No. _____

IN THE

Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress created the Foreign Intelligence Surveillance Court ("FISC") in 1978 to oversee electronic surveillance conducted for foreign intelligence purposes. The FISC's role was originally narrow, but today, as a result of legislative changes and new technology, the court evaluates broad programs of surveillance that can have profound implications for Americans' privacy, expressive, and associational rights. The court's opinions frequently include significant interpretations of statutory and constitutional law. Petitioner filed motions with the FISC asserting that the First Amendment provides a qualified right of public access to FISC opinions containing significant legal analysis—even if portions of the published opinions must be redacted. The FISC rejected one of these motions on the merits. Subsequently, in this case, the FISC and the Foreign Intelligence Surveillance Court of Review ("FISCR") both held that they lack jurisdiction even to rule on Petitioner's constitutional claim.

The questions presented are:

1. Whether the FISC, like other Article III courts, has jurisdiction to consider a motion asserting that the First Amendment provides a qualified public right of access to the court's significant opinions, and whether the FISCR has jurisdiction to consider an appeal from the denial of such a motion.

2. Whether the First Amendment provides a qualified right of public access to the FISC's significant opinions.

PARTIES TO THE PROCEEDINGS

Petitioner is the American Civil Liberties Union, Inc. ("ACLU"). The ACLU was the movant in the Foreign Intelligence Surveillance Court and the petitioner in the Foreign Intelligence Surveillance Court of Review.

With respect to the petition for a writ of certiorari or common-law certiorari, Respondent is the United States, which opposed Petitioner's motion and petition below.

In the alternative, should the Court treat the petition as one for a writ of mandamus, *see infra* Part III.B, Petitioner seeks a writ to the U.S. Foreign Intelligence Surveillance Court and the U.S. Foreign Intelligence Surveillance Court of Review, which denied Petitioner's motion and petition below.

CORPORATE DISCLOSURE STATEMENT

The ACLU is a non-profit corporation. It has no parent corporations and does not issue stock.

RELATED PROCEEDINGS

There are no directly related proceedings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution & Statutes

Rules

Other Authorities

OPINIONS BELOW

The opinion of the Foreign Intelligence Surveillance Court (App. 4a) is not published in the Federal Supplement but is available at 2020 WL 5637419. The opinion of the Foreign Intelligence Surveillance Court of Review (App. 1a) is not published in the Federal Reporter but is available at 2020 WL 6888073.

JURISDICTION

The Court has statutory jurisdiction under 28 U.S.C. § 1254(1) and 50 U.S.C. § 1803(b). *See infra* Part III.A. In the alternative, the Court has jurisdiction over this petition as a petition for a writ of mandamus or common-law certiorari under 28 U.S.C. § 1651. *See infra* Part III.B.

The FISCR entered the judgment under review on November 19, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

Statutory Background

In 1975, Congress established a committee, chaired by Senator Frank Church, to investigate allegations of "substantial wrongdoing" by federal intelligence agencies conducting surveillance. Final

Report of the S. Select Comm. to Study Governmental Operations with Respect to Intelligence Activities (Book II), S. Rep. No. 94-755, at v (1976) ("Church Committee Report"). The committee discovered that, over four decades, the intelligence agencies had "violated specific statutory prohibitions," "infringed the constitutional rights of American citizens," and "intentionally disregarded" legal limitations on surveillance in the name of "national security." *Id.* at 137.

Largely in response to the Church Committee Report, Congress enacted the Foreign Intelligence Surveillance Act of 1978 ("FISA"), Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. § 1801 *et seq.*). The statute created the Foreign Intelligence Surveillance Court ("FISC") and empowered it to grant or deny government applications for electronic surveillance orders in foreign intelligence investigations. *See* 50 U.S.C. § 1803(a). The statute also created the Foreign Intelligence Surveillance Court of Review ("FISCR") to hear appeals from the FISC's rulings. Today the FISC comprises eleven federal district court judges, and the FISCR comprises three additional federal court judges. 50 U.S.C. § 1803(a)–(b).

As originally enacted, FISA generally required the government to obtain an individualized order from the FISC before conducting "electronic surveillance" on U.S. soil. *Id.* §§ 1804(a), 1805. The FISC could issue an order authorizing such surveillance only if there was "probable cause to believe that the target of the electronic surveillance [was] a foreign power or an agent of a foreign power." *Id.* § 1805(a)(2)(A). The role that FISC judges played in the first years after the court's creation was analogous to the role that federal district court judges play in granting or denying

wiretap applications under Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

Over time, however, the FISC's role has changed fundamentally—due to both Congress's expansion of FISA and the exponential growth in the capabilities of powerful surveillance technologies. After the terrorist attacks of September 2001, the FISC interpreted some provisions of FISA to permit it to authorize sweeping surveillance programs that entailed the mass collection of sensitive records about millions of Americans' expressive and associational activities, as discussed further below.[1] In addition, Congress amended FISA in 2008 to authorize the FISC to approve broad programs of surveillance that, while targeted at foreign nationals abroad, include the warrantless acquisition of Americans' international communications from facilities inside the United States. *See* FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 ("FAA"). Under the authority granted by the FAA, the FISC's role consists principally of reviewing, on an annual basis, the general procedures the government proposes to use in carrying out its surveillance—in particular, "targeting procedures" and "minimization procedures." 50 U.S.C. § 1881a(j). This is a momentous shift, as "[r]ather than approving or denying individual targeting requests, the FISA court authorizes the surveillance program as a whole . . . ." Privacy and Civil Liberties Oversight Bd., *Report on the Surveillance Program Operated Pursuant to Section 702* at 106 (2014), https://perma.cc/WD5R-5GKE.

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[1] For ease of reference, Petitioner uses the term "Americans" to refer to citizens and residents of the United States.

Today, the court writes opinions that include significant interpretations of FISA, other federal statutes, and the Constitution. These opinions sometimes authorize broad surveillance regimes, with far-reaching implications for U.S. citizens and residents who are not the ostensible targets of the government's surveillance. For example, in 2006 the FISC authorized the government to collect metadata relating to most phone calls made or received in the United States—billions of phone records relating to millions of Americans—and in 2013 it wrote an opinion analyzing the lawfulness of this program under FISA and the Fourth Amendment. In 2011 the FISC issued a lengthy opinion assessing the legality of the government's practice of scanning Americans' international communications for certain terms that the government believes are associated with its foreign-intelligence targets. [*Redacted*], 2011 WL 10945618 (FISC Oct. 3, 2011), https://perma.cc/L4YQ-K2MB. And in 2018 the FISC issued an opinion on the government's querying of databases of international communications obtained without a warrant for information about Americans. [*Redacted*], 402 F. Supp. 3d 45 (FISC 2018).

Public Access to the FISC's Opinions

Although the FISC is an inferior court established by Congress under Article III, *see* App. 67a n.17 (citing *In re Certification of Questions of Law to FISCR*, No. 18-01, 2018 WL 2709456, at *4 (FISCR Mar. 16, 2018)), and although, as noted above, it sometimes resolves issues of immense importance to the public, the FISC's proceedings are held behind closed doors, and the court does not customarily publish its decisions. Between 1978 and 2013, the FISC published only two of its opinions. App. 119a; *In re*

Motion for Release of Court Records, 526 F. Supp. 2d 484 (FISC 2007). The FISC and the government released additional FISC opinions after media organizations published FISC materials provided by Edward Snowden, a former government contractor. App. 114a–116a.

In 2015, as part of the USA Freedom Act, Congress required the government to conduct a declassification review of opinions that "include[] a significant construction or interpretation of any provision of law" and to make those opinions available to the public "to the greatest extent practicable." 50 U.S.C. § 1872(a). This declassification review, however, is conducted by the executive branch, not the court; does not apply to opinions issued before the USA Freedom Act was enacted, according to the executive branch, *see infra* note 3; is subject to a national security waiver, *see* 50 U.S.C. § 1872(c); and does not involve application of the standard the courts have ordinarily applied to public access claims for court records.

Prior Related Proceedings

In motions filed over a period of almost a decade, Petitioner ACLU asked the FISC to recognize a qualified First Amendment right of access to its significant legal opinions, including opinions containing "significant constructions or interpretations of any provision of law." 50 U.S.C. § 1872(a). Invoking the framework set out by this Court in *Press–Enterprise Co. v. Superior Ct.* (*Press–Enterprise II*), 478 U.S. 1 (1986), and related cases, Petitioner argued that a right of access should apply because (1) judicial opinions interpreting constitutional and statutory limits on governmental authorities—including those relevant to foreign-

intelligence surveillance—have historically been available for inspection by the public, and (2) disclosure would educate the public about government activity that affects individual rights, ensure a more informed public debate about the reach of government surveillance, increase the perceived legitimacy of the FISC and the surveillance it authorizes, and allow other courts to engage with the FISC's rulings, to the benefit of those courts as well as the FISC.

The FISC rejected some of Petitioner's motions on the merits and others on jurisdictional grounds. One of those motions, in particular, produced rulings that are an essential backdrop to this Petition.

In November 2013, soon after the government acknowledged that the FISC had authorized bulk collection of Americans' telephony metadata,[2] Petitioner moved the FISC to publish its opinions relating to any collection of data in bulk. Motion of ACLU, ACLU of the Nation's Capital & Media Freedom and Information Access Clinic for the Release of Court Records, No. 13-08 (FISC Nov. 7, 2013) ("November 2013 Motion"). In 2020, Judge Collyer held that the FISC had ancillary jurisdiction over Petitioner's motion because exercising such jurisdiction was "necessary to [the court's] successful functioning," and in particular to its ability to "ensure that its proceedings comport with a correct understanding of both the First Amendment and statutorily required security procedures." App. 97a, 100a.

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[2] Ellen Nakashima & Sari Horwitz, *Newly Declassified Documents on Phone Records Program Released*, Wash. Post, July 31, 2013, https://wapo.st/2R1ZeXy.

Judge Collyer rejected Petitioner's First Amendment argument on the merits, however, reasoning that neither "history" nor "logic" supported a qualified right of access to the FISC's significant opinions. App. 103a–127a.

Petitioner filed a "Petition for Review, or, in the alternative, for a Writ of Mandamus" with the FISCR. The FISCR dismissed the petition for lack of jurisdiction, reasoning that it did not "fall[] within the class of cases carefully delineated by the FISA as within [the FISCR's] authority as a court of appellate review." App. 69a. The court rejected Petitioner's argument that FISA supplied the FISCR with jurisdiction by giving the court authority to "review the denial of any application [made] under this chapter," App. 74a (quoting 50 U.S.C. § 1803(b)).

The court also rejected Petitioner's argument that it should exercise ancillary jurisdiction over the petition. The court reasoned that Petitioner had not been haled into court against its will, and that resolution of the petition was not necessary to enforce the court's mandates or to protect the integrity of its proceedings. The court also rejected Petitioner's request for a writ of mandamus, reasoning that the writ is available only to "assist an existing basis for jurisdiction," and that Petitioner had not identified an "independent basis for subject matter jurisdiction" over its petition." App. 86a.

The Right-of-Access Motion at Issue Here

This Petition arises from a motion Petitioner filed with the FISC in October 2016, seeking "opinions and orders containing novel or significant interpretations of law issued between September 11, 2001, and the passage of the USA FREEDOM Act" ("October 2016

Motion"). App. 8a. These opinions and orders address, among other matters, the lawfulness of bulk email searches, the government's authority to surreptitiously install malware on Americans' computers, and the use of warrantless internet surveillance for cybersecurity purposes. App. 9a. Although the FISC's rulings on these matters may have broad implications for the rights of Americans, the public has been entirely deprived of access to them without any judicial determination that such secrecy is justified.[3]

Petitioner argued that judicial opinions relating to foreign-intelligence surveillance had historically been open to the public; that lower courts routinely published opinions about the scope and lawfulness of surveillance under FISA; that Congress had recognized that some FISC opinions should be published; and that many FISC opinions had been published since 2013. App. 14a–15a, 23a–25a. Petitioner also argued that recognition of a qualified right of access would play a significant positive role and would not compromise the operation of the FISC or the government's legitimate interest in protecting the confidentiality of properly classified information, because the right of access would extend only to information that could be disclosed without undermining national security. App. 29a–33a.

In September 2020, FISC Judge Boasberg dismissed the motion, concluding that exercising

[3] The government takes the position that 50 U.S.C. § 1872(a) does not require it to declassify FISC opinions predating the passage of the USA Freedom Act. *See* Gov't Mem., *Elec. Frontier Found. v. DOJ*, No. 14-cv-00760 (D.D.C. Feb. 5, 2016), ECF No. 28.

jurisdiction would be "inconsistent" with the decision the FISCR had issued five months earlier in relation to Petitioner's November 2013 Motion. App. 4a. The FISCR then dismissed Petitioner's request for review, holding that it, too, lacked jurisdiction. App 1a. Petitioner asked the court to certify the jurisdictional question to this Court under 28 U.S.C. § 1254(2), but the FISCR declined. App. 2a–3a.

REASONS FOR GRANTING THE PETITION

For centuries, the public has enjoyed access to judicial proceedings to promote transparency, accountability, and democratic participation and oversight. And for more than forty years, this Court has recognized a right of access rooted in the Constitution, holding that the First Amendment guarantees public access to judicial proceedings "so as to give meaning to" its "explicit guarantees" of freedom of speech and of the press. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980).

The FISC's and FISCR's denial of even a forum to assert such a right cannot be reconciled with this tradition, or with the universal understanding that every court controls access to its own records.

I. The questions presented by this case are extraordinarily important, and there is no possibility of further percolation.

Whether there is a constitutional right of access to significant legal opinions issued by the FISC, and whether there is any forum in which to assert such a right, are questions of exceptional importance.

The decisions of the FISC affect the privacy, expressive, and associational rights of every

American. The FISC's opinions often involve the interpretation of the Constitution and federal surveillance laws on issues of broad public significance. Over the last twenty years, the FISC has been asked to approve broad programs of surveillance in tension with the public understanding of the statutes at issue. *See, e.g.*, *ACLU v. Clapper*, 785 F.3d 787, 818 (2d Cir. 2015) (holding call-records program unlawful and rejecting FISC's previously secret statutory interpretation as a "drastic expansion" that "swe[pt] further than [other national security-related] statutes ha[d] ever been thought to reach").

Public access to these opinions is critical to the legitimacy of the FISC and FISCR, to the legitimacy of the government's surveillance activities, and to the democratic process. As explained below, access would allow the public to understand the government's surveillance powers and practices, promote confidence in the FISA system, strengthen democratic oversight, and improve judicial decision-making. *See* Part II.B.2. Transparency would also give Americans, and Congress, the opportunity to press for reforms. While national security concerns may sometimes require redaction, the First Amendment right of access is "qualified" precisely to permit such exceptions where justified.

Despite the importance of public access to the FISC's proceedings, the FISCR and FISC have foreclosed *any* consideration of this question, thereby denying the public "any judicial forum for [the assertion of] a colorable constitutional claim," which itself raises a "serious constitutional question." *Webster v. Doe*, 486 U.S. 592, 603 (1988). The FISC's and FISCR's rulings were wrong, and only this Court can correct them.

Further, the FISC and FISCR are courts of specialized jurisdiction, so there can be no split among the circuits or further percolation on either of the issues the Petition presents. Indeed, the courts below have categorically precluded *any* further development of the law by ruling that they lack jurisdiction even to consider the merits question.

II. The FISC's and FISCR's rulings were incorrect.

A. The FISC and FISCR have jurisdiction to hear right-of-access motions, and their holdings to the contrary are inconsistent with the decisions of other Article III courts.

The FISC and FISCR both erred in concluding that they lack jurisdiction to consider whether the First Amendment affords a qualified right of public access to the FISC's opinions.

1. Other courts uniformly exercise jurisdiction over claims for access to their records.

The FISC's and FISCR's jurisdictional holdings conflict with the jurisdictional holdings of other Article III courts, as well as other specialized federal courts.

Article III courts routinely exercise jurisdiction over motions seeking access to their own records and proceedings. They do so in both criminal and civil proceedings—sometimes while the matter is ongoing and, at other times, long after the matter has concluded. It is uniformly accepted that the court that conducted the proceedings, and has dominion over the records at issue, also has competence to rule on a

motion for access. *See, e.g.*, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 599 (1978) ("[T]he decision as to access is one best left to the sound discretion of the trial court."); *Flynt v. Lombardi*, 782 F.3d 963, 966–67 (8th Cir. 2015) (collecting cases holding that a motion to intervene, not a separate civil action, is the appropriate procedural vehicle for access claims seeking judicial records); *In re Globe Newspaper Co.*, 920 F.2d 88, 90 (1st Cir. 1990); *In re Application of Nat'l Broad. Co.*, 635 F.2d 945, 948–49 (2d Cir. 1980); *United States v. Criden*, 648 F.2d 814, 816 (3d Cir. 1981); *Doe v. Pub. Citizen*, 749 F.3d 246, 264 (4th Cir. 2014); *United States v. Chagra*, 701 F.2d 354, 359–60 (5th Cir. 1983); *United States v. Beckham*, 789 F.2d 401, 404 (6th Cir. 1986); *United States v. Corbitt*, 879 F.2d 224, 226–27 (7th Cir. 1989); *United States v. Bus. of Custer Battlefield Museum & Stores*, 658 F.3d 1188 (9th Cir. 2011); *United States v. Pickard*, 733 F.3d 1297, 1300 (10th Cir. 2013); *United States v. Valenti*, 987 F.2d 708, 711–12 (11th Cir. 1993); *Wash. Post v. Robinson*, 935 F.2d 282, 283–84 (D.C. Cir. 1991); *Uniloc 2017 LLC v. Apple, Inc.*, 964 F.3d 1351, 1355–56 (Fed. Cir. 2020).

The FISC is a specialized federal court with limited jurisdiction, but specialized courts have also exercised jurisdiction over motions for access to their records and proceedings. For instance, bankruptcy courts, which are established under Article I and whose power is limited to cases arising under Title 11 of the U.S. Code, *see* 28 U.S.C. § 157, exercise jurisdiction over right-of-access motions brought by non-parties. *See, e.g.*, *In re Alterra Healthcare Corp.*, 353 B.R. 66 (Bankr. D. Del. 2006) (holding that the court had jurisdiction over newspaper's challenge to sealing

orders because the motion was "a core proceeding over which the Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1334(b) & 157(b)(2)(A)"); *In re Bennett Funding Grp., Inc.*, 226 B.R. 331 (Bankr. N.D.N.Y. 1998); *In re Symington*, 209 B.R. 678 (Bankr. D. Md. 1997); *cf. Dacoron v. Brown*, 4 Vet. App 115, 119 (1993) ("[N]othing in the above analysis [recognizing district court jurisdiction over constitutional claims] implies that this Court does not have power to review claims pertaining to the constitutionality of statutory and regulatory provisions. Such authority is inherent in the Court's status as a court of law, and is expressly provided in 38 U.S.C. § 7261(a)(1) . . . ." (citations omitted)).

The FISC's and FISCR's rulings conflict with all of the above decisions, which confirm the common-sense principle that a federal court has authority to determine the extent of public access to its own proceedings.

2. The decisions below were incorrect.

The FISC and FISCR were wrong to conclude that they lacked jurisdiction to consider Petitioner's motion. Like other courts, the FISC has inherent "supervisory power" over its own records, and this power encompasses jurisdiction to consider claims for access to those records. *Nixon*, 435 U.S. at 598. In addition, the doctrine of ancillary jurisdiction supplies an independent basis for jurisdiction. Notably, before the FISC concluded that it lacked jurisdiction to consider right-of-access motions, it exercised jurisdiction over such motions on precisely these two bases. *Compare* App. 4a–6a, *with, e.g.*, App. 93a–102a; *In re Orders Interpreting Section 215 of the Patriot Act*, No. Misc. 13-02, 2013 WL 5460064, at *5 (FISC

Sept. 13, 2013) (Saylor, J.); *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 486–87, 497.

First, like all Article III courts, the FISC has inherent authority over its own records. All Article III courts enjoy "certain implied powers [that] necessarily result to our Courts of justice from the nature of their institution." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (alteration removed) (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)). These inherent powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962).

This inherent judicial authority encompasses the "supervisory power over [a court's] own records and files." *Nixon*, 435 U.S. at 598; *see Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140 (2d Cir. 2004) (same). Perhaps the most important judicial records are a court's own opinions. The power to decide cases, and to issue opinions interpreting the law, lies at the very core of the "judicial power" vested in Article III courts. *Young v. United States ex rel. Vuitton*, 481 U.S. 787, 816, 821 (1987) (Scalia, J., concurring); *Lowenschuss v. W. Publ'g Co.*, 542 F.2d 180, 185 (3d Cir. 1976) ("[U]nder our system of jurisprudence the judiciary has the duty of publishing and disseminating its decisions." (quoting Benjamin N. Cardozo, *The Nature of the Judicial Process* 20, 21–22 (1963))).

The power to control a court's records necessarily includes jurisdiction to decide claims for access to those records. *See Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 782 (1st Cir. 1988) (observing that "courts and commentators seem unanimous" in

finding "an inherent power" to modify protective orders in response to motions for public access, even after final judgment); *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995) (citing *Nixon*, 435 U.S. at 598); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). As the FISC itself previously observed, "it would be quite odd if the FISC did not have jurisdiction in the first instance to adjudicate a claim of right to the court's very own records and files." *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 486–87.

Indeed, Congress expressly recognized the FISC's "inherent authority" as an Article III court in FISA, 50 U.S.C. § 1803(h), and it provided that the FISC "may establish such rules and procedures, and take such actions, as are reasonably necessary to administer [its] responsibilities under this chapter," *id.* § 1803(g)(1). The FISC has exercised its inherent authority by promulgating rules concerning the publication of its opinions. FISC Rule of Procedure 62 provides that "The Judge who authorized an order, opinion, or other decision may *sua sponte* or on motion by a party request that it be published." The FISC's and FISCR's decisions below offer no explanation why these courts would have inherent authority to publish their opinions *sua sponte* or on a motion filed by a party to a FISC proceeding, but not on a motion filed by a third party such as Petitioner. Nothing about Petitioner's status as a third party alters the FISC's inherent authority over its own records.[4]

[4] Courts routinely exercise jurisdiction over motions for public access filed by non-parties, precisely because the original parties

Second, ancillary jurisdiction provides an independent basis for the FISC to adjudicate Petitioner's motion. *See* App. 93a–102a (Collyer, J.) (holding, in prior proceeding, that the FISC had ancillary jurisdiction over motion for public access to FISC opinions). A court may exercise ancillary jurisdiction over a claim that is ancillary to and dependent on proceedings over which a court already has jurisdiction, even if the ancillary claim "does *not* satisfy requirements of an independent basis of subject matter jurisdiction." 13 Charles Alan Wright et al., *Federal Practice & Procedure* § 3523 (3d ed. 2021) ("Wright & Miller") (emphasis in original).

Courts have exercised ancillary jurisdiction for "two separate, though sometimes related, purposes": (1) "to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees"; or (2) "to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379–80 (1994). "Under this concept, a district court acquires jurisdiction of a case or controversy in its entirety, and, as an incident to the full disposition of the matter, may hear collateral proceedings when necessary to allow it to vindicate its role as a tribunal." Wright & Miller § 3523.2.

Courts routinely exercise ancillary jurisdiction over a broad range of proceedings related to functions at the core of the judicial power. In *Kokkonen*, for

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to a proceeding will typically already have access themselves and thus have little reason to assert a First Amendment right of access. *See, e.g., In re Globe Newspaper Co.*, 920 F.2d at 90; *Chagra*, 701 F.2d at 359–60 (collecting cases).

example, this Court recognized that a court may exercise ancillary jurisdiction to vindicate its contempt power. 511 U.S. at 379–80 (citing *Hudson*, 11 U.S. (7 Cranch) at 34); *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990) (recognizing ancillary jurisdiction over proceedings related to costs, attorneys' fees, and sanctions).

Here, the FISC has ancillary jurisdiction because Petitioner's motion seeks access to the FISC's own opinions, and thus is ancillary to the FISC proceedings that gave rise to those opinions. *See, e.g.*, 50 U.S.C. §§ 1803–1805.

Moreover, exercising ancillary jurisdiction would serve both of the "purposes" this Court recognized in *Kokkonen*.

The decision to publish or seal judicial records is necessary to vindicate the court's own authority. Thus, in *United States v. Hubbard*, the D.C. Circuit held that a court may exercise ancillary jurisdiction over the motion of a third-party intervenor in a criminal case requesting that the district court maintain certain documents under seal. 650 F.2d 293, 307 (D.C. Cir. 1980); *see also In re Sealed Case*, 237 F.3d 657, 664 (D.C. Cir. 2001) (same). If courts have ancillary jurisdiction to hear third-party motions to *preclude* public access to judicial records, the same jurisdiction authorizes them to hear third-party motions to *grant* public access. Access to a court's records or proceedings is inextricably connected with the court's ability to conduct its day-to-day affairs. As the FISC itself noted in an earlier ruling, "[w]hen a claimant asserts [a] right of access with respect to the proceedings or documents of a federal court established under Article III, it is necessary for that

court to be able to adjudicate the claim, lest its own actions violate the First Amendment." App. 99a.

Also, no other court is positioned to rule with the same knowledge of the underlying facts concerning motions for public access to FISC materials. *See Richmond Newspapers*, 448 U.S. at 560–61 (describing trial court's order to clear the courtroom and subsequent hearing to address the parties' interests in closure); *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 609 n.25 (1982) (recognizing trial court's ability to ascertain the various parties' interests in public access versus closure).

The FISC's expertise in foreign intelligence surveillance means that it is especially well-positioned to consider which portions of its own opinions should remain secret—and which should not. *See, e.g.*, *In re Orders Interpreting Section 215 of the Patriot Act*, No. Misc. 13-02, 2014 WL 5442058, at *2–*4 (FISC Aug. 7, 2014) (examining government claims that FISC order should be withheld from the public in toto). The FISC itself previously recognized that its "statutory obligation to maintain its records securely underscores the need for it to be able to adjudicate" claims for public access. App. 99a. The alternative would give another court control over the FISC's records and would require that court to determine the constitutionality of the FISC's specialized rules and procedures. App. 99a; *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 486–87.

For these reasons, Judge Collyer previously held that the FISC had ancillary jurisdiction over a motion for access, concluding that "[t]he FISC's ability to 'function successfully' and 'manage its proceedings,' would be significantly compromised if it lacked

authority to adjudicate First Amendment claims such as the one asserted by Movants." App. 100a (quoting *Kokkonen*, 511 U.S. at 379–80). That ruling was correct, and the contrary decisions of the FISC and FISCR are incorrect.

In rejecting Petitioner's motion, the FISC held that exercising inherent or ancillary jurisdiction was inappropriate because Petitioner had not been "involuntarily haled into court," did not have a preexisting connection to the records sought, and did not seek to assert rights "in an ongoing action." App. 6a (citing App. 83a). But none of these factors bars jurisdiction over right-of-access claims. Motions for access to court records are regularly filed by members of the public or the press who are not parties to the original proceeding and lack a preexisting connection to the records sought. *See, e.g.*, *Nixon*, 435 U.S. at 597–98 ("American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit."). Courts routinely exercise jurisdiction over claims for their records even *after* judgment has been entered. *See, e.g.*, *Pub. Citizen*, 749 F.3d at 253 (directing district court to unseal records requested in post-judgment motion); *Gambale*, 377 F.3d at 141 ("The court's supervisory power does not disappear because jurisdiction over the relevant controversy has been lost. The records and files are not in limbo."). And the FISC's proceedings are secret and almost never publicly docketed, making it virtually impossible to seek intervention in an ongoing proceeding.

The FISC also reasoned that the "crux" of Petitioner's claim for access lay "within the Executive's clear authority to determine what

material should remain classified," App. 6a (quoting App. 85a). Yet that is plainly a question for the merits, not jurisdiction. *See In re Wash. Post Co.*, 807 F.2d 383, 391–93 (4th Cir. 1985) (exercising jurisdiction over right-of-access claim to records related to proceedings under the Classified Information Procedures Act). Further, as elaborated below, the mere fact that an opinion contains information classified by the executive does not deprive the issuing court of its power over its own records.

The FISC framed its refusal to exercise jurisdiction as "respect for the separation of powers," App. 6a (quoting App. 85a), but this is exactly backwards. Were Congress to deny a court power to adjudicate motions for access to its own opinions, it would violate the separation between the legislative and judicial branches by interfering with the court's inherent authority to control its own records. *Cf. Michaelson v. United States*, 266 U.S. 42, 64–66 (1924); *In re Stone*, 986 F.2d 898, 901–02 (5th Cir. 1993). Yet this is precisely what the FISC has said that Congress did here.

The FISCR implied that Petitioner might be able to file a motion in another Article III court—for example, in the Southern District of New York—asserting a right of access to the FISC's opinions. *See* App. 74a n.41. But it is unlikely that any court other than the FISC would exercise supervisory power over the FISC's records. *Cf. Nixon*, 435 U.S. at 598 ("Every court has supervisory power over *its own* records and files . . . ." (emphasis added)). Such an exercise of jurisdiction would disturb ordinary principles of comity and deference among courts of coordinate jurisdiction, and it would practically ensure

duplicative litigation in multiple courts around the country over the FISC's records.[5]

B. The First Amendment provides a right of access to significant FISC opinions.

Under the framework set out by this Court in *Press–Enterprise II* and related cases, a qualified First Amendment right of access applies to significant FISC opinions. First, there is a "history" of public access to judicial opinions, including to those that address the lawfulness of national security surveillance. *Press–Enterprise II*, 478 U.S. at 8–9. Second, recognizing a right of access here would play a "significant positive role," including with respect to the functioning of the FISC itself. *Id.* The prior FISC decision denying a First Amendment right of access on the merits was in error. App. 103a–127a.[6]

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[5] For reasons similar to those discussed here and below, *see infra* Part III.B, the FISCR had jurisdiction to review the FISC's jurisdictional holding.

[6] While the earlier FISC opinion is not under review, Petitioner addresses its errors here because the FISC has definitively decided the First Amendment question and because that ruling is relevant to Petitioner's claim on the merits. This Court has discretion to decide the jurisdictional and merits questions together. *See Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982); *House v. Mayo*, 324 U.S. 42, 44–45 (1945), *overruled on other grounds*, *Hohn v. United States*, 524 U.S. 236, 251 (1998).

1. There is a history of public access to judicial opinions evaluating the lawfulness and constitutionality of government conduct, including in the national security context.

Because transparency of the judicial process is central to the rule of law, "[t]he policy of the state always has been that the opinions of [judges], after they are delivered, belong to the public." *Nash v. Lathrop*, 142 Mass. 29, 36 (1886) (cited by *Banks v. Manchester*, 128 U.S. 244, 253–54 (1888)). That principle applies equally in cases involving national security. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *United States v. U.S. Dist. Ct. (Keith)*, 407 U.S. 297 (1972); *N.Y. Times v. United States*, 403 U.S. 713 (1971).

There is accordingly a long history of federal courts publishing their opinions in cases relating to the legality of national security surveillance. *See, e.g.*, *Keith*, 407 U.S. 297; *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008); *Klayman v. Obama*, 142 F. Supp. 3d 172 (D.D.C. 2015). Indeed, federal courts routinely publish opinions addressing the same issues that the FISC addresses in *its* opinions—the legality of surveillance conducted under FISA. *See, e.g.*, *United States v. Moalin*, 973 F.3d 977 (9th Cir. 2020); *ACLU v. Clapper*, 785 F.3d 787 (2d. Cir. 2015); *United States v. Duggan*, 743 F.2d 59, 72–74, 77 (2d Cir. 1984).

In asking whether there was a relevant history of openness, the FISC erroneously limited its inquiry to whether there was a tradition of access to the FISC's own opinions. App. 112a. But as this Court has made clear, whether a First Amendment right of access attaches does not turn on the historical practices of the particular forum, *El Vocero de P.R. v. Puerto Rico*,

508 U.S. 147, 149 (1993)—especially when that forum is of "relatively recent vintage," *In re Bos. Herald, Inc.*, 321 F.3d 174, 184 (1st Cir. 2003). Approaching the question in this way renders the inquiry a tautology; by definition, new forums will *never* have a history of access.

The relevant question is not whether the public has historically had access to FISC opinions, but whether it has had access to analogous opinions issued by other Article III courts. *See El Vocero*, 508 U.S. at 149; *In re Bos. Herald*, 321 F.3d at 184 (looking to how "analogous" courts have treated "documents of the same type or kind" (quotation marks omitted)); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 94 (2d Cir. 2004) (examining First Amendment right of access to court "docket sheets and their historical counterparts," beginning with early English courts). As the cases cited above demonstrate, the answer to that question is clear.

2. Recognizing a qualified right of access would "play a significant positive role."

The second prong of the *Press–Enterprise II* test is also satisfied here, because a qualified right of access would play a significant positive role, including with respect to the functioning of the FISC.

First, a qualified right of access would help the public better understand the nature, scope, and import of the government's surveillance activities. As noted above, the FISC is frequently called on to address questions that have far-reaching implications for Americans' expressive, associational, and privacy rights. A qualified right of access to the FISC's opinions would allow the public to understand the

authorities Congress has granted to the intelligence agencies, how those authorities have been interpreted, and what implications these activities have for their constitutional rights.

Second, a qualified right of access would promote public confidence in the integrity of the FISA system. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Press–Enterprise II*, 478 U.S. at 13 (quotation marks omitted); *see also Globe Newspaper*, 457 U.S. at 606 (public access to court documents and proceedings "fosters an appearance of fairness, thereby heightening public respect for the judicial process"). FISC judges have themselves acknowledged this dynamic and pressed for disclosure of certain FISC opinions to better inform debate. *See, e.g.*, Ellen Nakashima & Carol D. Leonnig, *Effort Underway to Declassify Document that Is Legal Foundation for NSA Phone Program*, Wash. Post, Oct. 12, 2013, https://wapo.st/3dhLXS4 (reporting that "several members of the intelligence court want more transparency about the court's role to dispel what they consider a misperception that the court acted as a rubber stamp").

Third, a qualified right of access would strengthen democratic oversight. In the past, unnecessary secrecy relating to FISC opinions has frustrated congressional oversight. *See, e.g.*, Letter from Sens. Dianne Feinstein, Jeff Merkley, Ron Wyden & Mark Udall to Hon. John Bates, Presiding Judge, FISC (Feb. 13, 2013), https://perma.cc/H3Q5-CGNZ (calling on FISC to declassify certain opinions containing "significant interpretations of law" to inform congressional debate about surveillance authorities scheduled to sunset); *In*

re Orders Interpreting Section 215 of the Patriot Act, 2013 WL 5460064, at *7 ("Congressional *amici* emphasize the value of *public* information and debate in representing their constituents and discharging their legislative responsibilities.").

In some instances, secrecy has allowed the government's surveillance policies to become unmoored from the democratic consent essential to their legitimacy. *See, e.g.*, *ACLU*, 785 F.3d 787 (holding call-records program to be unlawful). Transparency gives citizens the opportunity to press for reforms, and gives Congress the opportunity to consider those reforms with public input. *See, e.g.*, USA Freedom Act, Pub. L. No. 114-23, 129 Stat. 268 (2015) (after unprecedented disclosures by FISC and executive branch, narrowing certain FISA authorities and providing for new procedural safeguards).

Fourth, transparency would aid judicial decision-making. Since public attention focused on FISA surveillance and the FISC's rulings beginning in June 2013, there has been a proliferation of highly sophisticated legal and technical debates about the FISC's opinions and the surveillance they authorize. In camera decision-making precludes meaningful engagement by experts from different fields or sustained development of competing viewpoints.

Fifth, a qualified right of public access would afford other federal courts the benefit of the FISC's expertise and analysis. This iterative process lies at the foundation of our legal system. *See, e.g., Penny v. Little*, 4 Ill. (3 Scam.) 301, 304 (1841) ("The common law is a beautiful system; containing the wisdom and experience of ages."). Yet it has been stunted by the withholding of the FISC's significant legal opinions.

In its prior opinion, the FISC concluded that the benefits of a qualified right of access here would be outweighed by the risk of inadvertent disclosure. App. 124a–126a. That risk, however, does not supply a persuasive reason against recognition of a *qualified* right of access. The FISC's own recent practice shows that the court can publish its opinions in a manner that safeguards properly classified information. Over the past eight years, the FISC has published more than fifty opinions with redactions to protect government secrets. App. 117a–119a (listing opinions and circumstances of publication). Neither the FISC nor the government has suggested that the publication of these opinions undermined national security. That other federal courts commonly publish opinions relating to sensitive national security matters—with redactions, where necessary, *see, e.g., N.Y. Times v. DOJ*, 806 F.3d 682 (2d Cir. 2015)—underscores the point.[7]

To the extent the FISC's reasoning was based on the view that Article III courts lack authority to overturn the government's classification decisions,

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[7] The FISC's recent practice demonstrates the value of judicial review in this context. When Petitioner moved for disclosure of opinions relating to Section 215 of the USA PATRIOT Act, for example, the government initially contended that national security required the opinions to be withheld from the public in their entirety. *See In re Orders Interpreting Section 215 of the Patriot Act*, 2014 WL 5442058, at *2–*3. After FISC Judge Saylor questioned this contention, the government agreed that the opinions could be published with redactions. When Judge Saylor pressed the government again, the government agreed that many of the redactions were unnecessary. While Judge Saylor did not apply the *Press-Enterprise II* test, he found that the remaining redactions would be justifiable under that test if the test applied. *See id.* at *4.

App. 123a–124a, it inappropriately conflated the question of classification with the question of whether court opinions can constitutionally be withheld from the public. Article III courts cannot leave the latter question to the executive branch alone. To the contrary, courts have a constitutional duty to decide this constitutional question for themselves. *See, e.g.*, *Bismullah v. Gates*, 501 F.3d 178, 188 (D.C. Cir. 2007) ("It is the court, not the Government, that has discretion to seal a judicial record."), *vacated on other grounds*, 554 U.S. 913 (2008); *United States v. Moussaoui*, 65 F. App'x 881, 887 (4th Cir. 2003)).

III. This Court has jurisdiction to correct the FISC's and FISCR's errors.

This Court has jurisdiction over the Petition under its statutory certiorari jurisdiction or its authority to entertain extraordinary writs.

A. The Court has jurisdiction to issue a statutory writ of certiorari under 28 U.S.C. § 1254(1) and 50 U.S.C. § 1803(b).

The Court has jurisdiction to issue a statutory writ of certiorari under both 28 U.S.C. § 1254(1) and 50 U.S.C. § 1803(b).

1. 28 U.S.C. § 1254(1)

Section 1254(1) provides that this Court may review by writ of certiorari cases "in the court of appeals." The FISCR is a "court of appeals" within the meaning of section 1254(1) because it is an Article III court that sits in review of decisions made by the FISC, also an Article III court. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d at 486; *In re Sealed Case*, 310 F.3d 717, 731 (FISCR 2002); *see also* FISCR Rule 4 ("The FISCR is an appellate court

established by act of Congress."); FISCR Rule 6(b) (referring to the FISCR as a "Court of Appeals"); FISCR Rule 8 ("All writs that may be issued by United States courts of appeals shall be available to the FISCR.").

The FISCR has cited 50 U.S.C. § 1803(k) in support of the proposition that it is not a "court of appeals." App. 81a n.64. But that provision of FISA, which states that the FISCR "shall be considered to be a court of appeals" for purposes of section 1254(2), merely clarifies that the FISCR may certify questions of law to this Court pursuant to section 1254(2). It does not purport to strip this Court of the statutory jurisdiction generally granted in section 1254(1). And this Court "normally do[es] not read *statutory silence* as implicitly modifying or limiting Supreme Court jurisdiction that another statute specifically grants." *Hertz Corp. v. Friend*, 559 U.S. 77, 83 (2010) (emphasis added).

2. 50 U.S.C. § 1803(b)

Section 1803(b) of FISA provides an independent basis for this Court to issue a statutory writ of certiorari. The provision vests the FISCR with jurisdiction to review "the denial of any application made under this chapter," and it states that, if the FISCR "determines that the application was properly denied," the Supreme Court "shall have jurisdiction to review such decision." Petitioner's motion for access to the FISC's legal opinions is plainly "any application." *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (in a statute, the word "any" has "expansive" sweep). And Petitioner's motion arises "under this chapter," because it seeks access to opinions issued by

the FISC pursuant to authority granted by FISA, 50 U.S.C. § 1801 *et seq.*

B. Alternatively, this Court has jurisdiction to issue a writ of mandamus or a writ of common-law certiorari.

In the alternative, Petitioner respectfully requests that this Court treat the Petition as one for a writ of mandamus or common-law certiorari pursuant to the All Writs Act, 28 U.S.C. § 1651. To justify issuance of either writ, "the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." S. Ct. Rule 20.1.

1. Issuance of a writ of mandamus or common-law certiorari would be in aid of this Court's appellate jurisdiction.

Issuance of an extraordinary writ would be in aid of this Court's appellate jurisdiction for four independent reasons.

First, issuance of an extraordinary writ would be in aid of this Court's inherent jurisdiction to review a lower court's dismissal for lack of jurisdiction. As the Court noted in *Nixon v. Fitzgerald*, "[t]here can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction—a power we have exercised routinely." 457 U.S. at 743 n.23. If the Court lacked jurisdiction over petitions like this one, "decisions to dismiss for want of jurisdiction would be insulated entirely from review by this Court." *Id.*; *see also Hohn*, 524 U.S. at 247.

"The traditional use of the writ in aid of appellate jurisdiction . . . has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or *to compel it to exercise its authority when it is its duty to do so.*" *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943) (emphasis added).

Second, issuance of an extraordinary writ would be in aid of this Court's constitutional appellate jurisdiction. Because the FISC and the FISCR are inferior Article III tribunals, *see supra* Part II.A.2, their decisions are within this Court's constitutional appellate jurisdiction. *See* U.S. Const. art. III, § 2, cl. 2. This jurisdiction obtains even where no statute provides jurisdiction, because this Court's appellate jurisdiction—unlike that of the inferior courts—derives from the Constitution itself. *See* James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 Tex. L. Rev. 1433, 1494–98 (2000); Richard F. Wolfson, *Extraordinary Writs in the Supreme Court Since* Ex parte Peru, 51 Colum. L. Rev. 977, 991 (1951) (In *Ex parte Peru*, "the Court found that, with respect to cases coming from the federal courts, its power [under the All Writs Act] was practically limitless.").

Third, issuance of an extraordinary writ would be in aid of this Court's inherent jurisdiction over claims of access to records of the judiciary. As explained above, *see supra* Part II.A, "[e]very court has supervisory power over its own records and files." *Nixon*, 435 U.S. at 598; *see also In re Motion for Release of Court Records*, 526 F. Supp. 2d at 486–87 (earlier FISC opinion recognizing "inherent power[]" over its records). As the ultimate repository of the judicial power, this Court necessarily has jurisdiction to review the exercise of, or the refusal to exercise,

lower courts' supervisory power of their records and files. *See Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010) ("This Court also has a significant interest in supervising the administration of the judicial system."); *cf.* S. Ct. Rule 10(a) (the Court will consider whether the courts below have "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power").

Finally, issuance of an extraordinary writ would be in aid of this Court's jurisdiction—under the First Amendment itself—to review the denial of a claimed right of access to Article III proceedings. Forty years ago, this Court held that the press and public "must be given an opportunity to be heard" in challenging any limitation on public access to court proceedings. *Globe Newspaper*, 457 U.S. at 609 n.25. Yet the courts below have closed the door to all such claims at the threshold. Only this Court can ensure that the opportunity guaranteed in *Globe Newspaper Co.* is afforded here.

Each of these independent bases for jurisdiction supports the Court's review not only of the FISCR's and the FISC's jurisdictional rulings, but of the merits of Petitioner's substantive claim as well. *See Nixon*, 457 U.S. at 743 n.23; *Mayo*, 324 U.S. at 44–45, *overruled on other grounds*, *Hohn*, 524 U.S. at 251.

2. Exceptional circumstances warrant issuance of a writ of mandamus or common-law certiorari.

Exceptional circumstances warrant the issuance of an extraordinary writ. This case asks whether the public has a First Amendment right of access to significant opinions of law issued by an Article III

court that directly affect their privacy and associational rights. The FISC and the FISCR have held that they cannot even consider such a claim. This categorical holding cannot be squared with the unbroken tradition of public access to judicial opinions, or with the logic in upholding a qualified entitlement to legal opinions concerning the nation's surveillance laws.

3. Adequate relief is unavailable in any other form or from any other court.

If the Court determines that statutory certiorari is unavailable, then "adequate relief cannot be obtained in any other form or from any other court." S. Ct. Rule 20.1. As explained above, *see supra* Part II, the effect of the FISCR's and the FISC's rulings is to shut the courthouse doors on claims of public access, no matter how meritorious, and even where there are no legitimate national security concerns requiring redaction. There are no clear avenues for Petitioner or other members of the public to pursue their First Amendment claims of access to FISC and FISCR records. *See supra* Parts I, II.A. Only this Court can review those courts' rulings.

CONCLUSION

Public access to judicial opinions is necessary to the legitimacy of the judicial process and the functioning of democracy—especially where, as here, the judicial opinions have profound implications for individual rights. For reasons discussed above, the FISC was wrong to conclude that public access to the FISC's opinions is a matter for the executive branch alone to decide, and both the FISC and FISCR were wrong to later conclude that they lack jurisdiction

even to consider Petitioner's motion for access. Petitioner respectfully asks this Court to correct the FISC's and FISCR's jurisdictional errors and to make clear that the First Amendment's qualified right of access applies to the FISC's opinions as it does to the opinions of other Article III courts.

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