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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

REPLY BRIEF OF AMICI CURIAE

I. Section 702 and Acquisition of Data

Since the Government first disclosed to the Court in 2011 the nature of NSA's upstream collection pursuant to section 702, much of the discussion of acquisitions under section 702 has reflected an understanding that those acquisitions could fall into only two possible categories: communications to or from a targeted account or communications that refer to, but are neither to nor from, a targeted account.[1] Certainly the entire discussion of section 702 during the legislative process leading to enactment of the Reauthorization Act rested on this binary understanding. The 2018 Certifications, and the Government's Ex Parte Submission accompanying them, make clear

In amici's view, the Government's discussion of its collection of in the 2018 Certifications raises two basic issues. The first is the one addressed in the Court's questions (a) and (b): Does the acquisition of trigger the restrictions in section 103 of the Reauthorization Act? The second, which arises without regard to section 103, is whether the proposed targeting, minimization, and querying procedures as applied to acquisitions of are adequate to satisfy the statutory requirements in section 702, *see* 50 U.S.C. §1881a(b)-(j), and the Fourth Amendment.

In assisting the Court in answering these questions, amici believe it is at least as important for us to identify factual questions the Government should be required to answer as it is for us to offer legal argument. For any argument we could make, like the Court's analysis of

[1] To add one prominent example, the PCLOB's description of section 702 collection in its 2014 report on the program adopts this binary understanding. *See* PCLOB Section 702 Report at 32-41.

the legal issues, cannot proceed effectively without a clear understanding of the facts concerning acquisition of [redacted] Thus, this reply brief will move back and forth between posing questions for the Government to answer—many of which were set out in our opening brief but were not answered in the Government's Response Brief—and offering arguments designed both to explain why the questions are important and to rebut arguments in the Government's opposition.[2] The most important question is this one:

F1. Please provide a list of all types of [redacted] collected pursuant to section 702.[3]

Without a clear and complete understanding of what the Government is collecting, the Court cannot effectively discharge its statutorily-assigned task to review and make certain legal determinations concerning the operation of section 702 surveillance. *See* 50 U.S.C. § 1881a(j). In particular, without that clear and complete understanding, the Court cannot determine whether the collection of [redacted] invades the privacy interests of U.S. persons and, if so, whether the proposed targeting, minimization, and querying procedures provide sufficient safeguards for those interests.[4]

It may be that, [redacted] collection of that data, like acquisition of 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 be outside the

[2] Amici identify factual questions with the letter "F" and legal questions with the letter "L."

[3] *See* Amici Opening Br. 27 & n.33 (discussing differences between the list of types of [redacted] in the 2018 Ex Parte Submission and those in the directive [redacted]

[4] This basic point seems clear from the judicial review provisions in section 702. But the experience of Judge Bates in reviewing section 702 certifications in 2011-2012 and of Judge Collyer in reviewing certifications in 2016-2017 drives home the practical importance of keeping this point in mind.

United States, will rarely include communications of or information about U.S. persons.[5] But the Court cannot make a determination on that fundamental point without a much fuller explanation from the Government of the kinds of data being acquired.

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F2. Does the Government collect [redacted] only via downstream collection or also via upstream collection?

The Government contends that in adopting section 103 Congress sought to restrict only the acquisition of "about communications" via upstream collection and to leave untouched the Government's longstanding practice of acquiring [redacted] Resp. Br. 1-8. The Government acknowledges, however, as it must, that nothing in the legislative history of section 103 shows any awareness by the enacting Congress that the collection of [redacted] would fall outside section 103's scope.[6] The Government suggests that this absence of congressional attention to the collection of [redacted] "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." Resp. Br. 2.

That explanation does not hold water, and indeed is contradicted by assertions in the Government's own briefs. In order to consider the acquisition of [redacted] in the course of enacting the Reauthorization Act, Congress did not need to get into "precise details" of that sort of collection any more than it needed to (or did) get into the precise details of upstream collection of abouts communications. The basic nature of acquisition of [redacted] could

[5] *See* Amici Opening Br. 10-11; Oct. 3, 2011 Mem. Op. at 37-38.
[6] *See* Resp. Br. 2 (acknowledging that "the government's acquisition of such data, and Congress's awareness of it, is not clearly reflected in the legislative history of the Reauthorization Act itself").

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have been discussed, just as the basic nature of upstream collection was. Indeed, in the Government's Ex Parte Submission the Government pointed to what it views as a reference to such collection in the legislative history of the FISA Amendments Act of 2008, *see* 2018 Ex Parte Submission 36, and in its Response Brief it identifies references in FISA itself and in legislative history materials other than regarding the Reauthorization Act that it views as reflecting congressional discussion of [redacted] *see* Resp. Br. 3-7. The Government cannot have it both ways. If references to collection of [redacted] in legislative materials were as frequent as the Government suggests, surely there was no obstacle to discussion of such collection in debates over the Reauthorization Act. The materials the Government cites only make the absence of any mention of [redacted] in the Reauthorization Act's legislative history all the more conspicuous. The Government effectively acknowledges as much when it summarizes its review of other legislative materials as showing that "Congress knew of (***or had the opportunity to know***) and leave intact the other, ongoing forms of section 702 acquisitions that began before and have continued beyond March 2017." Resp. Br. 7-8 (emphasis added). "Had the opportunity to know" is not the standard for determining congressional intent.

The Government's Response confirms, as amici suggested in our opening brief, that many of the types of information mentioned in the Court's question (b) [redacted] may be acquired as a result of collecting communications to or from a targeted account, whether those communications are acquired [redacted] Resp. Br. 8-10. As to/from communications, those communications plainly fall outside section 103's restrictions. The new issue before the Court, in amici's view, arises from the Government's ongoing acquisition of [redacted] Resp. Br. 9, 10.

The Government contends that its "view of whether information fall's within the scope of the 'abouts communication' prohibition" does not turn "solely on whether the government deems the information at issue to be a 'communication' or 'data.'" Resp. Br. 9. But Government never squarely answers this question:

> **L1. If the [redacted] falls within the meaning of "communications" in section 103, why does that data not constitute communications that "contain a reference to, but are not to or from, a target," 50 U.S.C. §1881a(b)(5)?**

The Government's final two arguments why [redacted] should not be understood as falling within the scope of section 103's restrictions rest on legislative purpose. The Government contends that

> [s]ection 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. When viewed in that broader historical perspective, it is clear that interpreting the Reauthorization Act's "abouts communication" prohibition [as removing] from section 702's reach data 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 communication" prohibition, which was to restrict a unique type of acquisition previously acquired under section 702. By contrast, [redacted] has historically and routinely been acquitted not just under section 702 but [redacted]

Resp. Br. 8-9. Amici acknowledge that there is some force in the Government's arguments. But we find them unpersuasive, for the following reasons.

First, the Government's argument betrays a fundamental misunderstanding of section 103. Section 103 is not a "prohibition" on the acquisition of certain types of communications under section 702. As the heading of section 103 states, it is rather a provision that establishes a process for "congressional review and oversight of" the acquisition of certain types of

communications under section 702. Although subsection 103(a) is phrased as a prohibition, subsection 103(b) makes clear that the section actually requires only a 30-day moratorium on the acquisition of covered communications while the congressional oversight committees are given an opportunity to debate the propriety of the acquisition of those communications. Amici do not mean to minimize the potential disruption of intelligence collection that a 30-day pause might cause, but it is not the same as a prohibition.

Second, that the Government has acquired a type of data for a long period of time says little, if anything, about whether it is permissible to do so under section 702 today. The Government has also acquired core "about communications" for many years, including before enactment of section 702. While one of the central purposes of section 702 was to ensure that the Government could acquire communications from targets overseas in light of developments in communications technology, another purpose was to subject to statutory regulation—and to oversight by this Court—a type of surveillance the legality of which in the absence of such statutory authorization and judicial oversight had been widely questioned.

Thus, the "broader historical perspective" the Government urges the Court to adopt here also includes the dialogue between the Government and this Court over the scope of section 702 collection. A prominent feature of that broader history is this Court's concern, expressed more than once, about the NSA's "institutional lack of candor" about the nature of section 702 collection, a concern that featured in Congress's debate on the Reauthorization Act as well.[7] That aspect of the broader historical perspective counsels in favor of ensuring that all types of

[7] *See* April 26, 2017 Mem. Op. at 19 ("At the October 26, 2016 hearing, the Court ascribed the government's failure to disclose those IG and ICO reviews at the October 4, 2016 hearing to an institutional 'lack of candor' on NSA's part"); Senate Judiciary Committee CQ Part 1 Tr. 26 (statement of Sen. Grassley noting FISC April 2017 decision's concern about "an institutional—and these are their words—'lack of candor' on—on NSA's part").

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data collected pursuant to section 702 that meet the statutory definition of "abouts communication" receive proper congressional oversight, regardless of whether the Government's practice of collecting such data is longstanding. *See* Question F1.

[redacted]

II. Requirements for the FBI Under the Querying Procedures

Amici agree with the Government that the proposed Querying Procedures reflect either (1) greater specificity about exemptions or (2) increased protections for U.S. persons as required by the Reauthorization Act. Resp. Br. 11. The Government in essence argues that because the targeting and minimization procedures that the Court has previously approved have been further articulated and strengthened in the proposed Querying Procedures, the Court is required by its own precedents to approve them. Our argument is that the Reauthorization Act demands more. In requiring new Querying Procedures, the Act requires as well that the Court review those procedures to determine whether they are consistent with the Act and the Fourth Amendment in light of the Act's adoption of more stringent protections, particularly over U.S. person queries.

In passing the Reauthorization Act, Congress did not require a warrant for every query.

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b3, b7E per FBI [redacted] This requirement demonstrates that Congress wanted more stringent privacy protections for U.S. person queries, and stricter procedures to ensure that the querying process will not be abused. The fact that prior Courts have approved similar procedures does not mean that the Court must follow those precedents, particularly in light of the new requirements of the Reauthorization Act. Moreover, this Court has previously acknowledged that it "is not bound by its prior approvals of procedures permitting such querying," November 6, 2015 Opinion at 40, but is required by section 702 "to assess anew whether the procedures accompanying each certification submitted to it for review are both consistent with the applicable statutory requirements and with the Fourth Amendment," *id.*, *citing* 50 U.S.C. § 1881a(i)(2)(B)-(C), (i)(3)(A). This reexamination is particularly important where Congress has imposed new requirements that highlight areas in need of strict protections.

Amici urge the Court to conduct this assessment and conclude that the FBI procedures currently in place b3, b7E per FBI [redacted]

b3, b7E per FBI [redacted]

b3, b7E per FBI [redacted]

The Government cites numerous cases in refuting amici's arguments. Resp. Br. 14-16. None of these cases post-date the enactment of the Reauthorization Act, and therefore they do not serve as precedent for how the Court must evaluate the question of whether the Querying

Procedures meet the statutory requirements of section 702 as amended by that Act.[8] The Government also cites certain portions of the legislative history to support its argument that the Reauthorization Act endorsed the Government's existing minimization and targeting procedures. *Id.* at 17. But the legislative history also noted that the Act's new requirement of a court order was "intended to provide a safeguard against the potential use of U.S. person information incidentally collected pursuant to section 702, for inappropriate criminal purposes." H.R. Rep. No. 115-475 part I (Dec. 19, 2017), at 19. Amici argue that the court order requirement is only a partial safeguard, b3, b7E per FBI [redacted]

b3, b7E per FBI [redacted]

Amici also disagree with the Government's argument that the unchecked U.S. person querying process is justified by the fact that the information is already collected in a database that could be reviewed on a communication-by-communication basis. Resp. Br. 15, 25. The dragnet effect of the section 702 collection provides the protection of anonymity. Compare, for example, the collection of section 702 information, including incidental collection of U.S. person

[8] While upholding the constitutionality of the section 702 program, two of the cases cited by the Government also caution about their limited holdings and the danger that certified procedures may exceed their proper scope in specific instances. *See United States v. Mohamud*, 843 F.3d 420, 438 (9th Cir. 2016) ("Although § 702 potentially raises complex statutory and constitutional issues, this case does not. . . Confined to the particular facts of this case, we hold that the § 702 acquisition of Mohamud's email communications did not violate the Fourth Amendment."); *United States v. Muhtorov*, 187 F. Supp. 3d 1240, 1257 (D. Colo. 2015) (observing that "§ 702's authorization procedures are 'riddled' with loopholes and there is no judicial oversight of their execution over time.")

information, to the collection of video footage of every Metro rider who walks past a surveillance camera. Courts have upheld video surveillance in public places, which may capture evidence of assaults, robberies, and other crimes committed in public places. That does not mean that the courts would authorize the police to select at random a single individual to monitor through facial recognition as that person moves through the Metro system. That more targeted surveillance would certainly violate the individual's expectation of privacy and require a warrant supported by probable cause. Police may not lawfully target specific individuals with surveillance techniques that may be allowed for the general public in an indiscriminate manner.[9]

Similarly, just because section 702 data may be contained in a lawfully collected data set does not mean that a U.S. person query of that data should be permitted with no justification whatsoever. The Government argues that the oversight process over FBI queries is sufficiently robust that no written statement of facts should be required. Resp. Br. 35. Amici fully support the National Security Division's oversight process and the ways in which it corrects problems and promotes compliance. Yet the oversight process can only focus on b1, b3, b7E per FBI the FBI field offices each year, and can only review a subset of the activities of those offices. The oversight process is therefore no substitute for procedures that provide more certain safeguards on the querying process.

[9] In *Carpenter v. United States*, 585 U.S. ___ (2018), the Supreme Court just last week extended the Fourth Amendment's warrant requirement to the collection of historical cell site location information (CSLI). Slip op. at 18. The Government argued that cell phone tower records tracking the defendant's location were not protected by the Fourth Amendment, yet the Court disagreed. "Whether the Government employs its own surveillance technology as in [*United States v.*] *Jones* [565 U.S. 400, 411 (2012)] or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." *Carpenter*, slip op. at 11. The fact that Carpenter was allowing his cell phone to send his location data to his wireless carrier did not mean that he gave up his expectation of privacy in his daily movements. The records themselves were business records of a third party, not obtained through a search of an individual's personal property, and yet because they were pulled for purposes of the investigation and prosecution of Carpenter and revealed his precise movements from one location to the next, the Court found that they warranted Fourth Amendment protection.

Finally, the Government has not made any effort to explain why imposition of a written statement requirement to access content obtained through U.S. person queries would be an undue burden. The Reauthorization Act imposed a much more significant burden, requiring an order of this Court, in order for agents to review such content in criminal investigations not related to national security. It would not be a significant imposition to require a less demanding process, creation of a written record to justify the need to review the information, for all cases where the FBI seeks to review content obtained through a U.S. person query.

As amici argued in our initial brief, the fact that the FBI has reported b3, b7E per FBI [redacted] b3, b7E per FBI [redacted] b3, b7E per FBI [redacted] We remain concerned that this is a loophole that allows U.S. person information to be subjected to unwarranted and intrusive searches, as the National Security Division has found to have happened in the several compliance incidents described in our brief. We urge the Court to close this loophole by requiring the FBI b3, b7E per FBI [redacted] b3, b7E per FBI [redacted] b3, b7E per FBI [redacted] At a minimum, we urge the Court to require a written statement to review information obtained through U.S. person queries not designed to obtain foreign intelligence information.

The submitted Querying Procedures contain no requirement that the FBI record its U.S. person queries as such, let alone a requirement to provide a written justification as amici have argued is required. The Querying Procedures' failure to establish an ascertainable set of records "of each United States person query term used for a query" is directly contrary to the

Reauthorization Act, 50 U.S.C. § 1881a(f)(1)(B). Contrary to the Government's argument, *see* Resp. Br. 28-29, the Act's plain terms require that some "technical procedure" for recording U.S. person queries, specifically, be included as part of the newly mandated Querying Procedures. Nowhere in the statute is the FBI exempted from this record-keeping requirement. Given that Congress was aware that the other covered agencies already had procedures in place to record U.S. person queries as a distinct category, *see* S. Rep. No. 115-182, at 11 (Minority Views of Sen. Heinrich), reading this provision of the Reauthorization Act to codify the FBI's "longstanding practice" would render the query record-keeping requirement meaningless.

To support its strained reading, the Government relies on the legislative history of the 2015 USA FREEDOM Act, *see* Resp. Br. 29-30, which requires the DNI to report annual statistics but does not mandate or exempt any covered agency from record-keeping obligations. But the fact that Congress acknowledged that the FBI b3, b7E per FBI b3, b7E per FBI

The Government also argues that section 112 of the Reauthorization Act, which mandates that the Justice Department Inspector General report on "impediments. . . for the [FBI] to count" U.S. person queries, Pub. L. No. 115-118, § 112(b)(8), 132 Stat. 3, exempts the FBI from the same record-keeping requirements as the other covered agencies. *See* Resp. Br. 30. This argument mistakenly equates an "impediment" with an "impossibility" and ignores a more plausible rationale for requiring the IG report: that Congress was interested in *how* the FBI implemented the new Reauthorization Act requirements, not *whether* the FBI implemented those requirements. Interpreted correctly in the light of the Reauthorization Act's other requirements, Section 112 is not "pointless" as the Government argues, Resp. Br. 30. To the contrary, it may

allow Congress to better examine the FBI's implementation of the Reauthorization Act's new, but clear, requirement for the FBI to adopt querying procedures with a "technical procedure" for effectively recording U.S. person queries.

III. Exemptions in the Querying Procedures and Minimization Procedures Related to "Lawful Training," "Lawful Oversight," and "Congressional Mandates"

As amici argued in our opening brief, a number of the standing exemptions[10] to the Querying and Minimization Procedures should be eliminated or narrowed so that they appropriately balance the Government's interests against the associated intrusion on U.S. persons' privacy. These exemptions—in the name of training, oversight, and congressional mandates—must be appropriately defined to ensure they are "reasonable" under the Fourth Amendment, but also, in the case of exemptions to the Minimization Procedures, to ensure that they adhere to the statutory definition in 50 U.S.C. § 1801(h) and § 1821(4) requiring "specific procedures" that are "reasonably designed."[11] The Government's response that these overbroad exemptions "clearly strike a reasonable balance" is unavailing.

While each exemption is discussed individually below, the indiscriminate introductory language to all of these exemptions ("nothing shall restrict") demands careful consideration of their reasonableness. The procedures allow any deviation in support of the vaguely worded exemptions, no matter how disproportionate the Government's purpose may be to the deviation. The exemptions do not aim for a reasonable balance between the Government's interest in

[10] Amici note that as standing exemptions incorporated into the procedures, the covered agencies may rely on these exemptions to deviate from the relevant procedures without reporting such deviations to NSD or the FISC.
[11] 50 U.S.C. § 1801(h) defines "minimization procedures," in relevant part, as "specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information." 50 U.S.C. § 1821(4) contains the same definition, but in the context of a "physical search."

performing training and oversight, on the one hand, and the privacy interest of U.S. persons affected by deviations from the procedures on the other; they simply presume that any conceivable training or oversight purpose will always outweigh any privacy interest. As the FISC has noted in relation to the statutory requirements for the Minimization Procedures, the "page after page of detailed restrictions on the acquisition, retention, and dissemination of Section 702-acquired information concerning United States persons" should not be swept aside by inadequately "specified" exemptions, which might "undermine the Court's ability to find that the procedures satisfy the...statutory requirement." November 6, 2015 Opinion at 22.

A. The Government Has Not Articulated an Interest that Justifies the Wide Latitude Afforded for "Lawful Training"

In its response, the Government argues that queries performed to train agency personnel serve the Government interest of "ensuring an effective workforce," but the Court must balance that interest with the complete elimination of any of the procedural privacy protections that would otherwise apply. Broadly defined, the "lawful training functions of [agency] personnel" do not represent so great an interest that training functions should be exempted, wholesale, from the procedures' restrictions. Instead, the Court should require greater specificity regarding who is responsible for the development and approval of the otherwise non-compliant queries undertaken for training. Alternatively, the exemption should expressly limit what deviations are allowed, i.e., what restrictions within the Querying Procedures and Minimization Procedures the agencies may ignore, in order to afford the covered agencies the "flexibility to design training to their specific needs, tools, and employees," *see* Resp. Br. 20, while at the same time ensuring that those "specific needs" are proportionate to the deviations that would result.[12]

[12] In its Response, the Government points to two compliance reports as support for the importance of training and how it may enhance U.S. persons' privacy. *See* Resp. Br. 19, n.26. [redacted]

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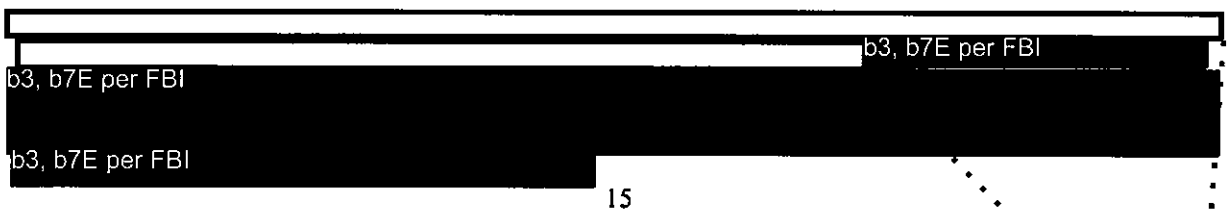
Similarly, when it comes to deviation from the Minimization Procedures for training purposes, it remains unclear why the Government must ignore *all* of the minimization protections in order to train effectively. The Government's response states that the Government "does not intend for the training provision to allow the retention of U.S. person information that would otherwise be subject to destruction under the minimization procedures or for compliance reasons, or to permit the dissemination of section 702 information that otherwise does not meet the applicable dissemination standard(s)," Resp. Br. 41-42, but there is no such limitation contained in the exemption. The Court must evaluate whether the "lawful training" exemption, as written, is "reasonable" and "reasonably designed," *see* 50 U.S.C. §§ 1881a(j)(2)(C), 1881a(j)(3)(A), not whether the Government's *intent* is reasonable.

The Government's professed restraint when it comes to relying on the lawful training exemption only underscores why the exemption's broad wording is inadequate. Indeed, it remains unclear what restrictions in the Querying Procedures and the Minimization Procedures otherwise prevent agencies from conducting effective training of their personnel. For instance, without relying on any exemptions, agencies could conduct training queries using previously-queried terms confirmed to be associated with non-U.S. persons, for whom it would be reasonably likely to retrieve foreign intelligence information. The contents of communications obtained from those training queries could be accessed, but need not be retained or disseminated outside of training in order for the training purpose to be served. Why, the Court should ask,



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would such procedurally-compliant training be insufficient in light of any agency's "specific needs"? The Government's response does not provide an answer. To be sure, amici do not suggest that anything other than the least intrusive form of training is unreasonable, but it remains unclear why any intrusion is reasonably necessary.

This same observation supports amici's contention that the use of U.S. person identifiers for training queries does not appear necessary in relation to the privacy intrusion that it presents.

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[redacted]

B. The "Lawful Oversight" Exemption Lacks Necessary Specificity Regarding the Purposes of Oversight

In its Response, the Government misunderstands amici's argument regarding the danger of the broadly-worded "oversight" exemption. Although the Government's stated purpose of the enumerations may be to provide transparency regarding the categories of oversight that noncompliant querying, retention, and dissemination of 702 information support, there is a danger that vague enumerated subcategories will actually broaden the meaning of the "oversight"

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umbrella category. And to the extent that "oversight" is extended by its subcategories, more deviations from the relevant procedures will go unseen by NSD and the FISC.

For instance, "oversight" could be interpreted to refer to oversight of the section 702 program, specifically, rather than an agency's oversight of its personnel for the more amorphous categories of "quality control" [redacted] *See* Querying Procedures at 1. Yet the enumerated subcategories the Government seeks to add in the procedures under review necessitates the broader interpretation. Not all categories of oversight justify jettisoning the restrictions contained within the applicable procedures in their entirety. "[E]nsuring the efficient and proper operation of the workplace" may be a legitimate government interest, *see* Resp. Br. 22, but the Government must not act unreasonably, without any restriction, in service of that interest. *City of Ontario v. Quon*, 560 U.S. 746, 761-64 (2010) (a reasonable search for a "legitimate work-related purpose" is one that is "efficient and expedient" and "not excessive in scope."); *O'Connor v. Ortega*, 480 U.S. 709, 726 (1987) (Government's practices must be "reasonably related to the objectives" of investigating the potential [redacted] As the Government implicitly acknowledges, it may be reasonable to perform a query on [redacted] in support of an investigation for potential [redacted] but it would be unreasonable to perform the same query across the "agencies' main raw repositories containing section 702 information." Resp. Br. 22, n.29. Despite the Government's professed intention, that limitation is spelled out nowhere in the current oversight exemption.

Amici understand that it may be difficult for the Government—and the Court—to predict every deviation that might be necessary for the covered agencies to accomplish internal oversight, but that observation supports the adoption of narrowly defined oversight subcategories so that their reasonableness can be better evaluated prospectively. It also suggests that there

should be a default requirement that the Government report to the FISC deviations from the procedures in the name of oversight so that the Court may evaluate the reasonableness of each instance as it arises. Given its potential breadth, the Court cannot find the current "lawful oversight" exemption and its subcategories to be reasonable or reasonably designed.

C. The Government Has Not Adequately-Tailored the "Congressional Mandates" Exemption Despite Previous Direction from the FISC

Although the FISC did not order the Government to revise the Minimization Procedure language related to "congressional mandates" in its 2015 certification review, it strongly suggested as much, reiterating the same concern in April 2017. *See* April 26, 2017 Opinion at 52-54. Unfortunately, the Government's revision merely added the word "specific," without providing any more precision.[13] For this reason, amici contend that the "congressional mandates" exemption to the Querying Procedures is unreasonable.

This exemption should precisely define a narrow set of congressional inquiries that would reasonably qualify. As the language stands currently, a single member of Congress with a political or personal vendetta against an individual could send a letter to the Department of Justice demanding an intrusive search of 702-collected information, and the Department could carry out that search, even if it were clearly improper, under the "congressional mandate" rubric. While amici recognize that legitimate congressional oversight is essential to the checks and balances over the 702 program, the congressional mandate exemption as currently worded is prone to abuse that could go far beyond legitimate oversight. To avoid this potential abuse, the

[13] Specifically, the 2015 NSA and CIA Minimization Procedures that the FISC considered stated that "[n]othing in these procedures shall prohibit the retention, processing or dissemination of information ***reasonably necessary to comply with specific constitutional, judicial, or legislative mandates***," whereas the Government's revised language submitted in 2016 require that any deviation be "***necessary to comply with a specific congressional mandate or order of a court within the United States***." April 26, 2017 Opinion at 53-54 (emphasis added). The Querying Procedures adopt essentially the same language as the 2016 submission. Querying Procedures at 2.

exemption should only apply to bipartisan congressional subpoenas, and such subpoenas should make clear that deviation from the Querying Procedures is necessary to respond.

The Government appears to accept the same interpretative gloss that narrowed the congressional mandate exemption previously in relation to the Minimization Procedures, Resp. Br. 24 ("The government understands that those same limitations apply to the querying procedures"), and the Court should expressly incorporate that gloss in its ruling should it accept the current wording. The Court should also require the Government to report any reliance on this exemption for querying to the FISC, as has been the case under previous certification decisions relating to the Minimization Procedures. *See* April 26, 2017 Opinion at 54-55.

IV. [redacted] b1, b3, b7E per FBI

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