the reasonableness of the procedures under the Fourth Amendment.

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

~~(S//NF)~~ As implemented, the government's application of the existing query standard in FBI's section 702 minimization procedures—which this Court has repeatedly found satisfies the

[37] ~~(S//NF)~~ The appropriate vehicle for including a requirement not mandated by the Fourth Amendment is through the legislative process, which in this instance has recently taken place with a fulsome consideration of FBI's queries of raw section 702 information.

[38] ~~(S//NF)~~ As an example, NSA has certain restrictions in its FISA Title I minimization procedures for the handling of domestic communications; such restrictions are not found in FBI's procedures, as those restrictions were put in place for NSA for solely policy reasons and were not required by any statutory or constitutional requirements.

requirements of the Fourth Amendment and is the same standard used in the proposed querying procedures—has provided appropriate protection for U.S. person privacy, in part because the standard has consistently been applied regardless of whether the query term is a U.S. or non-U.S. person identifier. FBI records *all* query terms, a sample of which is subject to NSD's oversight reviews.[39] Where the government identifies queries that are not consistent with the querying provisions of the FBI 702 minimization procedures, the government reports those incidents to the Court—regardless of whether the query terms were U.S. or non-U.S. person identifiers, and without the requirement of any written justification for the query. As amici agree, "[s]o 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." Amici Br. at 78. FBI's records of queries are already maintained in an effective manner to afford robust oversight by NSD regarding FBI's querying practices.[40] The lack of a requirement for written documentation of the query justification does not mean that FBI personnel are not required to have a justification for each query: FBI, like NSA, CIA, and NCTC, is required to

[39] ~~(S//NF)~~ Amici incorrectly assert that FBI "lacked a 'technical procedure' to record U.S. person query terms," which prompted Congress to add this requirement to section 101. Amici Br. at 79. FBI's [redacted] b3, b7E per FBI b3, b7E per FBI [redacted] b3, b7E per FBI [redacted] b3, b7E per FBI [redacted] Further, the FBI maintains the relevant records in a fashion that allows for effective oversight, and thus the particular format of the records should not affect the Court's analysis under the Fourth Amendment.

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

have a justification for each query of raw FISA-acquired information, as each query has to meet the substantive query standard in the minimization or querying procedures. While, for FBI, that justification need not ~~be~~ documented, it is still subject to audit, as detailed below, during NSD's oversight reviews.

~~(S//NF)~~ b3, b7E per FBI [redacted]

[redacted] b3, b7E per FBI [redacted]

b3, b7E per FBI [redacted] Rather, FBI may not query raw section 702 information unless it meets the requisite standard—that is, any query must be reasonably likely to retrieve foreign intelligence information or evidence of a crime, a standard only different from the other agencies in that FBI may also query its systems to find evidence of a crime, consistent with its status as a law enforcement agency. This requirement, as this Court has previously acknowledged, is derived directly from the statutory definition of "minimization procedures" in FISA, which provides that the government may acquire and disseminate both foreign intelligence information and evidence of a crime. *See* 2015 702 Hearing at 19–20; 50 U.S.C. § 1801(h)(1), (3). Given its dual intelligence and law enforcement role, as well as its role as a domestic investigatory agency, FBI necessarily conducts U.S. person queries in its systems that store raw section 702 information for these purposes on an order of magnitude substantially greater than the number of U.S. person queries run by NSA, CIA, or NCTC, which are not law enforcement agencies and generally focus on intelligence collection outside the United States. The fact that FBI runs more U.S. person queries and is not required to maintain a written justification for such queries does not

therefore render FBI's query rules deficient,[41] as FBI is also subject to oversight of its querying practices in an order of magnitude different from the other agencies.

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

~~(S//NF)~~ The oversight of FBI's queries is substantial and effective, further supporting the Court's repeated conclusion that FBI's procedures satisfy the Fourth Amendment without a requirement to document query justifications. As the government explained in 2015, as required in the FBI's Court-approved section 702 minimization procedures, NSD annually conducts minimization reviews at selected FBI field offices. *See* 2015 702 Hearing, at 24–25; FBI 702

b3, b7E per FBI

b3, b7E per FBI

b3, b7E per FBI

b3, b7E per FBI

b1 Per FBI
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b3 Per FBI
b7E

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b1 Per FBI
b3
b7E

(S)

[redacted]

b1 Per FBI
b3
b7E

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[redacted]

b1 Per FBI
b3
b7E

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(S) [redacted]

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(S) [redacted]

[redacted]

b1 Per FBI
b3
b7E

b3 Per FBI
b7E

[redacted]

E. (U) The Agencies' Minimization Procedures Are Consistent with the Definitions of "Minimization Procedures" and the Fourth Amendment. Amici raise concerns with only some of the provisions identified in question (e) in the Court's April 2018 Order. First, amici

raise concerns with the provision in each agency's proposed minimization procedures stating that nothing in the procedures shall restrict the agency's performance of lawful training functions of its personnel.[48] Second, amici raise concerns with the provision in each agency's proposed minimization procedures stating that nothing in the procedures shall restrict the agency's performance of lawful oversight functions of its personnel or systems (and listing specific functions).[49] Finally, amici raise concerns with sections III.F.5 and III.F.6 of the proposed FBI minimization procedures. The government respectfully submits that, despite amici's concerns, each agency's proposed minimization procedures are consistent with the definition of "minimization procedures" in sections 101(h) and 301(4) of FISA and with the requirements of the Fourth Amendment.[50]

(S//NF) **The Provisions Concerning Lawful Training Functions.** Each agency's currently applicable minimization procedures require that agency personnel receive training on the applicable procedures before they can be granted access to raw FISA information. The proposed provision regarding an agency's performance of lawful training functions of its

[48] (S//NF) *See* section 1 of the proposed NSA minimization procedures; section 6.g of the proposed CIA minimization procedures; section I.G of the proposed FBI minimization procedures; and section A.6.f of the proposed NCTC minimization procedures. Although this provision of each agency's proposed minimization procedures also references activities undertaken for "creating, testing, or maintaining [the agency's] systems," amici did not raise concerns with such activities.

[49] (S//NF) *See* section 1 of the proposed NSA minimization procedures; section 6.h of the proposed CIA minimization procedures; section I.H of the proposed FBI minimization procedures; and section A.6.g of the proposed NCTC minimization procedures.

[50] (S//NF) With respect to the provisions identified in question (e) in the Court's April 2018 Order that amici did not identify as raising concerns—several of which appear in current or former versions of agencies' minimization procedures—the government continues to assess that such provisions are consistent with the definitions of "minimization procedures" at sections 101(h) and 301(4) of FISA and with the requirements of the Fourth Amendment. For example, although amici raised concerns with the provision in the proposed *querying* procedures regarding compliance with a specific congressional mandate or order of a court within the United States, amici did not raise concerns with the analogous provision in each agency's proposed *minimization* procedures. The government notes that this provision appears in section 6.i of the proposed CIA minimization procedures and in section A.6.d of the proposed NCTC minimization procedures, neither of which were identified in question (e) in the Court's April 2018 Order, suggesting that the Court did not intend to direct amici to address this provision of each agency's proposed minimization procedures.

personnel will allow agencies to train their personnel using the actual materials that the trainees can expect to work with [redacted] b3 Per FBI b7E

[redacted]

[redacted]

b3 Per FBI b7E

[redacted]

[redacted] b3 Per FBI b7E

[redacted]

(S//NF) **The Provisions Concerning Lawful Oversight of Personnel or Systems**. The currently applicable minimization procedures for NSA, CIA, FBI, and NCTC each include a provision stating that nothing in the procedures shall restrict the agency's performance of lawful oversight functions of its personnel or systems.[52] The proposed modifications to this provision of each agency's minimization procedures do not expand the "lawful oversight functions of [an agency's] personnel or systems" covered by the currently applicable version of the provision.[53]

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[52] (S//NF) [redacted]; in NSA's section 702 minimization procedures since 2010; and in CIA's section 702 minimization procedures since 2010. b3 Per FBI b7E

[53] (S//NF) Indeed, because queries conducted as part of an agency's performance of lawful oversight functions of its personnel or systems will be covered in the proposed querying procedures, the analogous provision in each agency's

Rather, the intent of the proposed modifications is to *cabin* each agency's use of this provision by enumerating specific functions that the government considers to be covered by the currently applicable version of the provision. In the event that an agency intends to rely on this provision to deviate from the agency's minimization procedures for an unenumerated purpose, the agency is required to consult with NSD, and any such deviation must be reported to the Court.[54]

(S//NF) Amici argue that the lawful oversight exception in the proposed minimization procedures raises concerns "[f]or reasons that are substantially similar to those given . . . in [the] discussion of th[e] broadly-worded exceptions in the Querying Procedures." Amici Br. at 83. However, amici raise two issues with the lawful oversight exception in the proposed minimization procedures specifically. First, amici argue that this exception "present[s] the . . . danger that the Government may indefinitely store the private information of U.S. persons or disseminate it, without minimization." *Id.* The exception permits the government to engage in essential oversight activities that in fact promote the privacy interests of U.S. persons. In addition, any use of this provision to retain or disseminate information must be limited to a lawful oversight purpose. Some agencies may need to retain for some period of time FISA-acquired information subject to destruction in order to investigate or remediate a compliance incident and to identify all relevant information subject to a destruction requirement. Similarly, agencies may decide to maintain records of employee misconduct investigations, which could

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minimization procedures will cover considerably fewer oversight activities than the currently applicable version of this provision in each agency's minimization procedures, which cover such queries.

[54] (S//NF) The provision in each agency's proposed minimization procedures regarding *the agency's* performance of lawful oversight functions of its personnel or systems is different from the separate provision in each agency's proposed minimization procedures regarding the performance of lawful oversight functions of NSD, ODNI, or the applicable Offices of the Inspectors General, or an agency's provision of the assistance necessary for those entities to perform their lawful oversight functions. Amici did not raise any concerns with the latter provision of each agency's minimization procedures. The government notes that this provision appears in section 6.f of the proposed CIA minimization procedures and section A.6.e of the proposed NCTC minimization procedures, neither of which were identified in question (e) in the Court's April 2018 Order, suggesting that the Court did not intend to direct amici to address this provision of each agency's proposed minimization procedures.

contain raw FISA-acquired information, beyond the otherwise applicable retention period to assist them in the misconduct investigation. It may also be necessary for one agency to disseminate records of a compliance incident, which may include raw FISA information, to another agency for the purpose of remediating or resolving the compliance incident, including identifying information subject to purge. Furthermore, it may be necessary for one agency to share records of an employee misconduct investigation, which may include raw FISA-acquired information, with another agency.

(S//NF) Second, amici argue that the lawful oversight exception in each agency's proposed minimization procedures "do[es] not provide sufficient definition in light of the privacy interests at stake" and that it requires "greater specificity regarding what . . . oversight functions require the Government to abrogate otherwise applicable restrictions on retention and dissemination of 702 information." *Id.* at 84. As noted above, however, this exception already appears in the currently applicable version of each agency's minimization procedures, and the current version includes *no* enumerated purposes. Therefore, this exception in each agency's proposed minimization procedures is much more specific than the prior exceptions that have already been found by the Court to be consistent with sections 101(h) and 301(4) of FISA and with the requirements of the Fourth Amendment.

(S//NF) [redacted] b1 Per FBI b3 b7E

b1 Per FBI
b3
b7E

(S//NF)

b1 Per FBI
b3
b7E

(S//NF)

[55] (U) *See* H.R. Rep. No. 95-1283, pt. 1, at 56 (1978) (noting that minimizing retention of data should be done by "destr[uction] *where feasible*," but that it could also entail "other measures designed to limit retention," including "provisions with respect to . . . what may be retrieved and on what basis") (emphasis added).

b1 Per FBI
b3
b7E

[56] (S//NF)

b1 P er FBI
b3
b7E

[redacted]

(S//NF) [redacted]

[redacted]

[57] (S//NF) [redacted]

b1 Per RBI
b3
b7E

b1 Per FBI
b3
b7E

[redacted]

(S//NF) [redacted]

[redacted]

[58] (S//NF) [redacted]

b1 Per FBI
b3
b7E

b1 Per FBI
b3
b7E

(S//NF) [redacted]

b1 Per FBI
b3
b7E

(S) [redacted]

b1 Per FBI
b3
b7E

[redacted]

(S//NF) [redacted]

b1 Per FBI
b3
7E

[redacted]

[60] (S//NF) [redacted]

[61] (S//NF) [redacted]

(U) WHEREFORE, the United States respectfully submits this Government's Response to the Brief of Amici Curiae.

Respectfully submitted,

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National Security Division
U.S. Department of Justice

Dated: June 15, 2018

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

[redacted]

~~TOP SECRET//SI//NOFORN~~

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

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TABLE OF CONTENTS

Tab 1 ~~(S//NF)~~ In [redacted] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, No. 105B(g): 07-01, Mem. Op. [redacted]

Tab 2 ~~(S/NF)~~ Declaration of [redacted] Pursuant to Section 105(B) of the Foreign Intelligence Surveillance Act, 105B(g) 07-01 [redacted]

Tab 3 ~~(S/NF)~~ [redacted] Memorandum of Law [redacted] ("Jurisdiction Brief")

Tab 4 ~~(S/NF)~~ [redacted]

Tab 5 ~~(S/NF)~~ Brief for Respondent [Government] in Opposition to Petitioner's Motion for a Stay Pending Appeal [redacted]

Tab 6 ~~(S/NF)~~ Brief of Appellant [redacted]

Tab 7 ~~(S/NF)~~ Ex Parte Brief for Respondent [Government], In re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act [redacted]

Tab 8 ~~(S/NF)~~ Quarterly Report to the Foreign Intelligence Surveillance Court Concerning Compliance Matters Under Section 702 of the Foreign Intelligence Surveillance Act [redacted]

Tab 9 (U) 17th Semiannual Assessment of Compliance with Procedures and Guidelines Issued Pursuant to Section 702 of the Foreign Intelligence Surveillance Act, Submitted by the Attorney General and the Director of National Intelligence (Jan. 2018)

Tab 10 ~~(S/NF)~~ [redacted] Predecessor Certifications, Transcript of Hearing [redacted]

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