No. 20-1499

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

BRIEF OF FORMER GOVERNMENT OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

SEAN HECKER
Counsel of Record
MATTHEW J. CRAIG
MARCELLA COBURN
KAPLAN HECKER & FINK LLP
350 Fifth Avenue | Suite 7110
New York, NY 10118
(212) 763-0883
shecker@kaplanhecker.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former government officials who have worked on matters of national security and foreign intelligence surveillance at the highest levels of the United States government.[2] They have done so in a variety of roles—as senior Executive Branch officers who led the Nation's intelligence and counterterrorism operations; as officials with Congress and the Privacy and Civil Liberties Oversight Board who oversaw the Intelligence Community's work; and as a Solicitor General who defended the government's national security policies and practices before this Court. *Amici* have extensive experience with the Foreign Intelligence Surveillance Court (FISC) and Court of Review (FISCR), as well as the statutory and constitutional frameworks that govern the Nation's foreign intelligence efforts. *Amici* write to offer the Court their perspective on the important positive role that a qualified First Amendment right of access—one that allows for the protection of classified information, while permitting appropriate access to FISC opinions that develop the law—would play for those courts, the Intelligence Community, and the public.

---

[1] *Amici* state that no party's counsel authored this brief in whole or in part; no party or counsel for a party made a monetary contribution to the preparation or submission of the brief; and no person other than *amici* or *amici*'s counsel made a monetary contribution to the preparation or submission of the brief. All parties have consented to the filing of this brief and have been timely notified of its filing. *See* Sup. Ct. R. 37.6.

[2] A complete list of *amici* can be found in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

Tens of thousands of Americans serve this country with distinction every day as members of the United States Intelligence Community. Their greatest successes often lie in the events that they forestall, and the general public will never learn the extent of the harm that these civil servants have helped prevent.

Yet the secrecy required for effective intelligence operations is not without bound. Ultimately, the Intelligence Community's effectiveness depends on the public's confidence and support, which, in turn, demands a degree of transparency over the rules and policies governing the activities that the Intelligence Community carries out in the public's name.

There is a balance to strike between protecting the sources, methods, and targets of intelligence on the one hand, and enabling sufficient transparency on the other. But it is not a zero-sum game.

In the years since the terrorist attacks of September 11, the Foreign Intelligence Surveillance Court (FISC) has been asked to determine the lawfulness of and has repeatedly authorized broad intelligence collection programs—a marked departure from the FISC's original role of reviewing individualized requests for targeted surveillance. That transformation, and the legal principles the FISC relied upon in blessing new methods of electronic surveillance, were in many ways shielded from public view.

Unfortunately, unauthorized disclosures of vast amounts of classified material were offered as an answer to questions the public didn't even know to

ask. Some *amici* had a front-row seat to the 2013 leaks by Edward Snowden and have spoken out about the harms they believe Snowden's leaks have caused. Yet the secrecy that had accompanied post-September 11 surveillance efforts made it difficult to respond to the public misunderstandings that resulted from indiscriminate leaks lacking necessary context. And it became clear that the same secrecy contributed to the conditions that gave rise to the leaks in the first place. Too much secrecy, in other words, puts at risk the very intelligence operations that require secrecy to be effective.

This lesson is often understood in theory, but forgotten in practice—as the present proceedings reflect. Petitioner seeks access to judicial opinions that contain significant interpretations of the law relating to foreign intelligence surveillance. A presumption of access to this information inspires public faith and confidence in the government's surveillance efforts and in the courts that oversee them. But these courts have denied that there is any First Amendment right of access to FISC opinions that develop the law, or that they even possess jurisdiction to consider Petitioner's right-of-access motion. The refrain throughout the decisions precipitating the Petition is that a qualified right of access—even though it would allow for protection of classified information—is incompatible with the secrecy needed for effective intelligence.

History teaches that this is a false choice. This Court should grant certiorari and correct the errors of the courts below.

I. The FISC has jurisdiction to decide the public's right of access to its own opinions. Like any Article III court, it possesses inherent supervisory authority over

its own records, including the power to adjudicate requests to access those records. It also possesses ancillary jurisdiction over requests like Petitioner's because the FISC—which exclusively addresses intelligence surveillance in proceedings that are generally secret—cannot function successfully, manage its proceedings, or vindicate its authority as an Article III court if it has no power over who can access the decisions it produces. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379-80 (1994). The contrary decision of the Foreign Intelligence Surveillance Court of Review (FISCR), which suggested that Petitioner might instead seek FISC opinions from almost any other federal district court, conflicts with *Kokkonen*'s holding that ancillary jurisdiction is appropriate to ensure that factually interdependent cases are resolved by the same court. That decision also sets the FISC apart from other courts established under Article III, all of which possess the authority to adjudicate requests for their own records.

II. The public has a qualified right of access—one that allows for the protection of classified information—to FISC opinions that contain novel or significant interpretations of the law. Those opinions satisfy this Court's two-part test for First Amendment right-of-access cases because there is a "tradition" and "history" of public access to judicial opinions that develop the law, and because recognizing a qualified right of access would play a "significant positive role" in the functioning of the FISC and the operations of the Intelligence Community. *Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1, 8-9 (1986) (*Press-Enterprise II*).

First, the FISC took an unduly narrow view of the first part of the inquiry, focusing specifically on the history of public access to FISC opinions in contravention of this Court's direction to look broadly at the general category of proceeding to which access is sought—in other words, to novel and significant opinions that develop the law. Under the proper analysis, the history and tradition of openness in relation to significant judicial opinions, including those concerning foreign intelligence surveillance, could not be clearer.

Second, it is difficult to overstate the "significant positive role" that a qualified presumption of access would play in the functioning of the FISC and among the Intelligence Community and the public. Particularly in a context like this one—where serious national security concerns abound and protecting access to intelligence sources, methods, and targets is paramount—the trust and confidence of the public and the assurance of strong and credible oversight are critical. That trust is maintained by a presumption of access to the important judicial opinions of the courts responsible for reviewing and adjudicating the government's compliance with the statutory and constitutional frameworks that govern intelligence collection.

ARGUMENT

I. THE FISC HAS JURISDICTION TO DECIDE THE PUBLIC'S RIGHT OF ACCESS TO ITS OWN OPINIONS.

The FISC, like all Article III courts, has inherent supervisory authority over its own records. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978).

That inherent authority is not limited merely because the FISC is a specialized court: in explaining why a statute did not displace a court's inherent authority to impose sanctions, this Court has cautioned against "lightly assum[ing] that Congress has intended to depart from established principles' such as the scope of a court's inherent power." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)). Quite the opposite: Congress recognized the FISC's "inherent authority" in the Foreign Intelligence Surveillance Act (FISA) itself, confirming that nothing in the Act abrogated its power "to determine or enforce compliance" with its rules and procedures. 50 U.S.C. § 1803(h). And it specifically provided that the FISC may "take such actions" as are "reasonably necessary to administer [its] responsibilities" under the Act. *Id.* § 1803(g)(1).

The FISC's chief responsibility under FISA is to determine whether government applications for electronic surveillance comport with a detailed framework of federal law. In the course of that work, the FISC, as well as the FISCR, issue "decision[s], order[s], [and] opinion[s]." *Id.* § 1872(a). At least some of those decisions, orders, and opinions "include[] a significant construction or interpretation of [a] provision of law." *Id.* Congress has recognized the public value of those decisions and has required the executive branch to undertake a declassification review to ensure that those decisions are made publicly available to the greatest extent practicable. *See id.* That statutory requirement may ensure satisfaction of the First Amendment going forward. But it does not displace the First Amendment, nor

does it say anything about the FISC's jurisdiction to consider motions seeking access to judicial opinions that predate the statute's 2015 enactment.

Addressing whether there is a qualified right of access to its own opinions is necessary for the FISC to administer its responsibilities as an Article III court with supervisory authority over its records. Not only does it protect the FISC's inherent power to decide, in the first instance, whether a qualified right of access exists with respect to its records. It also vindicates the court's responsibility to the public as a co-equal branch of government invested with the judicial power. Stripping the FISC of its inherent power to adjudicate requests for access to its own records would undermine the credibility that is so critical to public confidence in this area of the law.

That reasoning also explains why—even if the FISC's inherent power did not authorize jurisdiction over a claim of access to the court's own records—the FISC still possesses ancillary jurisdiction to decide Petitioner's motion. The doctrine of ancillary jurisdiction "recognizes federal courts' jurisdiction over some matters (otherwise beyond their competence) that are incidental to other matters properly before them." *Kokkonen*, 511 U.S. at 378-79. Here, the FISC's jurisdiction over Petitioner's request is ancillary to its jurisdiction over the proceedings that generated the opinions that Petitioner seeks.

Kokkonen sets out two purposes for which a court should exercise its ancillary jurisdiction. One is "to enable a court to function successfully," meaning "to manage its proceedings, vindicate its authority, and effectuate its decrees." *Id.* at 380. That purpose applies

here. The FISC cannot function successfully, manage its proceedings, or vindicate its authority as an Article III court—particularly one that exclusively addresses intelligence surveillance in proceedings that are generally secret—if it has no authority over the opinions it produces. The ability to determine whether the public has a qualified right to access those opinions is therefore "essential to the conduct" of the FISC's business. *Id.* at 381.

The other purpose for which a court may exercise ancillary jurisdiction is "to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent." *Id.* at 379-80. That, too, applies here. Petitioner seeks access to significant decisions of the FISC itself. It would be passing strange to allow an entirely different Article III court in a far-flung Circuit—one with no relation to or authority over the underlying proceedings—to adjudicate Petitioner's qualified right of access to these sensitive, significant opinions. That is a scenario that the FISCR suggested was plausible, *see* App. 73a-74a (noting that Congress has empowered "most other federal courts" to adjudicate claims like "the Movants' First Amendment claim"), but it is the exact scenario that the doctrine of ancillary jurisdiction seeks to avoid.

In declining to exercise ancillary jurisdiction, the FISCR emphasized the need for "restraint and discretion" in light of its "significantly limited powers carefully delineated by Congress." App. 83a. But none of those limitations bears on the FISC's authority over its own records.

For all these reasons, the FISCR was incorrect in determining that the Article III courts established under FISA have no jurisdiction to address motions for access to those courts' judicial opinions. They do, and this Court should grant the Petition so that it may bring the FISCR in line with this Court's precedents and the practices of all federal courts across the country.

II. THE PUBLIC HAS A QUALIFIED RIGHT OF ACCESS UNDER THE FIRST AMENDMENT TO FISC OPINIONS CONTAINING NOVEL OR SIGNIFICANT INTERPRETATIONS OF THE LAW.

Judicial opinions issued by the FISC that contain novel or significant interpretations of the law satisfy the two-part framework set out by this Court for determining whether a qualified First Amendment right of access exists. *See Press-Enterprise II*, 478 U.S. at 8.

First, there is a "tradition of accessibility" and a long "history" of public access to judicial opinions that develop the law. *Id.* at 8. Second, recognizing a qualified right of access to novel or significant FISC opinions would play a "significant positive role" in the functioning of the FISC and the operations of the Intelligence Community, while permitting the continued protection of classified information. *Id.* at 8-9.

A. Public access to judicial opinions that develop the law is the cornerstone of our legal system.

The first part of the *Press-Enterprise II* test asks whether the "place and process have historically been open to the press and general public." 478 U.S. at 8.

The Court's precedents confirm that this inquiry is meant to be a broad one; it is not limited to the history of the particular forum where access is currently sought, nor does it focus on the precise subject matter of the process at issue. *Press-Enterprise II*, which addressed the public's right of access to "preliminary hearings as conducted in California," examined the centuries-long history of open preliminary hearings throughout the country, including in Aaron Burr's 1807 trial for treason. *Id.* at 10-11. *Richmond Newspapers*, which addressed the closure of a criminal trial in Virginia state court, looked all the way back to the public nature of criminal trials in England before the Norman Conquest to determine that a "presumption of openness" inheres in criminal trials in this country. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-73 (1980); *id.* at 589 (Brennan, J., concurring).

This Court's most recent First Amendment right-of-access case reiterated the same point: "[T]he 'experience' test . . . does not look to the particular practice of any one jurisdiction, but instead to the experience in that *type* or *kind* of hearing throughout the United States." *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 150 (1993) (internal quotation marks omitted).

Those cases addressed public access to a judicial proceeding; here, Petitioner seeks access to judicial records. But the same broad view of history applies regardless of how the First Amendment right of access is vindicated. As Justice Brennan explained in *Globe Newspaper Co. v. Superior Court*, the right of access is based on the "common understanding that 'a major purpose of th[e First] Amendment was to protect the free discussion of governmental affairs,'" and to "ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." 457 U.S. 596, 604 (1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). Those rights are vindicated by access to judicial records no less than judicial proceedings. *See, e.g.*, *Company Doe v. Pub. Citizen*, 749 F.3d 246, 267 (4th Cir. 2014) ("Without access to judicial opinions, public oversight of the courts, including the processes and the outcomes they produce, would be impossible.").

Without question, there is a robust history of openness and public access to judicial opinions that contain novel or significant interpretations of law. Our legal system depends on it: "As ours is a common-law system based on the 'directive force' of precedents, its effective and efficient functioning demands wide dissemination of judicial decisions. . . . Even that part of the law which consists of codified statutes is incomplete without the accompanying body of judicial decisions construing the statutes." *Lowenschuss v. W. Publ'g Co.*, 542 F.2d 180, 185 (3d Cir. 1976).

This Court, too, has recognized that "judicial precedents are . . . valuable to the legal community as a whole. They are not merely the property of private litigants." *U.S. Bancorp Mortg. Co. v. Bonner Mall*

P'ship, 513 U.S. 18, 26 (1994). Consistent with that understanding, Congress began funding the compilation of this Court's written decisions in 1874. *See* Act of June 23, 1874, ch. 455, 18 Stat. 204.

The basic, longstanding premise of public access to judicial opinions does not cease to apply merely because the judicial opinions of the FISC relate to surveillance, intelligence, and national security.

Indeed, this Court has already rejected efforts to use the subject matter of a particular judicial process to splinter the historical assessment of public access. In *Globe Newspaper*, the appellee argued that the general First Amendment right of access to criminal trials did not extend to the testimony of minor victims of sexual assault, because such testimony had "not always been open to the press and the general public." 457 U.S. at 605 n.13. The Court deemed that argument "unavailing," even if it was factually correct. *Id.* Instead, whether the right of access "can be restricted in the context of any particular criminal trial, such as a murder trial . . . or a rape trial, depends not on the historical openness of that type of criminal trial but rather on the state interests assertedly supporting the restriction." *Id.* In other words, sensitivities surrounding the testimony of minor victims did not eliminate the public's qualified First Amendment right of access, though they could support closure in a particular case upon a proper showing.

Similarly, in his concurrence in *Richmond Newspapers*, which laid the groundwork for the two-part test crystallized in *Press-Enterprise II*, Justice Brennan acknowledged that in certain cases countervailing interests "might be sufficiently

compelling to reverse th[e] presumption of openness" attendant to criminal trials. 448 U.S. at 598 (Brennan, J., concurring). "For example, national security concerns about confidentiality may sometimes warrant closures during sensitive portions of trial proceedings, such as testimony about state secrets." *Id.* at 598 n.24.

Recent terrorism trials follow that approach. Courts ask whether proposed mechanisms to protect intelligence sources and methods satisfy the relevant right-of-access standard, rather than finding that such intelligence concerns create a categorical exception to the First Amendment. For example, in *United States v. Alimehmeti*, Judge Engelmayer allowed partial closure of a trial where certain witnesses' identities were "classified in relation to [the present case] and other terrorism investigations." 284 F. Supp. 3d 477, 483 (S.D.N.Y. 2018). In permitting departure from the general presumption of openness of trials, Judge Engelmayer found it important that the government had "propose[d] two steps"—a live audio feed to a different room in the courthouse, and prompt delivery of unredacted copies of transcripts—"to assure a degree of immediate public access to the content of this testimony notwithstanding the exclusion of the press and public." *Id.* at 487; *see also, e.g.*, *United States v. Alameti*, No. 19 Crim. 13, 2019 WL 3778372, at *1-*2 (D. Mont. Aug. 12, 2019) (permitting trial witness to wear disguise so as to protect his identity given participation in "national security investigations targeting potential terrorists," while preserving the "the press and public's First Amendment right to a public trial"); *United States v. Abu Marzook*, 412 F. Supp. 2d 913, 925-27 (N.D. Ill. 2006) (allowing partial

closure of suppression hearing where foreign agents would testify to classified material because the government had satisfied the standard for overcoming the presumption of openness).

Even if the FISC were right that a sui generis historical inquiry is required, *see* App. 112a, there remains a long history of public access to the exact type of judicial opinions that Petitioner seeks. Before FISA was enacted, the scope of the government's authority to conduct foreign intelligence surveillance was regularly addressed in the opinions of Article III courts. *See ACLU of So. Cal. v. Barr*, 952 F.2d 457, 460-61 (D.C. Cir. 1991) (recounting history of federal court opinions concerning foreign intelligence surveillance). That pattern continued after FISA became law. *See* Georgetown Univ., *Non-Specialized Article III Court Decisions* (last visited May 18, 2021), https://repository.library.georgetown.edu/handle/10822/1053019 (collecting non-FISC judicial decisions concerning FISA beginning in 1982).

And Article III courts other than the FISC continue to issue opinions that develop the law in relation to foreign intelligence surveillance today. *See, e.g.*, *United States v. Moalin*, 973 F.3d 977 (9th Cir. 2020) (addressing whether call records program exceeded statutory authorization under FISA). Indeed, these courts have addressed the legality of the very same surveillance programs that the FISC has addressed in its judicial opinions. *Compare, e.g.*, *ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015) (holding call records program unlawful), *and United States v. Hasbajrami*, 945 F.3d 641 (2d Cir. 2019) (remanding for assessment of whether querying of databases of information acquired pursuant to Section 702 of the FISA

Amendments Act violated Fourth Amendment), *with In re Application of the Fed. Bureau of Investigation for an Order Requiring the Prod. of Tangible Things from Redacted*, No. BR 13-80, 2013 WL 5460137 (FISA Ct. Apr. 25, 2013) (Vinson, J.) (reauthorizing collection of call records), *and Redacted*, 402 F. Supp. 3d 45 (FISA Ct. 2018) (finding querying and minimization procedures related to Section 702 to be inconsistent with statutory requirements and the Fourth Amendment), *aff'd in part sub nom. In re DNI/AG 702(h) Certifications 2018*, 941 F.3d 547 (FISA Ct. Rev. 2019). And review by these courts will continue because criminal defendants must be given notice "[w]henever the Government intends to enter into evidence or otherwise use or disclose in any trial . . . any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to [FISA]." 50 U.S.C. § 1806(c); *see id.* § 1881e(a)(1).

In distancing itself from these longstanding practices, the FISC emphasized "the distinctive characteristics of FISC proceedings," especially that "the FISC's review and disposition of FISA applications . . . is not open to the public." App. 105a-06a. Here, again, the FISC departs from this Court's clear directive that the First Amendment inquiry asks only whether the "*type* or *kind*" of process has been historically open to the public. *El Vocero de Puerto Rico*, 508 U.S. at 150-51.

There are certainly differences between the FISC's caseload and that of the non-specialized courts from which FISC judges hail. But the differences are not all-encompassing. Other Article III courts regularly consider applications for surveillance out of the public eye, *see* 18 U.S.C. § 2510 *et seq.*, just as the FISC has

reviewed applications for targeted surveillance against individuals since FISA's passage, *see* 50 U.S.C. §§ 1804, 1805. That some subset of proceedings are necessarily secret, however, does not mean that secrecy is required across the board.

And, in the years after September 11, the work of the FISC changed significantly, in ways that brought the court even closer to its non-specialized counterparts. Previously, the FISC had the role of "approv[ing] individualized FISA warrants . . . relating to a specific person, a specific place, or a specific communications account or device." Privacy & Civil Liberties Oversight Board (PCLOB), *Report on the Telephone Records Program Conducted Under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court* 13 (Jan. 23, 2014). In the ensuing years, the court began issuing opinions regarding the statutory and constitutional validity of non-individualized surveillance programs based on new statutory provisions. *See* PCLOB, *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* 106 (July 2, 2014) (explaining that under the FISA Amendments Act, "[r]ather than approving or denying individual targeting requests, the FISA court authorizes the surveillance program as a whole"). Congress has since confirmed the FISC's changed role, mandating in a 2015 amendment to FISA that the FISC appoint *amici* in cases involving a "novel or significant interpretation of the law." Pub. L. No. 114-23, 129 Stat. 279 (codified at 50 U.S.C. § 1803(i)(2)(A)); *see also* Faiza Patel & Raya Koreh, Brennan Center for Justice, *Enhancing Civil Liberties Protections in Surveillance Law* (Feb.

27, 2020) (reporting based on publicly available statistics that *amici* were appointed in at least three cases in which no judicial opinion has been made public).

Even accounting for the secrecy that necessarily accompanies other aspects of the FISC's work, the judicial opinions resulting from cases involving novel or significant interpretations of the law are not materially different from opinions about surveillance issued by other Article III courts.

National security is, of course, a critical interest of the government, and one that *amici* view with the utmost seriousness. And national security concerns play an important role in informing the qualifications on the right of access that the First Amendment permits in individual cases, including redactions to protect classified information. But those concerns do not answer the basic question of whether the relevant "place and process" have traditionally been open to the public. The place and process here—judicial opinions that contain novel or significant interpretations of the law, including opinions on foreign intelligence surveillance—have a long history of public access. The first prong of *Press-Enterprise II* is satisfied.

B. A qualified right of access to significant FISC opinions has a positive impact on the court, national security, and the public interest.

The second part of the *Press-Enterprise II* test asks "whether public access plays a significant positive role in the functioning of the particular process in question." 478 U.S. at 8.

The answer here is a resounding "yes." A qualified right of public access to significant FISC opinions enhances the court's ability to fulfill its function as an adjudicative body responsible for interpreting and explaining laws that not only guide and regulate the government, but also impact the privacy and civil liberties of ordinary Americans. And the significant positive impact on the FISC's functioning would, in turn, serve the interests of the Intelligence Community and the public.

As with access to any significant judicial opinion, a qualified right of access to FISC opinions that address significant and novel issues will help the public understand the nature and scope of the FISC's authority and will shed further light on the government's surveillance programs. Such access would enhance public confidence about how and why the government carries out statutorily authorized surveillance. And the released opinions could appropriately redact facts that need to remain classified while making publicly available the legal discussion of applicable rules. This Court expressed a similar view about the value of open criminal trials in *Press-Enterprise I*: "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501, 508 (1984) (*Press-Enterprise I*).

If anything, the general need for secrecy with respect to much of the government's surveillance operations makes it even more important to recognize a qualified right of access to the types of opinions that Petitioner seeks. Without question, broad public access to intelligence sources, methods, and targets would compromise the government's ability to protect the Nation. Access to FISC opinions on novel or significant issues of law— with appropriate redactions as may be necessary—can help fill the void by ensuring proper oversight of the government's intelligence activities, informing the public of the rules that govern activities carried out on the public's behalf, and instilling confidence in the FISC itself.

"[P]eople 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." *Richmond Newspapers*, 448 U.S. at 572. Those words ring especially true in the realm of intelligence and surveillance. *See, e.g.*, James R. Clapper, Director of Nat'l Intelligence, Remarks to the U.S. Senate Select Committee on Intelligence: Open Hearing on Foreign Intelligence Surveillance Authorities (Sept. 26, 2013) (declassifying documents while redacting "sensitive sources and methods" is "the only way we can reassure our citizens that their Intelligence Community is using its tools and authorities appropriately"); Nick Hopkins, *Former NSA Chief: Western Intelligence Agencies Must Be More Transparent*, Guardian (Sept. 30, 2013) (Michael Hayden: "It's clear to me now that in liberal democracies the security services don't get to do what they do without broad public understanding and support. . . . [A]lthough the public cannot be briefed on

everything, there has to be enough out there so that the majority of the population believe what they are doing is acceptable.").

The FISC held that qualified public access to judicial opinions would not play a "significant positive role in the functioning of the [court]." App. 127a (internal quotation marks omitted). Its reasoning, however, focused not the benefits of public access, but on the "anticipated harms" that such access might cause. App. 124a. That reasoning is flawed in various respects.

First, it improperly relies on concerns that might correspond to certain judicial opinions (or certain information contained within those opinions) to categorically deny access to *all* judicial opinions that the FISC has issued in the past and might ever issue in the future. Risks to national security can—and should—be used to determine precisely which opinions and which parts of those opinions the public may see. *See Richmond Newspapers*, 448 U.S. at 598 & n.24 (Brennan, J., concurring). *See generally Boumediene v. Bush*, 553 U.S. 723, 797-98 (2008). But those are second-order questions. The possibility that access may properly be denied or limited in certain instances does not mean that there is no qualified First Amendment right in the first place. *See Press-Enterprise I*, 464 U.S. at 511 (First Amendment right of access attaches to voir dire proceedings, even though the "jury selection process may, in some circumstances, give rise to a compelling interest" that would justify keeping information "out of the public domain").

Second, the FISC's position rests on assumptions at odds with *amici*'s decades of relevant experience. For one, limited public access to judicial opinions about foreign surveillance activities will not "chill the government's interactions with the [FISC]" and thus harm national security. App. 124a. The Intelligence Community has historically been cautious with respect to its release of information to the public—sometimes overly so. But its members do not act based on the false expectation that the policies and legal principles that govern their work will be forever kept from public light. They are dedicated public servants, committed to the rule of law, and the possibility that the public may learn of their work in broad strokes will not cause them to withhold information from the FISC or otherwise avoid pursuing important surveillance.

Nor is there a factual basis for the FISC's concern that public access to judicial opinions could result in the unintentional release of "information that in fact should remain classified." App. 123a. The FISC's own experience demonstrates that judicial opinions can be appropriately redacted to protect information that must remain classified and then be released to the public, without any harm to intelligence operations. Courts elsewhere have proven perfectly capable of doing this as well. For example, in *United States v. Hasbajrami*, the Second Circuit addressed Fourth Amendment issues related to incidental collection under Section 702 of the FISA Amendments Act. The opinion contained a few redactions; the court explained that its opinion had been "reviewed by appropriate intelligence agencies for the purpose of redacting material that includes or references classified information." 945 F.3d at 646 n.1. Before

publishing the opinion, the panel had an "extremely productive" meeting with representatives from intelligence agencies to discuss substitutions or modified phrasing that would minimize the need for redactions. *Id.* The result was "a modest number of changes of wording that do not affect the substance of the opinion, and a significant reduction in the amount of redacted material." *Id.* The concept of minimizing the use of classified information to facilitate public release is familiar to *amici*. "Write-to-release" is an approach to intelligence reporting that proactively sanitizes references to sources and methods so the reporting can be more easily shared with those at lower security levels. *See* Intelligence Community Directive No. 208, App'x B, at 10 (Dec. 17, 2008).

Finally, and most troublingly, the FISC appears to start from the premise that recognizing a qualified right of access will undermine secrecy in ways that necessarily harm the Nation's foreign intelligence efforts. That reflects a short-sighted, unrealistic view of the world. Too much secrecy itself can set back intelligence operations. *See* Timothy H. Edgar, A Shield *and* a Sword: Reforming the FISA, Testimony Before the Senate Select Committee on Intelligence (Sept. 26, 2013) (discussing how lack of transparency in FISC's interpretations of law contributed to pre-September 11 barriers to information sharing within government).

And excessive secrecy risks the type of unauthorized disclosures that have framed public debate about government surveillance efforts for much of the past decade. The public demands assurances that surveillance activities done in its name are subject to proper oversight and buttressed by sound

applications of the law; if there is no legal means for obtaining such assurances, history has shown that unauthorized disclosures may fill the information vacuum.

Yet, unlike appropriately redacted judicial opinions of the type that Petitioner seeks, leaks often include detailed information about intelligence sources, methods, and targets, revelation of which may cause immediate and widespread harm to national security. And leaks often present the public with a distorted or incomplete view of the government's foreign intelligence activities. Without a pre-existing public account of those activities and the legal basis for them, the government is hamstrung in its ability to counter the misleading information that skews public debate. *See* Robert S. Litt, General Counsel, Office of the Director of Nat'l Intelligence, Keynote Remarks at the American University Washington College of Law: Freedom of Information Day Celebration (Mar. 18, 2014) ("One lesson that I have drawn from the recent events—and it is a lesson that others including the Director of National Intelligence have drawn as well—is that we would likely have suffered less damage from the leaks had we been more forthcoming about some of our activities, and particularly about the policies and decisions behind those activities."); Geoffrey R. Stone, *The View from Inside the NSA Review Group*, 63 Drake L. Rev. 1033, 1041-42 (2015) (stating that prior to months of work with the President's Review Group, Stone had "assumed that the most problematic surveillance programs that Edward Snowden had recently brought to light were the result of an NSA run amok," but

"found, to [his] surprise, that the NSA deserves the respect and appreciation of the American people").

In other words, recognizing a qualified right of access to novel or significant judicial opinions will not undermine foreign intelligence efforts. It will help to prevent leaks that arise when the public is kept too much in the dark. And it will help to minimize the damage to national security when unauthorized disclosures do occur.

In the long run, the Intelligence Community's ability to protect the public requires the public's confidence and support. A qualified right of access to novel or significant FISC decisions would therefore play a significant positive role in the functioning of FISC by enhancing public knowledge about and confidence in the legal frameworks that govern the Intelligence Community's work.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

SEAN HECKER
Counsel of Record
MATTHEW J. CRAIG
MARCELLA COBURN
Kaplan Hecker & Fink LLP
350 Fifth Avenue | Suite 7110
New York, NY 10118
(212) 763-0883
shecker@kaplanhecker.com

Dated: May 27, 2021 *Counsel for Amici Curiae*

APPENDIX

APPENDIX
List of *Amici Curiae*

1. Michael Bahar served as General Counsel for the House Permanent Select Committee on Intelligence from 2012 to 2017 and as the Committee's Minority Staff Director from 2015 to 2017. He previously served as Deputy Legal Advisor to the National Security Council from 2010 to 2012.

2. John O. Brennan served as Director of the Central Intelligence Agency from 2013 to 2017. He previously served as Deputy National Security Advisor for Homeland Security and Counterterrorism and Assistant to the President from 2009 to 2013.

3. Lt. Gen. James R. Clapper (ret.) served as Director of National Intelligence from 2010 to 2017.

4. James X. Dempsey served as a Member of the Privacy and Civil Liberties Oversight Board from 2012 to 2017.

5. Timothy H. Edgar served as Director for Privacy and Civil Liberties for the National Security Council from 2009 to 2010. He previously served as Deputy for Civil Liberties for the Office of the Director of National Intelligence from 2006 to 2009.

6. Sharon Bradford Franklin served as Executive Director of the Privacy and Civil Liberties Oversight Board from 2013 to 2017.

7. Robert S. Litt served as General Counsel for the Office of the Director of National Intelligence from 2009 to 2017.

8. Donald B. Verrilli, Jr. served as Solicitor General from 2011 to 2016. He previously served as

Deputy White House Counsel in 2011 and as Associate Deputy Attorney General at the Department of Justice from 2009 to 2010.