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(U) UNDER SEAL

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

~~(S)~~ [redacted]

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

~~(S)~~ [redacted]

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

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

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Central Intelligence Agency	CIA
Director of National Intelligence	DNI
Federal Bureau of Investigation	FBI
FISA Amendments Act of 2008	FAA
FISA Amendments Reauthorization Act of 2017	Reauthorization Act
Foreign Intelligence Surveillance Act	FISA
National Counterterrorism Center	NCTC
National Security Agency	NSA
National Security Division of the Department of Justice	NSD
Office of the Director of National Intelligence	ODNI

(U) JURISDICTIONAL STATEMENT

~~(S)~~ This is a government appeal from orders issued by the United States Foreign Intelligence Surveillance Court (FISC) pursuant to 50 U.S.C. § 1881a(j)(3)(B). The FISC had jurisdiction under 50 U.S.C. § 1881a(j)(1)(A) and issued the orders on October 18, 2018. On November 15, 2018, the government timely filed an appeal from those orders. *See* Rule 5(a)(2) of the Rules of this Court. This Court has jurisdiction under 50 U.S.C. § 1881a(j)(4)(A).

(U) STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. ~~(S//NF)~~ Section 702(f)(1)(B) of the Foreign Intelligence Surveillance Act (FISA), which was enacted as part of the FISA Amendments Reauthorization Act of 2017, Pub. L. No. 115-118, 132 Stat. 3 (Jan. 19, 2018), and is codified at 50 U.S.C. § 1881a(f)(1)(B), requires procedures for querying information acquired pursuant to Section 702 of FISA that "include a technical procedure whereby a record is kept of each United States person query term used for a query." The first question is whether that requirement is satisfied by procedures that ensure that a record is kept of every query term, including each U.S. person query term, but that do not specify which recorded query terms relate to U.S. persons and which relate to non-U.S. persons.

2. ~~(S//NF)~~ The second question is whether recent misapplications by a small number of FBI personnel of the standard for making Section 702 queries—which requires all queries to be reasonably likely to retrieve foreign intelligence information or evidence of a crime—render the FBI's querying and minimization procedures deficient under FISA's definition of "minimization procedures" and under the Fourth Amendment, despite the remedial measures adopted by the government and the other substantial safeguards in place.

(U) STATEMENT OF THE CASE

A. (U) Statutory and Legal Framework

1. (U) FISA and Section 702

(U) In 1978, Congress enacted FISA, codified as amended at 50 U.S.C. §§ 1801-1885c, "to authorize and regulate certain governmental electronic surveillance of communications for foreign intelligence purposes." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013). "In FISA, Congress authorized judges of the [FISC] to approve electronic surveillance for foreign intelligence purposes if there is probable cause to believe that 'the target of the electronic surveillance is a foreign power or an agent of a foreign power,' and that each of the specific 'facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power.'" *Id.* at 402-03 (citations omitted).

(U) FISA as originally enacted focused on the United States[1] and did not apply to the vast majority of intelligence collection conducted by the government

[1] (U) Congress defined "electronic surveillance" to include four discrete types of domestically focused foreign intelligence collection activities. *See* 50 U.S.C. § 1801(f). Congress subsequently amended FISA several times to authorize the FISC to approve certain other forms of domestically focused foreign intelligence collection—*e.g.*, certain physical searches in the United States, see 50 U.S.C. §§ 1821-1829, the installation and use of pen register and trap and trace devices in the United States, *see id.* §§ 1841-1846, and orders requiring the production of business records or other tangible things, *see id.* §§ 1861-1862.

outside the United States. *See* S. Rep. No. 95-701, at 7 & n.2, 34-35 & n.16 (1978). Instead, Executive Order No. 12,333, as amended, addresses the government's "human and technical collection techniques . . . undertaken abroad." Exec. Order No. 12,333, § 2.2, 3 C.F.R. § 210 (1981 Comp.), *reprinted as amended in* 50 U.S.C. § 401 note (Supp. II 2008). That Executive Order governs the intelligence community, *inter alia*, in collecting "foreign intelligence and counterintelligence" abroad, collecting "signals intelligence information and data" abroad, and using intelligence relationships with "intelligence or security services of foreign governments" that independently collect intelligence information. *Id.* §§ 1.3(b)(4), 1.7(a)(1), (5) and (c)(1).

(U) The questions presented here involve Section 702 of FISA, 50 U.S.C. § 1881a, which was enacted as part of the FISA Amendments Act of 2008. Section 702 established new, supplemental procedures for authorizing the "targeting of [non-United States] persons reasonably believed to be located outside the United States to acquire foreign intelligence information." 50 U.S.C. § 1881a(a); *see also Clapper*, 568 U.S. at 404. Such acquisitions are accomplished through the issuance of directives by the Executive Branch to

electronic communication service providers.[2] See 50 U.S.C. § 1881a(i); *see also id.* § 1881(b)(4).

(U) In general, Section 702 provides that, "upon the issuance" of an order from the FISC, the Attorney General and the Director of National Intelligence (DNI) may jointly authorize the "targeting of persons reasonably believed to be located outside the United States" for a period of up to one year to acquire foreign intelligence information. 50 U.S.C. § 1881a(a). Section 702 specifies that the authorized acquisition may not intentionally "target a United States person"—whether that person is known to be in the United States or is believed to be outside the United States, 50 U.S.C. § 1881a(b)(1) and (3)—and may not target a person outside the United States "if the purpose . . . is to target a particular, known person reasonably believed to be in the United States," *id.* § 1881a(b)(2).[3] Section 702 further requires that the acquisition be "conducted in a manner consistent with the [F]ourth [A]mendment." *Id.* § 1881a(b)(6).

(U) Unlike traditional FISA surveillance, Section 702 does not require an individualized court order addressing each non-U.S. person to be targeted under its

[2] (U) The FISA Amendments Act also enacted other amendments to FISA, including provisions not at issue in this case that govern the targeting of United States persons outside the United States. *See* 50 U.S.C. §§ 1881b, 1881c.

[3] (U) FISA defines "United States person" to mean, as to natural persons, a citizen or permanent resident of the United States. *See* 50 U.S.C. § 1801(i).

provisions. Section 702 instead permits the FISC to approve annual certifications by the Attorney General and DNI that authorize the acquisition of certain categories of foreign intelligence information—such as information concerning international terrorism and the acquisition of weapons of mass destruction[4]—through the targeting of non-U.S. persons reasonably believed to be located outside the United States. *See* Privacy and Civil Liberties Oversight Bd., *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* 25 & n.71 (July 2, 2014) ("PCLOB Report") (citing public statements by intelligence community officials).[5] Although the Section 702 program acquires a large number of communications, it is implemented entirely by

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targeting individual persons and acquiring the communications of those persons, from whom the government expects to obtain certain types of foreign intelligence information. PCLOB Report 103. Section 702 is not implemented by collecting communications in bulk. *Id.*

(U) Section 702 requires the government to obtain the FISC's approval of the government's certification regarding the proposed collection, and the targeting and minimization procedures to be used in the acquisition. 50 U.S.C. § 1881a(a), (c)(1) and (j)(2)-(3); *see id.* § 1881a(d), (e), and (h)(2)(B). As discussed below, recent statutory amendments now also require the government to obtain FISC approval of separate querying procedures—*i.e.*, procedures governing the use of search terms to retrieve and access unminimized information that has already been acquired pursuant to Section 702.[6] *Id.* § 1881a(f). If the FISC determines that the certification contains all the required elements and that the procedures are "consistent with" the Act and "the [F]ourth [A]mendment," the FISC must issue an order approving the certification and the use of the targeting, minimization, and querying procedures. *Id.* § 1881a(j)(3)(A).

[6] (U) "Unminimized" or "raw" Section 702 information is information that (1) is in the same or substantially the same format as when it was acquired (or has been processed only as necessary to render it reviewable), and (2) has not been reviewed and determined to reasonably appear to be foreign intelligence information, to be necessary to understand foreign intelligence information or to assess its importance, or to be evidence of a crime. *See* App. 266.

(U) A Section 702 certification must include the attestations of the Attorney General and the DNI that, *inter alia*, (1) the acquisition does not violate the Fourth Amendment and complies with the aforementioned limitations prohibiting the targeting of U.S. persons; (2) the acquisition involves obtaining "foreign intelligence information from or with the assistance of an electronic communications service provider"; and (3) the targeting and minimization procedures in place satisfy the applicable statutory requirements. 50 U.S.C. § 1881a(h)(2)(A)(i), (ii), (vi) and (vii); *see id.* §§ 1801(h), 1881a(b). Pursuant to those statutory requirements, the targeting procedures must be reasonably designed to ensure that any acquisition targets only persons reasonably believed to be located outside the United States and to prevent the intentional acquisition of purely domestic communications. *See id.* § 1881a(d). The minimization procedures must satisfy FISA's definition of "minimization procedures" by, *inter alia*, "minimiz[ing] the acquisition and retention, and prohibit[ing] the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information," and "allow[ing] for the retention and dissemination of information that is evidence of a crime . . . for law enforcement purposes." *See id.* § 1881a(e) (incorporating definitions set forth at

§§ 1801(h) and 1821(4)). Those requirements recognize that targeting non-U.S. persons located abroad, to whom the Fourth Amendment generally does not apply, *see United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), may result in the incidental acquisition of communications of or concerning U.S. persons—for example, when a U.S. person communicates with a target or when two non-U.S. persons discuss a U.S. person.

2. (U) The Use of Queries To Identify and Retrieve Information Acquired Under Section 702

(U) As discussed further below, appropriately trained and authorized personnel of the agencies that have access to unminimized information acquired under Section 702 ("Section 702 information") are permitted to review such information to evaluate and determine whether it reasonably appears to be foreign intelligence information or evidence of a crime. *See, e.g.*, App. 268-69. Review of unminimized information acquired under Section 702 can occur in a number of ways, one of which is through the use of a query to identify specific information (including both contents and metadata) for review. *See* PCLOB Report 55. A query "term" or "identifier" is akin to a search term used in an Internet search engine—the term could be, for instance, an e-mail address, a telephone number, or a key word or phrase. *Id.* Unlike Internet searches, Section 702 queries do not result in the acquisition of new information; they merely permit the government to

more efficiently locate and identify information in the data the government has already acquired. *Id.* By helping agents and analysts to identify communications that are likely related to threats, using queries can enhance privacy interests by reducing the need to review other communications that are unlikely to be pertinent.

~~(S//NF)~~ The minimization procedures approved by the FISC in recent years permit a query of unminimized Section 702 information only if it is reasonably designed to return foreign intelligence information or, in the case of the FBI only, evidence of a crime. *See* App. 610. The same standard applies whether or not a U.S. person query term is used. *See* App. 611-12. The minimization procedures previously approved by the FISC as consistent with FISA's definition of minimization procedures and the Fourth Amendment have not required the FBI to record the justification for each Section 702 query, regardless of whether a U.S. person query term is used, and it has not been the FBI's practice to do so. *See, e.g.,* Mem. Op. and Order 28, *[Caption Redacted]* (FISA Ct. Nov. 6, 2015) ("Nov. 2015 FISC Op.").[7] Even absent such requirement, the National Security Division (NSD) of the Department of Justice conducts regular oversight reviews that include the examination of hundreds of thousands of FBI queries each year, during which FBI personnel must provide the justifications for their Section 702 queries. *See*

[7] (U) This opinion is available at https://www.dni.gov/files/documents /20151106-702Mem_Opinion_Order_for_Public_Release.pdf.

App. 439-40. Those reviews have established that unjustified queries and other forms of noncompliance are rare. *See* App. 440.

~~(S//NF)~~ The agencies with access to unminimized Section 702 information have different data storage and querying practices. *See* PCLOB Report 55-60. Unminimized Section 702 information b1, 3, 7E per FBI b1, 3, 7E per b1, 3, 7E per FBI b1, 3, 7E per FBI b1, 3, b1, 3, 7E per FBI b1, 3, 7E per FBI (b)(1) (b)(3)-50 USC 3024(i)

Any query against a system that contains unminimized Section 702 information must satisfy the above-described query standard. *See, e.g.,* App. 234.

~~(S//NF)~~ Only appropriately trained FBI personnel who require access in order to perform their job duties or to assist in a lawful and authorized governmental function are permitted access to and can query unminimized Section 702 information. App. 264. Accordingly, an agent or analyst who conducts a query against a system containing such information, but who does not have the necessary training and authorization, would not receive Section 702 information in response to that query. PCLOB Report 55-56. Instead, he or she would be notified in the query results of the existence of responsive Section 702 information to which he or she does not have access. *Id.* at 56. The agent or analyst would need

to receive the necessary training and authorization before viewing the responsive Section 702 information or ask trained and authorized personnel to review the information to determine whether it contains pertinent information subject to further investigative or analytical use consistent with the minimization procedures. *Id.* Some queries using U.S. person query terms do not return any Section 702 information, and, even when a query does return such information, FBI personnel may decide not to review it. *See* App. 315, 439 & n.41.

(U) For years, the FBI's practice has been to keep records of all terms used to query unminimized Section 702 information, including terms used to query the contents of communications and those used to query only metadata. *See* PCLOB Report 59. The FBI has never separately identified U.S. person query terms as such in its systems or tracked the number of queries made using U.S. person identifiers. *See id.*

3. (U) The Reauthorization Act

(U) The FISA Amendments Reauthorization Act of 2017, Pub. L. No. 115-118, 132 Stat. 3 (Jan. 19, 2018) ("Reauthorization Act"), made several changes to Section 702. As relevant here, the Reauthorization Act added a new subsection 702(f) requiring the Attorney General, in consultation with the DNI, to "adopt querying procedures consistent with the requirements of the [F]ourth [A]mendment

to the Constitution of the United States." 50 U.S.C. § 1881a(f)(1)(A); *see also id.* § 1881a(f)(3)(B) (defining "query" as "the use of one or more terms to retrieve the unminimized contents or noncontents located in electronic and data storage systems of communications of or concerning United States persons obtained through acquisitions authorized under [Section 702]"). New subsection 702(f)(1)(B) requires the Attorney General, in consultation with the DNI, to "ensure that the [querying] procedures . . . 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). As part of the FISC's review of Section 702 certifications submitted by the government, the court must assess whether the querying procedures satisfy that requirement. *Id.* § 1881a(j)(2)(D). Another new provision not directly at issue here requires the government to obtain an order from the FISC before the FBI reviews the results of certain queries made in connection with criminal investigations. *Id.* § 1881a(f)(2).

(U) The Reauthorization Act also re-codified a provision expressly exempting the FBI from a reporting requirement that otherwise requires the government to disclose annually the number of U.S. person queries and U.S. person query terms used to retrieve certain unminimized information acquired under Section 702. *See* 50 U.S.C. § 1873(b)(2)(B)-(C), (d)(2)(A). In first enacting

that provision in 2015, Congress explained 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, at 26 (2015). Another provision of the Reauthorization Act requires the Department of Justice's Inspector General (IG), within one year after the FISC's first approval of querying procedures adopted pursuant to Section 702(f), to submit a report that includes, among other things, 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." Pub. L. No. 115-118, § 112(b)(8)(B), 132 Stat. 18-19.[8]

B. (U) Procedural History

1. ~~(S//OC/NF)~~ The 2018 Certifications and Accompanying Procedures

~~(S//OC/NF)~~ In March 2018, the Attorney General and the DNI executed reauthorization certifications ("2018 Certifications") that were intended to reauthorize the acquisition of foreign intelligence information authorized under the prior Certifications, which were then still in effect. *See* App. 587-88. The 2018

[8] (U) The Reauthorization Act also added other new provisions, including, *inter alia*, restrictions on the use and disclosure in criminal proceedings of Section 702 information concerning United States persons, *see* 50 U.S.C. § 1881e(a); limitations on the acquisition of so-called "abouts" communications, *see id.* § 1881a(b)(5); and a provision requiring the declassification and publication of minimization procedures, *id.* § 1881a(e)(3).

Certifications, accompanied by querying, targeting, and minimization procedures approved by the Attorney General, were filed with the FISC in late March 2018 for its review and approval. *See* App. 588. The 2018 Certifications had effective dates of April 26, 2018, or the date upon which the FISC issued orders approving the reauthorization certifications, whichever was later. *See* App. 584. The 2018 Certifications included amendments proposing the use of the accompanying minimization and querying procedures in connection with information acquired under the 2018 Certifications and information acquired under all prior certifications. *See* App. 589.

~~(S//NF)~~ The querying procedures accompanying the 2018 Certifications permitted the FBI to comply with the new statutory requirement that "a record [be] kept of each United States person query term" by continuing the Bureau's longstanding practice of keeping a record of all queries of unminimized Section 702 information, without distinguishing between U.S. person query terms and other query terms. The government explained:

> Because the vast majority of the FBI's investigative activity occurs in the United States, the FBI generally treats everyone located inside the United States the same, consistent with the Constitution and laws of the United States, when conducting investigations or identifying threat streams. Accordingly, when conducting queries to determine if an individual poses a threat to the national security, FBI personnel often elect not to initially focus their efforts on determining

> United States person status, but rather focus on identifying threat streams and "connecting the dots."

App. 612. The government further explained that the FBI's practice of keeping a record of every query term, including "every United States person query term," is consistent with the plain language of Section 702(f)(1)(B), the accompanying legislative history, and related provisions regarding querying.[9] App. 613-17.

~~(S//NF)~~ In accordance with existing practice, the querying procedures submitted to the FISC also did not require FBI personnel to furnish a written justification before running or reviewing the results of queries, including queries made using U.S. person query terms—a requirement that the FISC held in 2015 was not mandated by the Fourth Amendment in light of the other protections in place, *see* Nov. 2015 FISC Op. 39-45, and which Congress chose not to adopt in

[9] ~~(S//NF)~~ Historically, the other agencies that receive unminimized Section 702 information (the National Security Agency (NSA), the Central Intelligence Agency (CIA), and the National Counterterrorism Center (NCTC)) elected for policy reasons to specify in their records whether a particular query term is a U.S. person query term. *See* App. 598-99. In light of their differing missions, those agencies conduct far fewer queries than the FBI using U.S. person query terms. *See* App. 436. The querying procedures for NSA, CIA, and NCTC carry forward their historical practice of specifying in their records whether a particular query term is a U.S. person query term. App. 241, 246, 251 (Those procedures also separately require that a justification for each U.S. person query be recorded. App. 241, 247, 252.) Specifying which query terms are U.S person query terms enables NSA, CIA, and NCTC to comply with reporting requirements that Congress added to FISA in 2015, from which the FBI is exempted. Those requirements and the FBI exemption are discussed further below.

the Reauthorization Act, *see, e.g.*, S. Rep. No. 115-182, at 4-5, 7-10 (2017) (noting rejection of various querying-related proposals).

2. ~~(S//NF)~~ The FISC's Initial Review and Appointment of Amici Curiae

~~(S//NF)~~ On April 5, 2018, the FISC (Boasberg, J.) found that the 2018 Certifications and accompanying procedures "likely present[ed] one or more novel or significant interpretations of law, the consideration of which would benefit from amicus participation," and the court issued the first of two orders extending the time for its consideration of the matter (and the effective date of the new certifications and procedures). App. 585. Subsequently, on April 23, 2018, the FISC issued an order appointing amici curiae and directing amici and the government to file briefs addressing several questions, including, *inter alia*, the following:

> (d) Are the record-keeping provisions of the Querying Procedures consistent with the requirements of § 702(f)(1)(B) and the Fourth Amendment, with particular consideration of:
>
> > (i) FBI records that do not specify whether the recorded query terms are United States person query terms, . . .; [and]
> >
> > (ii) FBI use of United States person query terms without any statement of facts showing that the use of those terms is reasonably likely to retrieve foreign intelligence information or evidence of a crime . . . .

App. 570-71.

~~(S//NF)~~ Amici and the government filed briefs as directed by the court, and the FISC held a hearing on July 13, 2018. *See generally* App. 329-555. Amici raised a number of concerns about the government's minimization and querying procedures. They argued, *inter alia*, that the FBI's querying procedures failed to satisfy Section 702(f)(1)(B)'s requirement that "a record [be] kept of each United States person query term," which, in amici's view, requires the government to specify whether each query term is a U.S. person query term. *See* App. 539. Amici also asserted that the court should require, as a constitutional matter, that the FBI provide a written justification before viewing the results of any query made using a U.S. person query term. App. 531. Amici also argued, *inter alia*, that exceptions in the querying and minimization procedures for training agency personnel, testing and maintenance of agency systems, conducting internal agency oversight, and complying with congressional mandates were too broadly worded and should be narrowed. *See* App. 518-28, 541-44.

~~(S//NF)~~ On July 16, 2018, the FISC's legal staff, speaking at the court's direction, orally informed the government of the court's concerns, including, among other things, doubts about the adequacy of the FBI's querying procedures. *See* App. 4-5. First, staff informed the government of the court's view that new

subsection 702(f)(1)(B) may require the FBI to separately track U.S. person queries, rather than tracking all queries together without differentiating between U.S. person and non-U.S. person query terms. *See* App. 5. Second, staff advised that the court was inclined to find, as a statutory and constitutional matter, that the FBI must record its justification before reviewing the contents of Section 702 information returned through a query using a U.S. person identifier. *See* App. 5.

~~3. (S//OC/NF)~~ The Amended 2018 Certifications and Amended Querying and Minimization Procedures

~~(S//OC/NF)~~ Following a further extension of time, *see* App. 324-28, the government submitted amendments to the 2018 Certifications to the FISC, accompanied by revised minimization and querying procedures, on September 18, 2018. *See* App. 185, 232-305. The revisions to the minimization and querying procedures addressed many of the concerns raised by amici and the FISC. For example, the amended querying procedures added language narrowing the exceptions for training agency personnel, testing and maintenance of agency systems, conducting internal agency oversight, and complying with congressional mandates. *See* App. 236; *see also* App. 97 (FISC concluding that the revised exceptions "comport with the statutory requirements and the Fourth Amendment").

~~(S//NF)~~ The government did not, however, alter the recordkeeping provision of the FBI's querying procedures. To comply with Section

702(f)(1)(B)'s requirement that querying procedures "include a technical procedure whereby a record is kept of each United States person query term used for a query," the amended procedures permit the FBI to keep a record of every query without distinguishing between U.S. person query terms and other query terms. App. 235-36 & n.4.

~~(S//NF)~~ In support of the revised FBI querying procedures, the government submitted a declaration by the FBI Director explaining why requiring the FBI to determine U.S. person status before each query would present significant operational consequences that could impede the FBI's ability to fulfill its national security mission. App. 306. Given its dual intelligence and law enforcement roles, and its responsibilities as a domestic investigative agency, the FBI necessarily conducts a much greater number of U.S. person queries of its systems that store Section 702 information than the NSA, CIA, or NCTC, which generally focus on intelligence collection outside the United States. *See* App. 436. As explained in the FBI Director's declaration, the FBI worked diligently after the attacks of September 11, 2001, to follow the recommendations of the National Commission on Terrorist Attacks Upon the United States and the William H. Webster Commission by "eliminat[ing] balkanized information that impeded the ability of FBI personnel to identify and connect threat streams." App. 309. Requiring FBI

personnel to attempt to differentiate between U.S. person and non-U.S. person query terms in the context of conducting queries during the initial investigation of threat streams would have a significant negative impact on FBI operations by: "(1) diverting investigative resources toward identifying the U.S. person status of the individuals associated with query terms, (2) delaying the FBI's ability to timely investigate and thwart threat streams, and (3) disincentivizing agents and analysts from querying FISA data during investigations." App. 314.

~~(S//NF)~~ In addition, the FBI querying procedures were not changed to require the FBI to document a statement of facts before making or viewing the results of each U.S. person query. The revised procedures still require that "[e]ach query of FBI systems containing unminimized content or noncontent information acquired pursuant to section 702 of the Act must be reasonably likely to retrieve foreign intelligence information, as defined by FISA, or evidence of a crime, unless otherwise specifically excepted by these procedures." App. 234.[10] But the revised procedures do not require FBI personnel to record the basis for their determination that that standard is satisfied.

[10] ~~(S//NF)~~ In addition, a query cannot be "overly broad," but rather must be designed to extract foreign intelligence information or evidence of a crime, and it "must have an authorized purpose" and not be run for improper reasons. App. 337.

~~(S//NF)~~ The revised procedures, however, do contain a new provision aimed at addressing certain compliance problems that had been cited by the FISC as underlying the court's view about the need for a written justification requirement. That new provision states:

> Prior to reviewing the unminimized content of section 702-acquired information retrieved using a categorical batch query (as opposed to queries conducted on the basis of individualized assessments), FBI personnel will obtain approval from an attorney from either their Chief Division Counsel's Office or the National Security and Cyber Law Branch. This requirement does not apply if the persons whose identifiers are queried are (1) targets of lawful collection, (2) subjects of predicated investigations, or (3) in contact with targets of lawful collection or subjects of predicated investigations. Approvals to review the content returned by such queries will include a written justification for the queries, the approving official, and the duration of such approval.

App. 235. "Categorical batch queries" include any query that relies on a categorical justification for multiple query terms associated with more than one person, and for which there is no individualized assessment for each of the identifiers queried. *See* App. 168, 170.[11] The FBI Director's Declaration set forth

[11] ~~(S//NF)~~ An example of a permissible categorical batch query would be a situation in which the FBI has received information indicating that there is an employee at a cleared defense contractor who has access to certain sensitive technology and who plans to sell the technology to an adversarial foreign government. *See* App. 204 n.20. The cleared defense contractor has provided the FBI with a list of 100 employees at the company who have access to the sensitive technology. App. 204 n.20. The FBI could run a categorical batch query using the identifiers associated with those 100 employees, as there is a reasonable basis to assess that the queries would return foreign intelligence information or evidence of

facts supporting the government's position that a broader written justification requirement would "hinder the FBI's ability to perform its national security and public safety missions." App. 320.

4. ~~(S//NF)~~ The FISC's Rulings

a. ~~(S//NF)~~ The Memorandum Opinion and Order

~~(S//NF)~~ In a Memorandum Opinion and Order issued on October 18, 2018, the FISC found that the 2018 Certifications, as amended on September 18, 2018, contained all the required elements and, except as described below, that the targeting procedures, minimization procedures, and querying procedures adopted for use in connection with those certifications are consistent with the requirements of Sections 702(d)-(f)(1), 50 U.S.C. §1881a(d)-(f)(1), respectively, and with the Fourth Amendment. *See* App. 132-34. As further stated in the court's Memorandum Opinion and Order, however, the FISC determined that it was not able to make all of the required findings with respect to certain aspects of the FBI's minimization and querying procedures. *See* App. 133.

~~(S//NF)~~ The FISC concluded that the FBI's querying procedures do not satisfy the requirements of Section 702(f)(1)(B) because they do not require records that "indicate whether terms are United States-person query terms." App. 52; *see also* App. 61 (recordkeeping requirement "not satisfied by procedures

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a crime. App. 204 n.20; *see also* App. 170-71.

under which the FBI does not keep such records in a readily identifiable manner"). The court asserted that the government's reading of Section 702(f)(1)(B) "misses the essential aim of the recordkeeping requirement, which is to memorialize when a United States-person query term is used to query Section 702 information." App. 53. The court rejected arguments that related statutory provisions concerning querying and the relevant legislative history support the government's reading of the statute. App. 54-59.

~~(S//NF)~~ The FISC separately concluded that the FBI's querying and minimization procedures, as implemented, fail to satisfy FISA's definition of minimization procedures and are unreasonable under the Fourth Amendment, in light of "the FBI's repeated non-compliant queries of Section 702 information." App. 62.

~~(S//NF)~~ The FISC explained that restrictions on the FBI's use of U.S. person queries are "important for minimization," App. 65, because of the amount of information concerning U.S. persons that is incidentally acquired through the program and "because the FBI conducts many more U.S.-person queries than the other agencies," App. 66. Queries, the court noted, can "result in a further intrusion into the privacy of . . . U.S. persons, who may have enjoyed 'the

protection of anonymity' [within the acquired data] until information concerning them" was retrieved via query. App. 65-66 (citation omitted).

~~(S//NF)~~ The court reaffirmed that, as written, the FBI's query standard—which, as noted above, requires (subject to enumerated exceptions) that queries be reasonably likely to retrieve foreign intelligence information or evidence of a crime—is consistent with the definition of minimization procedures because it "contribute[s] to the minimization of private U.S.-person information, consistent with foreign-intelligence needs, as contemplated [by the definition of minimization procedures]." App. 67-68; *see* App. 97-110 (approving exceptions). In practice, however, the court concluded that the procedures fail to satisfy that requirement.

~~(S//NF)~~ In support of that conclusion, the FISC listed several instances of noncompliance by FBI personnel with the requirement that all queries be reasonably likely to return foreign intelligence information or evidence of a crime, some of which, the court found, "evidence misunderstanding of the querying standard," or "indifference toward it," on the part of FBI personnel. App. 72. The court's discussion focused on [redacted] incidents involving a handful of FBI personnel who had made noncompliant categorical batch queries using a large number of query terms. *See* App. 68-69.[12]

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

[12] ~~(S//NF)~~ The principal incidents involving Section 702, which were reported to the FISC by the government, included queries of: [redacted]

~~(S//NF)~~ The FISC acknowledged the "steps [taken by the government] in response to the FBI's non-compliance with the querying standard," including the adoption of a provision requiring attorney approval of "categorical batch quer[ies]" and the promulgation to FBI personnel of detailed guidance on querying requirements. App. 79. The court concluded that while these actions constitute "constructive steps" by the government, they "do not adequately justify" a finding that the querying and minimization procedures satisfy the definition of minimization procedures. App. 82-83.

~~(S//NF)~~ For similar reasons, the FISC concluded that the FBI's minimization procedures are, as implemented, unreasonable under the Fourth Amendment. App. 84. As an initial matter, the FISC rejected amici's contention that querying should be regarded as a "separate Fourth Amendment event subject to its own reasonableness analysis," App. 85, instead reaffirming that the government's examination of information lawfully acquired under Section 702

[redacted] Subsequent reviews of these queries established that each of the handful of personnel involved ran the queries in question for the proper purpose of identifying and retrieving foreign intelligence information or evidence of a crime. *See* App. 441-42. It was determined, however, that the each of the queries in question was not, under the circumstances, reasonably likely to retrieve such information. App. 441-42.

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

"requires a judicial determination that the totality of attendant circumstances, including the government's acquisition, retention, use, and dissemination of such information, is reasonable under the Fourth Amendment," App. 87-88.

~~(S//NF)~~ Balancing the relevant interests, the FISC stated that the privacy interests at stake are "substantial," as "the FBI has conducted [redacted] b3, 7E per FBI of unjustified queries of Section 702 data," App. 88, thus creating a serious risk of unwarranted intrusion into the private communications of a large number of U.S. persons, App. 89. The FISC acknowledged that "[u]nder the totality-of-circumstances framework" it "must take into account protections afforded by other provisions of the government's procedures," including provisions "direct[ing] . . . acquisitions toward communications that are likely to yield foreign intelligence information" and "substantial[ly] restrict[ing] . . . the use and dissemination of information derived from queries." App. 90 (citation and internal quotation marks omitted). The court also acknowledged that the government's countervailing interest in acquiring foreign intelligence information is "'particularly intense.'" App. 91 (citation omitted). The FISC asserted, however, that "the relevant governmental action [here] is the FBI's continuing to run queries without taking further measures to ensure they actually satisfy the querying standard." App. 91. Acknowledging that it is "a close question," and that "[r]easonableness under the

Fourth Amendment does not require perfection," the FISC concluded that "the balance of interests ultimately tips in favor of finding the procedures to be [unconstitutional]." App. 91.

~~(S//NF)~~ Finally, the court concluded that the procedures proposed by amici—requiring FBI personnel to record the bases for believing that queries using U.S. person query terms were reasonably designed to return foreign intelligence information or evidence of a crime before they examine the content of information returned by any such query—would "remedy the statutory and Fourth Amendment deficiencies" it had found. App. 92.

b. (S//NF) The Deficiency Orders

~~(S//NF)~~ In two separate orders issued contemporaneously with the Memorandum Opinion and Order, the FISC found that the deficiency concerning recordkeeping under Section 702(f)(1)(B) applies to queries of information acquired under the 2018 Certifications, and that the deficiency concerning misapplications of the query standard applies to queries of information acquired under both the 2018 Certifications and prior certifications. *See* App. 140-41, 143; *see also* App. 133-34. Taken together, the FISC's deficiency determinations therefore apply to the minimization and querying procedures used by the FBI for all Section 702 information currently retained by the FBI, whether such

information was acquired under the 2018 Certifications or a predecessor certification.

~~(S//NF)~~ Pursuant to 50 U.S.C. § 1881a(j)(3)(B), the FISC directed the government, at its election, "[n]ot later than 30 days from the issuance of th[e] Order, [to] correct the deficiencies identified [by the FISC] and further described in the accompanying Memorandum Opinion and Order," or to "[c]ease, or not begin, the implementation of the authorizations for which the Certifications were submitted insofar as such implementation involves those deficiencies." App. 141, 144.

~~5. (S//NF)~~ The Government's Appeal

~~(S//NF)~~ The government filed a notice of appeal and petition for review on November 15, 2018. On November 16, 2018, this Court granted the government's motion for relief under 50 U.S.C. § 1881a(j)(4)(C) and ordered that the portions of the FISC's orders precluding the government from conducting U.S. person queries shall not be implemented pending the Court's review of those orders.

(U) SUMMARY OF THE ARGUMENT

I. ~~(S//NF)~~ The FBI's querying procedures are consistent with 50 U.S.C. § 702(f)(1)(B), which requires procedures that "include a technical procedure whereby a record is kept of each United States person query term." 50 U.S.C.

§ 1881a(f)(1)(B). The FBI's querying procedures satisfy that requirement by ensuring that a record is kept of every term, including "each United States person query term," that is used to query unminimized Section 702 information. The additional requirement imposed by the FISC—that the FBI's records must also indicate which query terms relate to U.S. persons—is not found in the plain statutory text. Assuming *arguendo* that the statutory language alone does not resolve the matter, the FISC's interpretation also is not justified by the pertinent statutory context or the legislative history, which confirm that Congress intended to give the government discretion in determining how records of U.S. person query terms are maintained, provided that those records permit effective oversight. Consistent with Congress's intent, the FBI has adopted querying procedures that ensure that a record of each U.S. person query term is maintained and available for subsequent oversight without imposing unjustified burdens on the FBI's work in safeguarding the national security.

II. ~~(S//NF)~~ The FBI's amended minimization and querying procedures are consistent with FISA's definition of minimization procedures and with the requirements of the Fourth Amendment. Contrary to the FISC's conclusion, recent misapplications of the query standard by a small number of FBI personnel do not warrant a different conclusion. Queries of unminimized Section 702 information

are made only after the application of targeting procedures that are reasonably designed to ensure that only non-U.S. persons located abroad are targeted and that wholly domestic communications are not acquired. In the case of the FBI, those queries are run against databases that contain only a small fraction of the unminimized Section 702 information that is acquired by the government, as the FBI only receives unminimized Section 702 information on facilities that are relevant to a pending full field investigation.

~~(S//NF)~~ All queries, including those made using identifiers associated with U.S. persons, must be reasonably likely to retrieve foreign intelligence information or evidence of a crime. That requirement has been clarified in the FBI's amended querying procedures to ensure that the query standard will not be read to suggest that only a valid purpose (*i.e.*, an intent to identify and retrieve foreign intelligence information or evidence of a crime) is needed. Adherence to the query standard has been and will remain subject to oversight audits conducted by the Department of Justice and ODNI. Past audits demonstrate that misapplication of the query standard by FBI personnel is rare.

~~(S//NF)~~ In response to concerns expressed by the FISC, the FBI has adopted a new provision requiring attorney approval before reviewing contents retrieved in response to the categorical queries that the FISC identified as creating the largest

risk of unjustified privacy intrusions. The newly clarified query standard and the attorney-approval provision, together with continuing guidance and training, are reasonably designed to reduce the risk of misapplications of the querying standard, both in the context of categorical queries and more generally.

~~(S//NF)~~ As the FISC has previously recognized, other protections in the FBI's minimization procedures serve to greatly reduce the risk that FBI personnel will make improper use of information returned by a query that fails to meet the query standard. Subject to narrowly defined exceptions, the procedures require that unminimized Section 702 information—including information retrieved through a query—is subject to review by authorized and appropriately trained personnel only for the purpose of determining whether it reasonably appears to be foreign intelligence information, to be necessary to understand foreign intelligence information or to assess its importance, or to be evidence of a crime. And the procedures prohibit the further use for analytical or investigative purposes, or the dissemination, of U.S. person information that does not meet that standard.

(U) STANDARDS OF REVIEW

(U) Questions of statutory interpretation are subject to de novo review. *See, e.g., United States v. Papagno*, 639 F.3d 1093, 1095-96 (D.C. Cir. 2011). "In the Fourth Amendment context," this Court, like other federal appellate courts,

"review[s] findings of fact for clear error and legal conclusions (including determinations about the ultimate constitutionality of government searches or seizures) de novo." *In re Directives Pursuant to Section 105B of FISA*, 551 F.3d 1004, 1009 (FISA Ct. Rev. 2008).

(U) ARGUMENT

I. ~~(S//NF)~~ THE FBI'S QUERYING PROCEDURES ARE CONSISTENT WITH THE RECORDKEEPING REQUIREMENT SET FORTH IN SECTION 702(f)(1)(B) OF FISA

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

~~(S//NF)~~ Section 702(f)(1)(B) provides that querying procedures must "include a technical procedure whereby a record is kept of each United States person query term." 50 U.S.C. § 1881a(f)(1)(B). The FBI's querying procedures satisfy that requirement. They ensure that a record is kept of every term, including "each United States person query term," that is used to query unminimized Section 702 information.

~~(S//NF)~~ The additional requirement imposed by the FISC—that the FBI's records must also indicate which query terms relate to U.S. persons—is not found in the statutory text. Section 702(f)(1)(B) does not specify that records of U.S. person query terms must be kept separately from records of other queries or that

such records must be separately identifiable. Indeed, the statute is altogether silent on the question of *how* records of U.S. person query terms are to be kept. The statute also does not require the government to specify before conducting each query whether the query term relates to a U.S. person, or to count the number of such queries. Therefore, the statutory text is clear and provides no basis for the FISC's conclusion that separate records of U.S. person query terms are required. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (where "the statute's language is plain, the 'sole function of the courts is to enforce it according to its terms'") (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)); *see also In re Sealed Case*, 310 F.3d 717, 726 (FISA Ct. Rev. 2002) (rejecting FISC-imposed requirement for FISA electronic surveillance that was not "tied . . . to *actual* statutory language") (emphasis in original).

~~(S//NF)~~ The FISC concluded that no "record" of U.S. person query terms is kept if the FBI's records do not differentiate U.S. person query terms from non-U.S. person query terms. App. 52-53. But contrary to the FISC's conclusion, no separate tracking requirement is reflected in the dictionary definitions of "record" recited by the court. App. 52. Consistent with those definitions, the FBI's procedures require that an "account" of each U.S. person query term is "collected," "set down," and "preserved." App. 52. The fact that records of U.S. person query

terms are not differentiated from records of non-U.S. person query terms does not convert them into something other than "records" within the meaning of the definitions cited by the FISC. Moreover, under the FISC's reasoning, the statutory text "whereby a record is kept of each United States person query term" would have the same meaning as the phrase "whereby a *separate* record is kept of each United States person query term." There is no basis for reading the word "separate" into the statutory text when Congress did not include it.

~~(S//NF)~~ In analyzing the text of Section 702(f)(1)(B), the FISC asserted that the government's interpretation "misses the essential aim of the recordkeeping requirement, which is to memorialize when a United States-person query term is used to query the Section 702 information." App. 53. But contrary to the FISC's assertion, separate tracking of U.S. person query terms is not an "aim" that is reflected in the plain language used by Congress, the ordinary meaning of which is "assum[ed] [to] . . . accurately express[] the legislative purpose." *United States v. Albertini*, 472 U.S. 675, 680 (1985). The controlling question is not what a reviewing court thinks Congress was trying to achieve, but what Congress actually said in the statutory text. Where, as here, the statutory language is clear, no further examination of congressional purpose is necessary or appropriate. *See Boyle v. United States*, 556 U.S. 938, 950 (2009).

~~(S//NF)~~ The FISC also asserted that "[j]ust as records of all applicants admitted to a university are not records of out-of-state applicants admitted if they do not differentiate out-of-state from in-state, records that do not memorialize whether a query term used to query Section 702 data meets the definition of a United States-person query term do not preserve the information specifically required by Section 702(f)(1)(B)." App. 53. The FISC's analogy does not support its reading of Section 702(f)(1)(B). Records of out-of-state applicants do not cease to exist merely because they are commingled with other records. If the goal of requiring records of out-of-state applicants is to ensure their preservation, that goal is accomplished regardless of whether they stand alone or are held together with other records. There may be contexts in which, to harmonize a recordkeeping statute with other related provisions or to avoid absurd or anomalous results, it is necessary to read a differentiation or separation requirement into the statute notwithstanding the statute's silence on that issue. But that is not the case here. As discussed below, the relevant statutory context and legislative history fail to support the FISC's departure from the plain language of Section 702(f)(1)(B). Moreover, as also discussed below, no absurd or anomalous results will follow from adherence to that plain language, as, under the FBI's procedures, a record of every U.S. person query term (and every other query term) will continue to be

maintained for subsequent oversight.

B. ~~(S//NF)~~ Nothing in the Relevant Statutory Context Supports the FISC's Departure from the Statutory Text

~~(S//NF)~~ Nothing in the relevant statutory context supports the FISC's reading of the statute. Indeed, review of the Reauthorization Act demonstrates that when Congress intended to require the FBI to alter its existing querying practices, it knew how to do so explicitly. As discussed above, another provision of the Reauthorization Act requires the government, for the first time, to obtain an order from the FISC before the FBI reviews the results of certain queries made in connection with criminal investigations. *See* 50 U.S.C. § 1881a(f)(2). That provision, now set out in Section 702(f)(2), clearly and unequivocally requires the FBI to alter its pre-existing practice by imposing detailed new provisions describing the circumstances in which such orders are required and the process for requesting and issuing them. Section 702(f)(1)(B), by contrast, is worded in a manner that is flexible enough to accommodate the distinct recordkeeping practices of the FBI—of which Congress was aware—and those of the other agencies that separately track U.S. person query terms. The contrast between Sections 702(f)(2) and 702(f)(1)(B) undercuts the FISC's conclusion that Congress intended the latter provision to require the FBI to change its recordkeeping practices.

~~(S//NF)~~ Two other statutory provisions specifically relating to querying also are instructive. First, a provision adopted in 2015 required for the first time that the DNI publicly report on an annual basis certain statistics, including, for information acquired pursuant to Section 702, "the number of search terms concerning a known United States person used to retrieve . . . unminimized contents," and "the number of queries concerning a known United States person of unminimized noncontents information." *See* 50 U.S.C. § 1873(b)(2)(B), (C). But Congress expressly exempted the FBI from that reporting requirement, *id.* § 1873(d)(2)(A), explaining that "[t]he FBI is exempted from reporting requirements that the agency has indicated it lacks the capacity to provide," H.R. Rep. No. 114-109, at 26 (2015). Congress thus clearly understood the FBI's limitations with respect to distinguishing U.S. person queries from other queries. And despite adding other disclosure requirements for the FBI in the Reauthorization Act, *see, e.g.*, 50 U.S.C. § 1873(b)(2)(D), Congress retained the provision expressly exempting the FBI from reporting on U.S. person queries (and updated the statutory cross-references in the exemption provision to account for the newly added disclosure requirements) in the same statute that adopted the recordkeeping provision in Section 702(f)(1)(B).[13] Pub. L. No. 115-118, § 102(b),

[13] ~~(S//NF)~~ The FISC asserted that the inclusion of an FBI exemption in the query reporting provision and the absence of a similar exemption in Section

132 Stat. 9-10 (2018).

~~(S//NF)~~ A second provision enacted simultaneously with Section 702(f)(1)(B) requires the Department of Justice's IG, within one year of the FISC's first approval of querying procedures adopted pursuant to Section 702(f), to submit a report that includes, among other things, 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." Pub. L. No. 115-118, § 112(b)(8)(B), 132 Stat. 19-20 (2018). That provision would not serve any purpose if the FISC were correct that Section 702(f)(1)(B) requires the FBI to record such queries separately, because such a requirement would ignore, and override, any impediments. Together with the FBI reporting exemption discussed above, the IG report mandated by Congress makes clear that Section 702(f)(1)(B) was not intended to require the tallying of U.S. person queries or query terms by the FBI. The FISC failed to persuasively account for these provisions, which directly undercut its

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702(f)(1)(B) demonstrates that Congress did not intend the FBI to be exempt from having to keep separately identifiable records of U.S. person query terms. App. 55. But no such exemption is needed, as the plain language of Section 702(f)(1)(B) does not require separate records. Nor would the exemption from reporting to Congress the total number of U.S. person queries make much sense if the FISC's reading were correct. It would be a simple matter for FBI to report to Congress on the total number of known U.S. person queries if it had to record such queries separately from other queries under Section 702(f)(1)(B).

interpretation of Section 702(f)(1)(B). *See* App. 55.

C. ~~(S//NF)~~ The Legislative History Confirms that the FISC's Interpretation of Section 702(f)(1)(B) Is Inconsistent with the Intent of Congress

(U) Assuming *arguendo* that the statutory language and context do not conclusively resolve the matter, the legislative history confirms that Congress did not intend Section 702(f)(1)(B) to impose any specific requirements pertaining to recordkeeping practices. Rather, Congress added Section 702(f)(1)(B) to ensure that records about the queries themselves are maintained for oversight and left it to the discretion of the Attorney General, in consultation with the DNI, to determine how that is accomplished. The House Report for the Reauthorization Act states that Section 702(f)(1)(B)

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

H.R. Rep. No. 115-475, at 18 (2017). The House Report also indicates that each element of the Intelligence Community should have "separate procedures documenting their *current policies and practices* related to the querying of lawfully acquired FISA Section 702 data." *Id.* at 17-18 (emphasis added).

~~(S//NF)~~ In accordance with the plain language of Section 702(f)(1)(B)—which, as discussed above, is flexible enough to accommodate the pre-existing recordkeeping practices of the FBI as well as the distinct practices of the other agencies that separately track U.S. person queries—the House Report thus confirms that Congress did not intend to require the FBI to change its recordkeeping practices. Rather, the Report makes clear that Congress intended Section 702(f)(1)(B) to codify existing recordkeeping practices, thereby setting a statutory floor below which the government may not drop. Prior to the Reauthorization Act, the statute did not expressly address the topic of queries (other than in the reporting requirement described above that was enacted in 2015), and the details of each agency's practices were addressed in their Attorney General-approved minimization procedures and subject to FISC review. Congress's intent was to expressly address queries in the statute and thereby to impose a statutory requirement to ensure that agencies would be required to keep, at a minimum, a record of all U.S. person queries. *See* H.R. Rep. No. 115-475, at 18 ("With respect to the retention of such records, Congress intends that the privacy interests of United States persons be protected by requiring the Government to apply a reasonable retention period consistent with each agency's mission and the desire to ensure such records are retained for appropriate oversight

purposes."). Whether the government elects to retain queries of other terms is a matter within the discretion of the Attorney General. *See id.*

~~(S//NF)~~ The FISC rejected the government's reliance on the House Report. *See* App. 57-59. But the court's narrow reading of the report rests on the fallacy that no records of U.S. person query terms are kept at all if those records are not separated or otherwise differentiated from records of other query terms. *See* App. 57-58. As discussed above, no separation or differentiation requirement is reflected in the ordinary meaning of the word "record," even as set forth in the dictionary definitions cited by the FISC. Contrary to the FISC's conclusion, whether and to what extent records of U.S. person query terms are differentiated from records of other query terms are questions about the "particular manner" in which those records are kept, a matter that the House Report confirms is outside the scope of Section 702(f)(1)(B). H.R. Rep. No. 115-475, at 18.

D. ~~(S//NF)~~ The FISC's Deviation from the Statutory Language Is Not Necessary To Ensure Adequate Oversight

(U) As the House Report makes clear, the objective of Section 702(f)(1)(B) is to ensure that records of U.S. person queries are "retained and thus available for subsequent oversight." H.R. Rep. No. 115-475, at 18. The FBI's longstanding recordkeeping practices, which have been carried forward by the FBI querying procedures, satisfy that objective. Pursuant to those procedures, a record of every

U.S. person query term is, and will remain, available for subsequent oversight. Accordingly, interpreting Section 702(f)(1)(B) in accordance with its plain language is consistent with its function within the statutory scheme. *See In re Certified Question of Law*, 858 F.3d 591, 600 (FISA Ct. Rev. 2016) (courts must read a statute's words "in their context and with a view to their place in the overall statutory scheme") (citation and internal quotation marks omitted).

(U) Section 702(f)(1)(B) adds to an already extensive oversight framework that involves all three branches of the federal government. *See Clapper*, 568 U.S. at 404 ("Surveillance under [Section 702] is subject to statutory conditions, judicial authorization, congressional supervision, and compliance with the Fourth Amendment."). Implementation of Section 702 includes internal oversight by various entities within each agency that has a role in the acquisition, retention, or dissemination of Section 702 information. *See* PCLOB Report 66-68. In addition, Section 702 requires the Attorney General and the DNI to periodically assess the government's compliance with the targeting, minimization, and querying procedures and with relevant compliance guidelines, and to submit those assessments both to the FISC and to congressional oversight committees. 50 U.S.C. § 1881a(m). And at least every six months, the Attorney General must keep the relevant congressional oversight committees "fully inform[ed]"

concerning the implementation of Section 702. *Id.* § 1881f(a) and (b)(1). Moreover, the government reports Section 702 compliance incidents to the FISC via individual notices and quarterly reports that are filed pursuant to the FISC's Rules of Procedure. *See* PCLOB Report 75-76.

~~(S//NF)~~ The oversight of the FBI's queries within the framework described above is substantial. *See* App. 439. As required in the FBI's FISC-approved Section 702 minimization procedures, NSD annually conducts minimization reviews at selected FBI field offices. *See* App. 439. NSD typically conducts minimization reviews at b1, 3, 7E per FBI FBI field offices each calendar year and in the process conducts audits b1, 3, 7E per FBI App. 439-40. In b1, 3, 7E per for instance, NSD conducted audits of queries run by b1, 3, 7E per FBI FBI personnel who had access to raw FISA information. In turn, the number of queries reviewed by NSD that were run by those personnel in systems that contain raw Section 702 information b1, 3, 7E per FBI App. 440. As a result of those reviews, NSD identified query incidents in b1, 3, field offices involving b1, 3, 7E per FBI FBI personnel, which were subsequently reported to the FISC and to Congress. App. 440. Although the FISC focused on the breadth of some of the reported query incidents, which involved a large number of query terms, such incidents represent a small percentage of the queries run by

the FBI. In [b1, 3, 7E per] for example, [b1, 3, 7E per FBI] audited personnel [b1, 3, 7E per FBI] [b1, 3, 7E per FBI] were found to have conducted a noncompliant query. App. 440. And even for those [b1, 3, 7E per FBI] personnel, only a small number of their queries were in some way noncompliant with the applicable rules. *See* App. 440. Accordingly, instances of noncompliance with the querying rules are, in relative terms, very rare.

~~(S//NF)~~ Separately identifying and tracking U.S. person query terms would not enhance oversight of the FBI's querying practices. Significantly, the requirement that each query must be reasonably likely to return foreign intelligence information or evidence of a crime applies to all queries, whether or not the query involves a U.S. person. And U.S. person queries and non-U.S. person queries are subject to oversight on the same basis. Thus, little oversight purpose would be served by segregating U.S. person query records from non-U.S. person query records (other than counting them, which Congress has expressly decided not to require of the FBI). Indeed, as noted above, the vast majority of the FBI's investigative activity focuses on individuals in the United States, and the FBI's general practice is to treat everyone located in the United States the same under the law. A sizeable portion of FBI queries likely involve U.S. person query terms. *See* App. 164. Accordingly, in conducting queries of Section 702 information, the FBI effectively treats all query terms as U.S. person query terms.

~~(S//NF)~~ Meanwhile, the cost of imposing a segregation requirement on the FBI would be significant in terms of the impact on FBI resources, the creation of unreliable government records, and the potential harm to the national security. The FBI Director's declaration explains that researching the U.S. person status of each term used to query Section 702 information would be resource intensive and time consuming, and, in many cases, would fail to produce definitive information, in part because many such queries are performed early in investigations or when FBI personnel are still attempting to identify threats based on limited or incomplete information. App. 313-14. Indeed, in many cases, such research would not lead to accurate assessments of U.S. person status. *See* App. 314. Foregoing such research and instead allowing FBI personnel to rely solely on information in their own personal knowledge or possession would be less burdensome, but it would also likely be even less reliable in determining the U.S. person status of query terms. *See* App. 317-19. This could have a cascading effect on other elements of the FBI's work, such as how the FBI applies its Section 702 targeting procedures. *See* App. 318-19. The FISC's reading of a differentiation requirement into the statute therefore would not meaningfully improve oversight of U.S. person queries. Nor would the FISC's interpretation of Section 702(f)(1)(B) help to ameliorate the compliance issues identified by the FISC, which involved application of the query

standard, not the determination of U.S. person status. *See* App. 68-71.

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

~~(S//NF)~~ The FISC erred in concluding that the FBI's querying and minimization procedures are deficient under the statutory definition of minimization procedures and the Fourth Amendment.

A. (U) The FBI's Procedures Satisfy FISA's Definition of Minimization Procedures

1. (U) The Minimization Standard

(U) Minimization procedures used in connection with information acquired under Section 702 must meet the definitions of "minimization procedures" set forth at 50 U.S.C. § 1801(h) or § 1821(4). *See* 50 U.S.C. § 1881a(e)(1). In pertinent part, those definitions require:

> (1) 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;
>
> (2) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in [Section 1801(e)(1)[14]], shall not be disseminated in a manner that identifies

[14] (U) Section 1801(e)(1) defines foreign intelligence information as:

> any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance; [and]
>
> (3) notwithstanding paragraphs (1) and (2), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes . . . .

50 U.S.C. § 1801(h); *see also id.* § 1821(4) (setting forth nearly identical definition).

~~(S//NF)~~ The FISC concluded that "[b]ecause the FBI procedures, as implemented, have involved a large number of unjustified queries conducted to retrieve information about U.S. persons, they are not reasonably designed, in light of the purpose and technique of Section 702 acquisitions, to minimize the *retention* and prohibit the *dissemination* of private U.S. person information" within the meaning of prong (1) of the definition quoted above. App. 81 (emphasis added).

> Information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against—
>
> (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
>
> (B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or
>
> (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power.

Section 1801(e)(2) further defines foreign intelligence information as information concerning "the national defense or the security of the United States" and "the conduct of the foreign affairs of the United States."

Referring to prong (3) of the definition, the FISC also noted "the prevalence of FBI queries that were unlikely to return evidence of a crime." *See* App. 81-82. Contrary to the FISC's conclusion, the FBI's procedures satisfy all the requirements of FISA's definition of minimization procedures.[15]

2. ~~(S//NF)~~ *The FBI's Procedures Provide More Than Adequate Protection Against the Risk that U.S. Person Information Retrieved Through a Noncompliant Query Will Be Indiscriminately or Improperly Reviewed, Used, or Disclosed*

~~(S//NF)~~ The FISC correctly found no deficiency with respect to the requirement that the government's procedures be reasonably designed to minimize the *acquisition* of U.S. person information consistent with its foreign intelligence needs. The scope of acquisitions under Section 702 is regulated primarily by the applicable targeting procedures, which work in conjunction with the minimization and querying procedures. The targeting procedures serve to limit the acquisition of U.S. person information and to focus the collection on communications that are likely to contain foreign intelligence information.[16] *See* App. 263; PCLOB Report

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[15] ~~(S//NF)~~ FISA does not require that querying procedures adopted pursuant to Section 702(f) satisfy the definition of minimization procedures. *See* 50 U.S.C. § 1881a(f), (j)(2)(D), (j)(3)(A). However, the FBI querying procedures at issue here are effectively incorporated into the minimization procedures, *see* App. 254, 283, 289, and thus function not only as the procedures required by Section 702(f), but also as part of the FBI minimization procedures. Accordingly, the FISC considered the FBI's querying procedures in its statutory minimization analysis. *See* App. 48-49.

[16] ~~(S//NF)~~ Both the FBI and NSA have targeting procedures. The NSA's

51-52. As the FISC found, the targeting procedures accompanying the 2018 Certifications are reasonably designed to ensure that only non-U.S. persons reasonably believed to be located outside the United States are targeted and that wholly domestic communications are not intentionally acquired. *See* App. 45. In addition, the targeting procedures require that before initiating an acquisition, the government must "reasonably assess, based on the totality of the circumstances, that the target is expected to possess, receive, and/or is likely to communicate foreign intelligence information concerning a foreign power or foreign territory authorized for targeting under . . . [S]ection 702."[17] App. 696. "These requirements direct the government's acquisitions toward communications that are likely to yield foreign intelligence information." Nov. 2015 FISC Op. 41-42.

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targeting procedures apply to all taskings made by the government under Section 702. *See* App. 693-710. The FBI's targeting procedures apply to acquisitions of [redacted] only after NSA has previously determined under its targeting procedures that the facilities are appropriate for tasking pursuant to Section 702. *See* PCLOB Report 42; *see also* App. 703.

[17] ~~(S//NF)~~ The targeting procedures also require post-tasking analysis designed to ensure that the users of tasked selectors remain non-U.S. persons located outside the United States, and require prompt termination of acquisitions in the event it is determined that a target reasonably believed to be outside the United States has since entered the United States, or that a person who at the time of targeting was believed to be a non-U.S. person was in fact a U.S. person. App. 698-700. Information acquired as a result of an erroneous tasking or because of a failure to timely de-task a facility is subject to purge, with limited exceptions. *See* App. 702; *see also* App. 265, 290.

~~(S//NF)~~ Furthermore, the FBI receives only a very small portion of the information that is acquired by the government pursuant to Section 702. *See* App. 66 (noting that "it was reported in b1, 3, 7E per FBI that FBI received information for approximately b1, 3, 7E per of persons targeted under Section 702"). b1, 3, 7E per FBI b1, 3, 7E per FBI b1, 3, 7E per FBI *See* Nov. 2015 FISC Op. 43. And, to date, the FBI has not received unminimized information acquired through NSA's upstream collection under Section 702. *See id.*

~~(S//NF)~~ The FBI's minimization procedures impose substantial restrictions on the retention, use, and dissemination by the FBI of U.S. person information that has been incidentally obtained through Section 702 acquisitions. Those restrictions apply whether the U.S. person information at issue is reviewed directly or identified and retrieved through a query. As the FISC noted, *see* App. 63, the minimization procedures contain provisions specifying the periods of time after which unminimized information that has not been identified as eligible for further retention must be deleted from FBI systems. *See, e.g.*, App. 273-74, 282-83, 285, 286. But those are hardly the only restrictions.

~~(S//NF)~~ Among other things, the minimization procedures also require the FBI to retain Section 702 information under "appropriately secure conditions that limit access to such information only to individuals who require access in order to perform their official duties or assist in a lawful and authorized government function." App. 264. The procedures provide that unminimized Section 702 information—including unminimized information retrieved through queries—may only be viewed by FBI personnel who are appropriately trained and approved to handle such information and generally "only as necessary for the purpose of evaluating or determining whether it reasonably appears to be foreign intelligence information, to be necessary to understand foreign intelligence information or to assess its importance, or to be evidence of a crime." App. 268-69. Once FBI personnel have assessed through such a review that particular unminimized information appears to meet that standard, the FBI may use the information for further investigation or analysis and may disseminate it in accordance with the restrictions on dissemination that are discussed below. App. 269. But before doing so, the FBI must "strike, or substitute a characterization for, information of or concerning a United States person, including that person's identity," unless the U.S. person information itself "reasonably appear[s] to be foreign intelligence information, to be necessary to understand or assess the importance of foreign

intelligence information, or to be evidence of a crime." App. 269.

~~(S//NF)~~ The minimization procedures generally provide that U.S. person information acquired through Section 702 may be disseminated outside the FBI only if the information is deemed to constitute foreign intelligence information, to be necessary to understand foreign intelligence information, or to be evidence of a crime. *See* App. 297-303. Further restrictions may apply depending on the type of foreign intelligence information involved, the identity of the intended recipient, and the purpose of the disclosure. *See* App. 297-303. In light of these restrictions on dissemination, there is no basis for the FISC's conclusion that the FBI's procedures are not reasonably designed to prohibit the dissemination of U.S. person information consistent with the government's foreign intelligence needs. There is no indication in the record that any of the results of the noncompliant Section 702 queries identified by the FISC in its opinion were improperly disseminated. Indeed, the FISC acknowledged that the results of the largest such incident were deleted before anyone had even viewed them. *See* App. 69.

~~(S//NF)~~ In addition, FISA imposes additional statutory restrictions that, together with the minimization procedures, enhance the protection of U.S. person information that has been acquired under Section 702. The Reauthorization Act, for instance, imposed additional protections for certain queries conducted by the

FBI in connection with criminal investigations that do not relate to the national security of the United States. 50 U.S.C. § 1881a(f)(2) (requiring FISC approval before the results of certain queries can be viewed). The Reauthorization Act also significantly restricted the FBI's ability to use Section 702 information in criminal prosecutions, permitting such use only in prosecutions with a national security nexus or for certain serious offenses. 50 U.S.C. § 1881e(a)(2). These newly enacted protections supplement other provisions of FISA that limit the use of U.S. person information acquired under Section 702. *See* 50 U.S.C §§ 1881e(a)(1), 1806.

~~(S//NF)~~ The querying procedures operate in the context of the restrictions on the review, use, and dissemination of Section 702 information, which serve to mitigate the impact of the relatively rare instances in which FBI personnel fail to comply with the query standard. In the event FBI personnel review information retrieved through a query that is *not* reasonably designed to retrieve foreign intelligence information or evidence of a crime, the minimization procedures would limit that review to determining whether the information constitutes foreign intelligence information, is necessary to understand foreign intelligence information or to assess its importance, or is evidence of a crime. App. 268-69. And the minimization procedures prohibit the use and dissemination of U.S. person

information that does reasonably appear to meet that standard. App. 268-269, 297-303. These restrictions greatly reduce the risk that information retrieved through a noncompliant query will be indiscriminately or improperly reviewed, used, or disclosed.

3. ~~(S//NF)~~ *Substantial and Effective Oversight of the Implementation of Section 702 Provides Further Protection of U.S. Person Information*

~~(S//NF)~~ As discussed more fully above, the FBI's application of its procedures, including the provisions relating to querying and the additional restrictions discussed herein, are subject to substantial oversight involving all three branches of government. *See also* App. 303-05. Although such oversight reveals that the rate of misapplication of the query standard (and other forms of noncompliance) is extremely low, it has nevertheless been effective in helping the government identify areas of concern, including, for example, recurring misunderstandings of the query standard that, while rare, warrant remediation through enhanced guidance, additional training, or, where appropriate, revised procedures.

~~(S//NF)~~ The FISC expressed concerns about what it described as "limitations" on the Executive Branch's oversight of Section 702 querying by the FBI. *See* App. 72-74. The FISC's concerns focused on (1) the lack of

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contemporaneous written documentation concerning the justifications for queries; and (2) the possibility that because of the manner in which oversight resources are deployed, "further querying violations . . . have escaped the attention of overseers." App. 73-74. With respect to the first concern, FBI personnel are frequently able during oversight reviews to articulate justifications for their past queries. Indeed, in the case of the [redacted] large-scale categorical query incidents cited in the FISC's opinion, *see* App. 68-69, the FBI personnel involved were able to articulate their justifications; the auditors determined, however, that those justifications failed to meet the standard. *See* App. 441-42.

~~(S//NF)~~ Regarding the second concern, the Executive Branch dedicates substantial resources to oversight of the FBI's use of queries, reviewing b1, 3, 7E per FBI [redacted] each year. *See* App. 72. As the FISC noted, certain b1, 3, 7E per FBI field offices tend to be audited more frequently b1, 3, 7E per FBI [redacted] *see* App. 73, because b1, 3, 7E per FBI [redacted] wider use of FISA authorities, App. 439 n.42. But when the Department of Justice sees recurrent problems at particular offices, it may return to those offices more frequently than it otherwise would. App. 439 n.42. To be sure, the government's oversight efforts, while substantial, likely do not detect every deviation from the querying standard or every departure from the applicable procedures. But it is highly doubtful that any oversight program, no

matter how comprehensive and effective, would detect every instance of noncompliance with every aspect of the applicable procedures. And, as discussed above, Section 702 oversight has unquestionably been effective in identifying recurrent problems so that they can be appropriately addressed.

4. ~~(S//NF)~~ Additional Remedial Measures Adopted by the Government Specifically Address the FBI's Querying Practices and Are Reasonably Designed To Reduce the Risk of Future Noncompliant Queries

~~(S//NF)~~ The government acknowledges and shares the FISC's concerns regarding the misapplications of the query standard that are discussed in the court's opinion. In response to those concerns, the government has adopted remedial measures that are reasonably designed to reduce the risk of future misapplications of the query standard like those identified by the FISC. Those measures provide additional protection against the risk that U.S. person information acquired through Section 702 will be indiscriminately or improperly reviewed, used, or disclosed by FBI personnel.

~~(S//NF)~~ As discussed above, the revised FBI querying procedures contain a new provision tailored to address categorical batch queries, which represent the greatest compliance risk identified by the FISC. The new provision is aimed at addressing misunderstandings about the query standard by FBI personnel and queries that raise the most privacy and compliance concerns. As discussed above,

that provision requires attorney approval before the contents of communications retrieved through a categorical batch query may be viewed. In June 2018, before the provision was adopted, the FBI issued guidance providing examples of permissible and impermissible categorical queries and providing other advice concerning such queries. *See* App. 166, 378. Together, the attorney-approval provision in the amended procedures and the previously issued guidance clarify how the query standard should apply, particularly with respect to categorical batch queries. These good-faith efforts by the FBI to respond to the FISC's concerns, together with ongoing training and continued oversight, are reasonably tailored both to balance operational needs and to address unjustified categorical queries (such as the handful of large-scale incidents highlighted by the FISC)—more so than the written justification remedy endorsed by amici and the FISC.[18] *See* App.

[18] ~~(S//NF)~~ FISA imposes few specific requirements on the handling of Section 702 information. Instead, the definition of minimization procedures and the Fourth Amendment generally provide the government with substantial flexibility to adopt targeting, minimization, and querying procedures that reasonably accommodate the countervailing interests of privacy and national security. *See* 50 U.S.C. § 1801(h)(1); *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (explaining that the Fourth Amendment's "flexible requirement of reasonableness" should not be read to mandate "rigid rule[s]" that ignore countervailing governmental interests). For example, the FBI has had only a limited opportunity to begin implementing the new attorney-approval provision for categorical batch queries. Although the government is hopeful that the provision will prove to be workable, it is possible that its use will have unanticipated adverse operational consequences. If that proves to be the case, the government may later propose modified or alternative measures, subject to the applicable requirements,

322 (FBI Director's assessment that "[w]hile the operational consequences would be significant if FBI were to be required to document their justifications for every U.S. person query that returned Section 702 results, . . . the burdens would be less severe if FBI personnel were required to document their justifications for queries conducted based on a categorical reason.").

~~(S//NF)~~ Second, an important change in the wording of the query standard reflected in the FBI's querying procedures is also reasonably designed to reduce the risk of misapplications of the standard, both in the context of categorical batch queries and more generally. The FBI's minimization procedures previously stated that FBI personnel could query unminimized Section 702 information "to find, extract, review, translate, and assess whether such information reasonably appears to be foreign intelligence information, to be necessary to understand foreign intelligence information or assess its importance, or to be evidence of a crime" and that such queries had to be "designed" to extract information meeting that standard. *See* App. 610-11 (citing 2016 procedures).

~~(S//NF)~~ As written, that language could have led FBI personnel, including those who conducted the categorical queries discussed in the FISC's opinion, to interpret the standard as requiring only that they design their queries for the *purpose* of extracting foreign intelligence information or evidence of a crime,

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including FISC approval.

regardless of whether such queries were in fact *likely to retrieve* such information. Indeed, the FBI personnel who ran the problematic categorical queries had justifications for running them (*i.e.*, they were running the queries in an effort to retrieve foreign intelligence information or evidence of a crime), and they articulated such reasons during the query audits. *See* App. 441-42. But the query standard requires more than simply an authorized purpose; in addition, each query must be *reasonably likely to return* foreign intelligence information or evidence of a crime.[19] The government determined that the queries reported to the FISC failed to meet this requirement. *See* App. 441-42. To correct such misapplications of the query standard, the government included language in the FBI querying procedures to make that requirement even clearer. The procedures now expressly provide that any query, whether or not using a U.S. person query term, must be reasonably likely to return foreign intelligence information or evidence of a crime.

~~(S//NF)~~ In deeming the government's categorical batch query provision to be inadequate to address its concerns, the FISC expressed skepticism about "the ability of the FBI's front-line personnel to determine which queries . . . rely on

[19] ~~(S//NF)~~ The government conveyed this interpretation of the query standard to the FISC in 2015, when it assured the court that the FBI's minimization procedures prohibit the government from running queries against Section 702 information without a basis to believe that foreign intelligence information or evidence of a crime would likely be returned by the query. *See* App. 611 (citing 2015 record).

categorical justifications and are subject to the approval requirement." App. 82. Because the government only recently adopted this provision, the FISC's concern about the effectiveness of the new attorney-approval requirement is not based on actual experience with the provision. Instead, the FISC pointed to misapplications of the generally applicable query standard as the basis for its concern. *See* App. 82. But those misapplications may have resulted from the since-corrected wording of the query standard, which, as discussed above, could previously be read to suggest that a query intended to retrieve foreign intelligence information or evidence of a crime was permitted without regard to the likelihood that such information would be returned. Moreover, the written-justification procedure that the FISC concluded would be adequate to address its concerns relies on the same FBI personnel to properly apply the query standard to all queries, including categorical batch queries, without attorney assistance.

~~(S//NF)~~ The FISC also expressed concern about what it described as "broad exceptions" to the attorney approval requirement for categorical batch queries, including for "persons whose identifiers are . . . in contact with . . . subjects of predicated investigations." App. 83 (internal quotation marks and citation omitted). The FISC noted that the FBI may initiate a predicated investigation merely on the basis of information or an allegation indicating that a federal crime

or threat to national security may have occurred or may be occurring, or that a someone is or may be the target or victim of an attack associated with a federal crime or threat to national security. *See* App. 83. The FISC failed to recognize, however, that a query subject to this exception, like every other query, must still satisfy the query standard—*i.e.*, it must be reasonably likely to retrieve foreign intelligence information or evidence of a crime, it must be conducted for the purpose of identifying such information, and it must not be overbroad. Moreover, the results of such a query may be reviewed, used, and disseminated only in accordance with the other limitations in the minimization procedures and the statute that are discussed above. Finally, categorical batch queries that are excepted from the attorney-approval requirement would still be subject to subsequent oversight audits.

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

(U) The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" and that "no Warrants shall issue, but upon probable cause." "[A]lthough 'both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search,'" *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (citation omitted), "neither a warrant nor

probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665 (1989). The "touchstone" of a Fourth Amendment analysis "is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (per curiam) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)).

~~(S//NF)~~ This Court has held that the Fourth Amendment does not require the government to obtain a warrant to conduct surveillance "to obtain foreign intelligence for national security purposes [that] is directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States." *In re Directives*, 551 F.3d at 1012 (addressing the predecessor to the Section 702 program). This "foreign intelligence exception" to the warrant requirement applies even when a U.S. person is the target of the surveillance. *See id.* at 1014. The FISC has correctly relied on *In re Directives* in holding that the foreign intelligence exception applies to acquisitions made pursuant to Section 702, which does not permit the targeting of U.S. persons but nonetheless results in the incidental acquisition of information concerning U.S. persons. *See In re DNI/AG Certification [Redacted]*, No. [b1, 3, 7E per FBI] Mem. Op. and Order 34-36

(Sept. 4, 2008) ("Sept. 2008 FISC Opinion")[20]; *accord United States v. Mohamud*, 2014 WL 2866749, at *15-18 (D. Or. June 24, 2014), *aff'd*, 843 F.3d 420 (2016), *cert. denied*, 138 S. Ct. 636 (2018).

~~(S//NF)~~ It follows that the targeting, minimization, and querying procedures are consistent with the requirements of the Fourth Amendment if those procedures are reasonable. In assessing the reasonableness of a governmental intrusion under the Fourth Amendment, the Court must "balance the interests at stake" under the "totality of the circumstances." *In re Directives*, 551 F.3d at 1012. The court must consider "the nature of the government intrusion and how the intrusion is implemented. The more important the government's interest, the greater the intrusion that may be constitutionally tolerated." *Id.* (citations omitted).

> If the protections that are in place for individual privacy interests are sufficient in light of the governmental interest at stake, the constitutional scales will tilt in favor of upholding the government's actions. If, however, those protections are insufficient to alleviate the risks of government error and abuse, the scales will tip toward a finding of unconstitutionality.

Id.

~~(S//NF)~~ The FISC has repeatedly concluded, after balancing the relevant interests, that procedures similar to those at issue here are reasonable under the

[20] (U) This opinion, which was the first in which the FISC addressed the government's implementation of Section 702, is available at https://www.dni.gov/files/documents/0315/FISC%20Opinion%20September%204%202008.pdf.

Fourth Amendment. *See, e.g.*, Nov. 2015 FISC Op. 38-39 (citing earlier decisions); Sept. 2008 FISC Op. 40-41. In this matter, the FISC reached a different conclusion in light of the misapplications of the query standard identified in its opinion. App. 91. The FISC's analysis is flawed, and its conclusion is incorrect.

~~(S//NF)~~ On one side of the balance, the government's national security interest in the Section 702 program is highly compelling. *See In re Directives*, 551 F.3d at 1012 (concluding that the government's interest in the predecessor to the Section 702 program was "of the highest order of magnitude"); *see also In re Certified Question*, 858 F.3d at 608 (recognizing that "'no governmental interest is more compelling' than national security" and that "the government's investigative interest in cases arising under FISA is at the highest level") (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981)). An important part of the Section 702 program is the FBI's use of queries to identify and to retrieve in a timely manner information relating to threats to national security—while filtering out irrelevant communications that might contain non-pertinent information of or concerning U.S. persons. As established in the FBI Director's Declaration, queries of Section 702 information are "a critical tool used by the FBI to identify threat streams such as terrorist attacks, clandestine intelligence gathering by hostile nations, and cyber

intrusions." App. 311.

~~(S//NF)~~ The FISC acknowledged the government's compelling interest in the Section 702 program. *See* App. 91. But the court declined to weigh that interest heavily in the government's favor, asserting that the Fourth Amendment balancing depends in part on "the degree to which the governmental action in question is needed for the promotion of the relevant governmental interest." App. 91 (citing *In re Certified Question*, 858 F.3d at 604-05). Defining the relevant action here as "the FBI's continuing to run queries without taking further measures to ensure they actually satisfy the querying standard," the FISC concluded that such queries do not serve the relevant interest. App. 91.

~~(S//NF)~~ The FISC defined the relevant action too narrowly. The question here is not whether isolated deviations from the querying requirements violate the Fourth Amendment; rather, it is whether, under the totality of the circumstances, the FBI's minimization and querying procedures are reasonable under the Fourth Amendment. *See* 50 U.S.C. § 1881a(j)(3)(A); Nov. 2015 FISC Op. 40. Those procedures regulate the government's handling of information that has been lawfully acquired for foreign intelligence purposes under Section 702. The "relevant governmental action" here is therefore the range of activities permitted by the FBI's procedures, which includes, *inter alia*, the use of queries to identify

actual and potential threats to national security. Those activities plainly serve the government's compelling national security interest in implementing Section 702.

~~(S//NF)~~ The FISC also erred in assessing the interest on the other side of the balance. At the outset, it is important to recognize that queries of Section 702 information do not result in the collection of new information. Rather, they are run against information that has already been lawfully acquired by the government by targeting communications facilities that are used by non-U.S. persons located abroad. Communications of and information concerning U.S. persons are acquired only incidentally, for instance when a U.S. person has communicated with a target. *See In re Directives*, 551 F.3d at 1015 ("incidental collections occurring as a result of constitutionally permissible acquisitions do not render those acquisitions unlawful"). As the Ninth Circuit recently explained, a U.S. person may retain some interest in the privacy of his communications that have been received by a foreign national located overseas and that are acquired under Section 702, but that interest is "diminished." *See United States v. Mohamud*, 843 F.3d 420, 442 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 636 (2018).

~~(S//NF)~~ Furthermore, in assessing the privacy interests at issue, the FISC placed too much weight on the misapplications of the query standard identified in its opinion and gave too little regard to the adequacy of the protections in place to

mitigate the impact of such errors. App. 91. Although the FISC emphasized the large number of query terms involved in the incidents highlighted in its opinion, only three or four incidents involving just a small number of FBI personnel account for the great majority of the improper queries tallied by the FISC. *See* App. 68-71. The misunderstanding of the query standard by a handful of FBI personnel that led to these incidents was not as widespread as one might infer from the FISC's opinion. And as discussed more fully above, NSD's oversight of queries has demonstrated that the rate of noncompliance is in fact very low.

~~(S//NF)~~ Moreover, not all of the incidents identified by the FISC actually resulted in a significant intrusion on privacy. Notably, the results of the single largest incident discussed by the FISC—the categorical queries run by the FBI's [redacted] using [redacted] b1, 3, 7E per FBI query terms—were deleted without review.[21] App. 68-69. As the FISC recognized, the relevant intrusion on privacy results not from simply running a query, but from the risk that the results will be indiscriminately or improperly reviewed, used, or disclosed. *See, e.g.,* App. 90;

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[21] ~~(S//NF)~~ As the FISC noted, *see* App. 89, the record does not reveal the extent to which the other noncompliant queries discussed by the FISC resulted in the review of U.S. person information by FBI personnel. In reporting compliance incidents involving Section 702 queries to the FISC, the government has not consistently stated whether and to what extent the results of such queries were viewed by FBI personnel. *See* App. 562-64, 556-58, 711-12. Prospectively, the government intends to include that information to provide the FISC with a fuller accounting of such incidents.

see also 50 U.S.C. § 1881a(f)(2) (requiring the FBI to obtain FISC approval before "access[ing] the contents of communications . . . retrieved pursuant to a query made using a United States person query term" that was designed to find evidence of a crime unrelated to national security). Indeed, the remedial measure endorsed by the FISC (providing written justifications before reviewing content returned through U.S. person queries) would apply only *after* U.S. person queries have been made, and only when FBI personnel seek to review contents returned by such queries. *See* App. 92.

~~(S//NF)~~ In any event, the remedial measures adopted by the government in good-faith response to the FISC's concerns—including the clarification of the query standard, the new attorney-approval provision for categorical batch queries, as well continuing guidance and training—are reasonably designed to reduce the risk of misapplications of the query standard.

~~(S//NF)~~ To the extent that noncompliant queries still occur, and then FBI personnel further decide to try to review the results of such queries, the restrictions on the review, use, and dissemination of U.S. person information that are contained in the FBI's minimization procedures serve to greatly reduce the magnitude of any resulting intrusions. Subject to narrowly defined exceptions, unminimized Section 702 information, including the results of queries, may only be viewed by FBI

personnel who are appropriately trained and approved to handle information and "only as necessary for the purpose of evaluating or determining whether it reasonably appears to be foreign intelligence information, to be necessary to understand foreign intelligence information or to assess its importance, or to be evidence of a crime."[22] App. 268-69. Information that is determined to meet one of those criteria may be used for further investigation and analysis and may be disseminated only in accordance with additional restrictions. *See* App. 268-69; *see also* App. 297-303. Before using FISA-acquired information for further investigation or analysis or disseminating such information, the FBI must strike, or substitute a characterization for, information of or concerning a U.S. person, including that person's identity, if it does not reasonably appear to be foreign intelligence information, to be necessary to understand foreign intelligence information or to assess its importance, or to be evidence of a crime. *See* App. 269. The FISC and other courts have concluded that these protections are adequate to safeguard the privacy interests at stake in the Section 702 program. *See, e.g.*, Nov. 2015 FISC Op. 38-39 (citing earlier decisions); Sept. 2008 FISC Op. 40-41;

[22] (U) Such limited review is not unlike the examination of documents to determine whether they are, in fact, among the papers authorized to be seized pursuant to a search warrant or the examination of post-cut-through digits obtained through the use of a pen register to determine whether they contain content information. *See In re Certified Question*, 858 F.3d at 608 (discussing *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976)).

see also Mohamud, 843 F.3d at 438-44; *United States v. Mohammad*, No. 15-cr-358, slip op. 39-42 (N.D. Ohio Sept. 11, 2018); *United States v. Al-Jayab*, No. 16-cr-181, slip op. 48-56 (N.D. Ill. June 28, 2018); *United States v. Hasbajrami*, No. 11-cr-623, 2016 WL 1029500, at *11-13 (E.D.N.Y. Mar. 8, 2016), *appeal pending* (2d Cir. No. 15-2684). The FISC erred in concluding otherwise here.

~~(S//NF)~~ In sum, the FBI's procedures, as a whole, provide substantial safeguards against the indiscriminate or improper review, use, or disclosure of U.S. person information through the use of queries or otherwise. The procedures strike a reasonable balance between the privacy interests of U.S. persons and persons in the United States, on the one hand, and the government's national security interests, on the other, and therefore are reasonable under the Fourth Amendment.

(U) CONCLUSION

~~(S)~~ For the foregoing reasons, this Court should reverse the FISC's determinations that the FBI's querying and minimization procedures are deficient under FISA and the Fourth Amendment.

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Dated: December 13, 2018

(U) CERTIFICATE OF COMPLIANCE

(U) 1. This brief does not comply with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 16,188 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The government has filed contemporaneously herewith a motion for leave to submit an overlength brief.

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

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[redacted]

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U.S. Department of Justice

Dated: December 13, 2018

(U) CERTIFICATE OF SERVICE

~~(S)~~ I hereby certify that on December 13, 2018, I served the foregoing Opening Brief for the United States by providing two true and correct copies thereof to the Clerk of the Court to be made available to amici curiae Jonathan Cedarbaum, Amy Jeffress, and John Cella.

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STATUTORY ADDENDUM

United States Code Annotated
Title 50. War and National Defense (Refs & Annos)
Chapter 36. Foreign Intelligence Surveillance (Refs & Annos)
Subchapter VI. Additional Procedures Regarding Certain Persons Outside the United States

50 U.S.C.A. § 1881a

§ 1881a. Procedures for targeting certain persons outside the United States other than United States persons

Effective: January 19, 2018

(a) Authorization

Notwithstanding any other provision of law, upon the issuance of an order in accordance with subsection (j)(3) or a determination under subsection (c)(2), the Attorney General and the Director of National Intelligence may authorize jointly, for a period of up to 1 year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information.

(b) Limitations

An acquisition authorized under subsection (a)--

(1) may not intentionally target any person known at the time of acquisition to be located in the United States;

(2) may not intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States;

(3) may not intentionally target a United States person reasonably believed to be located outside the United States;

(4) may not intentionally acquire any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States;

(5) may not intentionally acquire communications that contain a reference to, but are not to or from, a target of an acquisition authorized under subsection (a), except as provided under section 103(b) of the FISA Amendments Reauthorization Act of 2017; and

(6) shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States.

(c) Conduct of acquisition

(1) In general

An acquisition authorized under subsection (a) shall be conducted only in accordance with--

(A) the targeting and minimization procedures adopted in accordance with subsections (d) and (e); and

(B) upon submission of a certification in accordance with subsection (h), such certification.

(2) Determination

A determination under this paragraph and for purposes of subsection (a) is a determination by the Attorney General and the Director of National Intelligence that exigent circumstances exist because, without immediate implementation of an authorization under subsection (a), intelligence important to the national security of the United States may be lost or not timely acquired and time does not permit the issuance of an order pursuant to subsection (j)(3) prior to the implementation of such authorization.

(3) Timing of determination

The Attorney General and the Director of National Intelligence may make the determination under paragraph (2)--

(A) before the submission of a certification in accordance with subsection (h); or

(B) by amending a certification pursuant to subsection (j)(1)(C) at any time during which judicial review under subsection (j) of such certification is pending.

(4) Construction

Nothing in subchapter I shall be construed to require an application for a court order under such subchapter for an acquisition that is targeted in accordance with this section at a person reasonably believed to be located outside the United States.

(d) Targeting procedures

(1) Requirement to adopt

The Attorney General, in consultation with the Director of National Intelligence, shall adopt targeting procedures that are reasonably designed to--

(A) ensure that any acquisition authorized under subsection (a) is limited to targeting persons reasonably believed to be located outside the United States; and

(B) prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States.

(2) Judicial review

The procedures adopted in accordance with paragraph (1) shall be subject to judicial review pursuant to subsection (j).

(e) Minimization procedures

(1) Requirement to adopt

The Attorney General, in consultation with the Director of National Intelligence, shall adopt minimization procedures that meet the definition of minimization procedures under section 1801(h) of this title or section 1821(4) of this title, as appropriate, for acquisitions authorized under subsection (a).

(2) Judicial review

The minimization procedures adopted in accordance with paragraph (1) shall be subject to judicial review pursuant to subsection (j).

(3) Publication

The Director of National Intelligence, in consultation with the Attorney General, shall--

(A) conduct a declassification review of any minimization procedures adopted or amended in accordance with paragraph (1); and

(B) consistent with such review, and not later than 180 days after conducting such review, make such minimization procedures publicly available to the greatest extent practicable, which may be in redacted form.

(f) Queries

(1) Procedures required

(A) Requirement to adopt

The Attorney General, in consultation with the Director of National Intelligence, shall adopt querying procedures consistent with the requirements of the fourth amendment to the Constitution of the United States for information collected pursuant to an

authorization under subsection (a).

(B) Record of United States person query terms

The Attorney General, in consultation with the Director of National Intelligence, shall ensure that the procedures adopted under subparagraph (A) include a technical procedure whereby a record is kept of each United States person query term used for a query.

(C) Judicial review

The procedures adopted in accordance with subparagraph (A) shall be subject to judicial review pursuant to subsection (j).

(2) Access to results of certain queries conducted by FBI

(A) Court order required for FBI review of certain query results in criminal investigations unrelated to national security

Except as provided by subparagraph (E), in connection with a predicated criminal investigation opened by the Federal Bureau of Investigation that does not relate to the national security of the United States, the Federal Bureau of Investigation may not access the contents of communications acquired under subsection (a) that were retrieved pursuant to a query made using a United States person query term that was not designed to find and extract foreign intelligence information unless--

(i) the Federal Bureau of Investigation applies for an order of the Court under subparagraph (C); and

(ii) the Court enters an order under subparagraph (D) approving such application.

(B) Jurisdiction

The Court shall have jurisdiction to review an application and to enter an order approving the access described in subparagraph (A).

(C) Application

Each application for an order under this paragraph shall be made by a Federal officer in writing upon oath or affirmation to a judge having jurisdiction under subparagraph (B). Each application shall require the approval of the Attorney General based upon the finding of the Attorney General that the application satisfies the criteria and requirements of such application, as set forth in this paragraph, and shall include--

(i) the identity of the Federal officer making the application; and

(ii) an affidavit or other information containing a statement of the facts and circumstances relied upon by the applicant to justify the belief of the applicant that the contents of communications described in subparagraph (A) covered by the application would provide evidence of--

(I) criminal activity;

(II) contraband, fruits of a crime, or other items illegally possessed by a third party; or

(III) property designed for use, intended for use, or used in committing a crime.

(D) Order

Upon an application made pursuant to subparagraph (C), the Court shall enter an order approving the accessing of the contents of communications described in subparagraph (A) covered by the application if the Court finds probable cause to believe that such contents would provide any of the evidence described in subparagraph (C)(ii).

(E) Exception

The requirement for an order of the Court under subparagraph (A) to access the contents of communications described in such subparagraph shall not apply with respect to a query if the Federal Bureau of Investigation determines there is a reasonable belief that such contents could assist in mitigating or eliminating a threat

to life or serious bodily harm.

(F) Rule of construction

Nothing in this paragraph may be construed as--

(i) limiting the authority of the Federal Bureau of Investigation to conduct lawful queries of information acquired under subsection (a);

(ii) limiting the authority of the Federal Bureau of Investigation to review, without a court order, the results of any query of information acquired under subsection (a) that was reasonably designed to find and extract foreign intelligence information, regardless of whether such foreign intelligence information could also be considered evidence of a crime; or

(iii) prohibiting or otherwise limiting the ability of the Federal Bureau of Investigation to access the results of queries conducted when evaluating whether to open an assessment or predicated investigation relating to the national security of the United States.

(3) Definitions

In this subsection:

(A) The term "contents" has the meaning given that term in section 2510(8) of Title 18.

(B) The term "query" means the use of one or more terms to retrieve the unminimized contents or noncontents located in electronic and data storage systems of communications of or concerning United States persons obtained through acquisitions authorized under subsection (a).

(g) Guidelines for compliance with limitations

(1) Requirement to adopt

The Attorney General, in consultation with the Director of National Intelligence, shall adopt guidelines to ensure--

(A) compliance with the limitations in subsection (b); and

(B) that an application for a court order is filed as required by this chapter.

(2) Submission of guidelines

The Attorney General shall provide the guidelines adopted in accordance with paragraph (1) to--

(A) the congressional intelligence committees;

(B) the Committees on the Judiciary of the Senate and the House of Representatives; and

(C) the Foreign Intelligence Surveillance Court.

(h) Certification

(1) In general

(A) Requirement

Subject to subparagraph (B), prior to the implementation of an authorization under subsection (a), the Attorney General and the Director of National Intelligence shall provide to the Foreign Intelligence Surveillance Court a written certification and any supporting affidavit, under oath and under seal, in accordance with this subsection.

(B) Exception

If the Attorney General and the Director of National Intelligence make a determination under subsection (c)(2) and time does not permit the submission of a certification under this subsection prior to the implementation of an authorization under subsection (a), the Attorney General and the Director of National Intelligence shall submit to the Court a certification for such authorization as soon as practicable but in no event later than 7 days after such determination is made.

(2) Requirements

A certification made under this subsection shall--

(A) attest that--

(i) there are targeting procedures in place that have been approved, have been submitted for approval, or will be submitted with the certification for approval by the Foreign Intelligence Surveillance Court that are reasonably designed to--

(I) ensure that an acquisition authorized under subsection (a) is limited to targeting persons reasonably believed to be located outside the United States; and

(II) prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States;

(ii) the minimization procedures to be used with respect to such acquisition--

(I) meet the definition of minimization procedures under section 1801(h) or 1821(4) of this title, as appropriate; and

(II) have been approved, have been submitted for approval, or will be submitted with the certification for approval by the Foreign Intelligence Surveillance Court;

(iii) guidelines have been adopted in accordance with subsection (g) to ensure compliance with the limitations in subsection (b) and to ensure that an application for a court order is filed as required by this chapter;

(iv) the procedures and guidelines referred to in clauses (i), (ii), and (iii) are consistent with the requirements of the fourth amendment to the Constitution of the United States;

(v) a significant purpose of the acquisition is to obtain foreign intelligence information;

(vi) the acquisition involves obtaining foreign intelligence information from or with the assistance of an electronic communication service provider; and

(vii) the acquisition complies with the limitations in subsection (b);

(B) include the procedures adopted in accordance with subsections (d) and (e);

(C) be supported, as appropriate, by the affidavit of any appropriate official in the area of national security who is--

(i) appointed by the President, by and with the advice and consent of the Senate; or

(ii) the head of an element of the intelligence community;

(D) include--

(i) an effective date for the authorization that is at least 30 days after the submission of the written certification to the court; or

(ii) if the acquisition has begun or the effective date is less than 30 days after the submission of the written certification to the court, the date the acquisition began or the effective date for the acquisition; and

(E) if the Attorney General and the Director of National Intelligence make a determination under subsection (c)(2), include a statement that such determination has been made.

(3) Change in effective date

The Attorney General and the Director of National Intelligence may advance or delay the effective date referred to in paragraph (2)(D) by submitting an amended certification in accordance with subsection (j)(1)(C) to the Foreign Intelligence Surveillance Court for review pursuant to subsection (i).

(4) Limitation

A certification made under this subsection is not required to identify the specific facilities, places, premises, or property at which an acquisition authorized under subsection (a) will be directed or conducted.

(5) Maintenance of certification

The Attorney General or a designee of the Attorney General shall maintain a copy of a certification made under this subsection.

(6) Review

A certification submitted in accordance with this subsection shall be subject to judicial review pursuant to subsection (j).

(i) Directives and judicial review of directives

(1) Authority

With respect to an acquisition authorized under subsection (a), the Attorney General and the Director of National Intelligence may direct, in writing, an electronic communication service provider to--

(A) immediately provide the Government with all information, facilities, or assistance necessary to accomplish the acquisition in a manner that will protect the secrecy of the acquisition and produce a minimum of interference with the services that such electronic communication service provider is providing to the target of the acquisition; and

(B) maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning the acquisition or the aid furnished that such electronic communication service provider wishes to maintain.

(2) Compensation

The Government shall compensate, at the prevailing rate, an electronic communication service provider for providing information, facilities, or assistance in accordance with a directive issued pursuant to paragraph (1).

(3) Release from liability

No cause of action shall lie in any court against any electronic communication service provider for providing any information, facilities, or assistance in accordance with a directive issued pursuant to paragraph (1).

(4) Challenging of directives

(A) Authority to challenge

An electronic communication service provider receiving a directive issued pursuant to paragraph (1) may file a petition to modify or set aside such directive with the Foreign Intelligence Surveillance Court, which shall have jurisdiction to review such petition.

(B) Assignment

The presiding judge of the Court shall assign a petition filed under subparagraph (A) to 1 of the judges serving in the pool established under section 1803(e)(1) of this title not later than 24 hours after the filing of such petition.

(C) Standards for review

A judge considering a petition filed under subparagraph (A) may grant such petition only if the judge finds that the directive does not meet the requirements of this section, or is otherwise unlawful.

(D) Procedures for initial review

A judge shall conduct an initial review of a petition filed under subparagraph (A) not later than 5 days after being assigned such petition. If the judge determines that such petition does not consist of claims, defenses, or other legal contentions that are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law, the judge shall immediately deny such petition and affirm the directive or any part of the directive that is the subject of such petition and order the recipient to comply with the directive or any part of it. Upon making a determination under this subparagraph or promptly thereafter, the judge shall provide a written statement for the record of the reasons for such determination.

(E) Procedures for plenary review

If a judge determines that a petition filed under subparagraph (A) requires plenary review, the judge shall affirm, modify, or set aside the directive that is the subject of such petition not later than 30 days after being assigned such petition. If the judge does not set aside the directive, the judge shall immediately affirm or affirm with modifications the directive, and order the recipient to comply with the directive in its entirety or as modified. The judge shall provide a written statement for the record of the reasons for a determination under this subparagraph.

(F) Continued effect

Any directive not explicitly modified or set aside under this paragraph shall remain in full effect.

(G) Contempt of court

Failure to obey an order issued under this paragraph may be punished by the Court as contempt of court.

(5) Enforcement of directives

(A) Order to compel

If an electronic communication service provider fails to comply with a directive issued pursuant to paragraph (1), the Attorney General may file a petition for an order to compel the electronic communication service provider to comply with the directive with the Foreign Intelligence Surveillance Court, which shall have jurisdiction to review such petition.

(B) Assignment

The presiding judge of the Court shall assign a petition filed under subparagraph (A) to 1 of the judges serving in the pool established under section 1803(e)(1) of this title not later than 24 hours after the filing of such petition.

(C) Procedures for review

A judge considering a petition filed under subparagraph (A) shall, not later than 30 days after being assigned such petition, issue an order requiring the electronic communication service provider to comply with the directive or any part of it, as issued or as modified, if the judge finds that the directive meets the requirements of this section and is otherwise lawful. The judge shall provide a written statement for the record of the reasons for a determination under this paragraph.

(D) Contempt of court

Failure to obey an order issued under this paragraph may be punished by the Court as contempt of court.

(E) Process

Any process under this paragraph may be served in any judicial district in which the electronic communication service provider may be found.

(6) Appeal

(A) Appeal to the Court of Review

The Government or an electronic communication service provider receiving a directive issued pursuant to paragraph (1) may file a petition with the Foreign Intelligence Surveillance Court of Review for review of a decision issued pursuant to paragraph (4) or (5). The Court of Review shall have jurisdiction to consider such petition and shall provide a written statement for the record of the reasons for a decision under this subparagraph.

(B) Certiorari to the Supreme Court

The Government or an electronic communication service provider receiving a directive issued pursuant to paragraph (1) may file a petition for a writ of certiorari for review of a decision of the Court of Review issued under subparagraph (A). The record for such review shall be transmitted under seal to the Supreme Court of the United States, which shall have jurisdiction to review such decision.

(j) Judicial review of certifications and procedures

(1) In general

(A) Review by the Foreign Intelligence Surveillance Court

The Foreign Intelligence Surveillance Court shall have jurisdiction to review a certification submitted in accordance with subsection (g) and the targeting, minimization, and querying procedures adopted in accordance with subsections (d), (e), and (f)(1), and amendments to such certification or such procedures.

(B) Time period for review

The Court shall review a certification submitted in accordance with subsection (g) and the targeting, minimization, and querying procedures adopted in accordance with subsections (d), (e), and (f)(1) and shall complete such review and issue an order under paragraph (3) not later than 30 days after the date on which such certification and such procedures are submitted.

(C) Amendments

The Attorney General and the Director of National Intelligence may amend a certification submitted in accordance with subsection (g) or the targeting, minimization, and querying procedures adopted in accordance with subsections (d), (e), and (f)(1) as necessary at any time, including if the Court is conducting or has completed review of such certification or such procedures, and shall submit the amended certification or amended procedures to the Court not later than 7 days after amending such certification or such procedures. The Court shall review any amendment under this subparagraph under the procedures set forth in this subsection. The Attorney General and the Director of National Intelligence may authorize the use of an amended certification or amended procedures pending the Court's review of such amended certification or amended procedures.

(2) Review

The Court shall review the following:

(A) Certification

A certification submitted in accordance with subsection (h) to determine whether the certification contains all the required elements.

(B) Targeting procedures

The targeting procedures adopted in accordance with subsection (d) to assess whether the procedures are reasonably designed to--

(i) ensure that an acquisition authorized under subsection (a) is limited to targeting persons reasonably believed to be located outside the United States; and

(ii) prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States.

(C) Minimization procedures

The minimization procedures adopted in accordance with subsection (e) to assess whether such procedures meet the definition of minimization procedures under section 1801(h) of this title or section 1821(4) of this title, as appropriate.

(D) Querying procedures

The querying procedures adopted in accordance with subsection (f)(1) to assess whether such procedures comply with the requirements of such subsection.

(3) Orders

(A) Approval

If the Court finds that a certification submitted in accordance with subsection (h) contains all the required elements and that the targeting, minimization, and querying procedures adopted in accordance with subsections (d), (e), and (f)(1) are consistent with the requirements of those subsections and with the fourth amendment to the Constitution of the United States, the Court shall enter an order approving the certification and the use, or continued use in the case of an acquisition authorized pursuant to a determination under subsection (c)(2), of the procedures for the acquisition.

(B) Correction of deficiencies

If the Court finds that a certification submitted in accordance with subsection (h) does not contain all the required elements, or that the procedures adopted in accordance with subsections (d), (e), and (f)(1) are not consistent with the requirements of those subsections or the fourth amendment to the Constitution of the United States, the Court shall issue an order directing the Government to, at the Government's election and to the extent required by the Court's order--

(i) correct any deficiency identified by the Court's order not later than 30 days after the date on which the Court issues the order; or

(ii) cease, or not begin, the implementation of the authorization for which such

certification was submitted.

(C) Requirement for written statement

In support of an order under this subsection, the Court shall provide, simultaneously with the order, for the record a written statement of the reasons for the order.

(D) Limitation on use of information

(i) In general

Except as provided in clause (ii), if the Court orders a correction of a deficiency in a certification or procedures under subparagraph (B), no information obtained or evidence derived pursuant to the part of the certification or procedures that has been identified by the Court as deficient concerning any United States person shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a State, or political subdivision thereof, and no information concerning any United States person acquired pursuant to such part of such certification or procedures shall subsequently be used or disclosed in any other manner by Federal officers or employees without the consent of the United States person, except with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person.

(ii) Exception

If the Government corrects any deficiency identified by the order of the Court under subparagraph (B), the Court may permit the use or disclosure of information obtained before the date of the correction under such minimization procedures as the Court may approve for purposes of this clause.

(4) Appeal

(A) Appeal to the Court of Review

The Government may file a petition with the Foreign Intelligence Surveillance Court

of Review for review of an order under this subsection. The Court of Review shall have jurisdiction to consider such petition. For any decision under this subparagraph affirming, reversing, or modifying an order of the Foreign Intelligence Surveillance Court, the Court of Review shall provide for the record a written statement of the reasons for the decision.

(B) Continuation of acquisition pending rehearing or appeal

Any acquisition affected by an order under paragraph (3)(B) may continue--

(i) during the pendency of any rehearing of the order by the Court en banc; and

(ii) if the Government files a petition for review of an order under this section, until the Court of Review enters an order under subparagraph (C).

(C) Implementation pending appeal

Not later than 60 days after the filing of a petition for review of an order under paragraph (3)(B) directing the correction of a deficiency, the Court of Review shall determine, and enter a corresponding order regarding, whether all or any part of the correction order, as issued or modified, shall be implemented during the pendency of the review.

(D) Certiorari to the Supreme Court

The Government may file a petition for a writ of certiorari for review of a decision of the Court of Review issued under subparagraph (A). The record for such review shall be transmitted under seal to the Supreme Court of the United States, which shall have jurisdiction to review such decision.

(5) Schedule

(A) Reauthorization of authorizations in effect

If the Attorney General and the Director of National Intelligence seek to reauthorize or replace an authorization issued under subsection (a), the Attorney General and the Director of National Intelligence shall, to the extent practicable, submit to the Court the certification prepared in accordance with subsection (h) and the procedures

adopted in accordance with subsections (d), (e), and (f)(1) at least 30 days prior to the expiration of such authorization.

(B) Reauthorization of orders, authorizations, and directives

If the Attorney General and the Director of National Intelligence seek to reauthorize or replace an authorization issued under subsection (a) by filing a certification pursuant to subparagraph (A), that authorization, and any directives issued thereunder and any order related thereto, shall remain in effect, notwithstanding the expiration provided for in subsection (a), until the Court issues an order with respect to such certification under paragraph (3) at which time the provisions of that paragraph and paragraph (4) shall apply with respect to such certification.

(k) Judicial proceedings

(1) Expedited judicial proceedings

Judicial proceedings under this section shall be conducted as expeditiously as possible.

(2) Time limits

A time limit for a judicial decision in this section shall apply unless the Court, the Court of Review, or any judge of either the Court or the Court of Review, by order for reasons stated, extends that time as necessary for good cause in a manner consistent with national security.

(l) Maintenance and security of records and proceedings

(1) Standards

The Foreign Intelligence Surveillance Court shall maintain a record of a proceeding under this section, including petitions, appeals, orders, and statements of reasons for a decision, under security measures adopted by the Chief Justice of the United States, in consultation with the Attorney General and the Director of National Intelligence.

(2) Filing and review

All petitions under this section shall be filed under seal. In any proceedings under this section, the Court shall, upon request of the Government, review ex parte and in camera any Government submission, or portions of a submission, which may include classified information.

(3) Retention of records

The Attorney General and the Director of National Intelligence shall retain a directive or an order issued under this section for a period of not less than 10 years from the date on which such directive or such order is issued.

(m) Assessments[1] reviews, and reporting

(1) Semiannual assessment

Not less frequently than once every 6 months, the Attorney General and Director of National Intelligence shall assess compliance with the targeting, minimization, and querying procedures adopted in accordance with subsections (d), (e), and (f)(1) and the guidelines adopted in accordance with subsection (g) and shall submit each assessment to--

(A) the Foreign Intelligence Surveillance Court; and

(B) consistent with the Rules of the House of Representatives, the Standing Rules of the Senate, and Senate Resolution 400 of the 94th Congress or any successor Senate resolution--

(i) the congressional intelligence committees; and

(ii) the Committees on the Judiciary of the House of Representatives and the Senate.

(2) Agency assessment

The Inspector General of the Department of Justice and the Inspector General of each element of the intelligence community authorized to acquire foreign intelligence

information under subsection (a), with respect to the department or element of such Inspector General--

(A) are authorized to review compliance with the targeting, minimization, and querying procedures adopted in accordance with subsections (d), (e), and (f)(1) and the guidelines adopted in accordance with subsection (g);

(B) with respect to acquisitions authorized under subsection (a), shall review the number of disseminated intelligence reports containing a reference to a United States-person identity and the number of United States-person identities subsequently disseminated by the element concerned in response to requests for identities that were not referred to by name or title in the original reporting;

(C) with respect to acquisitions authorized under subsection (a), shall review the number of targets that were later determined to be located in the United States and, to the extent possible, whether communications of such targets were reviewed; and

(D) shall provide each such review to--

(i) the Attorney General;

(ii) the Director of National Intelligence; and

(iii) consistent with the Rules of the House of Representatives, the Standing Rules of the Senate, and Senate Resolution 400 of the 94th Congress or any successor Senate resolution--

(I) the congressional intelligence committees; and

(II) the Committees on the Judiciary of the House of Representatives and the Senate.

(3) Annual review

(A) Requirement to conduct

The head of each element of the intelligence community conducting an acquisition authorized under subsection (a) shall conduct an annual review to determine whether there is reason to believe that foreign intelligence information has been or will be obtained from the acquisition. The annual review shall provide, with respect to acquisitions authorized under subsection (a)--

(i) an accounting of the number of disseminated intelligence reports containing a reference to a United States-person identity;

(ii) an accounting of the number of United States-person identities subsequently disseminated by that element in response to requests for identities that were not referred to by name or title in the original reporting;

(iii) the number of targets that were later determined to be located in the United States and, to the extent possible, whether communications of such targets were reviewed; and

(iv) a description of any procedures developed by the head of such element of the intelligence community and approved by the Director of National Intelligence to assess, in a manner consistent with national security, operational requirements and the privacy interests of United States persons, the extent to which the acquisitions authorized under subsection (a) acquire the communications of United States persons, and the results of any such assessment.

(B) Use of review

The head of each element of the intelligence community that conducts an annual review under subparagraph (A) shall use each such review to evaluate the adequacy of the minimization procedures utilized by such element and, as appropriate, the application of the minimization procedures to a particular acquisition authorized under subsection (a).

(C) Provision of review

The head of each element of the intelligence community that conducts an annual review under subparagraph (A) shall provide such review to--

(i) the Foreign Intelligence Surveillance Court;

(ii) the Attorney General;

(iii) the Director of National Intelligence; and

(iv) consistent with the Rules of the House of Representatives, the Standing Rules of the Senate, and Senate Resolution 400 of the 94th Congress or any successor Senate resolution--

(I) the congressional intelligence committees; and

(II) the Committees on the Judiciary of the House of Representatives and the Senate.

(4) Reporting of material breach

(A) In general

The head of each element of the intelligence community involved in the acquisition of abouts communications shall fully and currently inform the Committees on the Judiciary of the House of Representatives and the Senate and the congressional intelligence committees of a material breach.

(B) Definitions

In this paragraph:

(i) The term "abouts communication" means a communication that contains a

reference to, but is not to or from, a target of an acquisition authorized under subsection (a).

(ii) The term "material breach" means significant noncompliance with applicable law or an order of the Foreign Intelligence Surveillance Court concerning any acquisition of abouts communications.