

No. 25-705

In the Supreme Court of the United States

CARTER PAGE, PETITIONER

v.

JAMES B. COMEY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the correctness of the court of appeals' fact-specific application of a discovery accrual rule to petitioner's claims under the Foreign Intelligence Surveillance Act—a rule that this Court has never held applies to such claims and on which there is no circuit conflict.

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INTRODUCTION

Petitioner seeks review of the fact-specific application of a discovery accrual rule, arguing the court of appeals' application of that rule conflicts with this Court's precedent. But no conflict is possible because this Court has never adopted that rule for FISA claims. That alone warrants denial.

Undeterred, petitioner argues that under this Court's law, a claim does not accrue until a plaintiff learns all the facts necessary to "survive[] a motion to dismiss." Petitioner's cherry-picked quotations do not endorse that radical view. Rather, they reaffirm this Court's *standard* accrual rule, under which a claim accrues when a plaintiff is injured—not when he discovers or should have discovered that injury. Those decisions cannot show any error in how the court of appeals applied its own, more expansive discovery rule. And to the extent this Court has considered the discovery rule in other contexts, it has rejected petitioner's view that anything more than discovery of injury is required. Petitioner's outcome-oriented rule would undermine the purpose of limitations periods.

Nor is certiorari justified on any other ground. Petitioner rightly does not contend the courts of appeals are split on this issue; indeed, no other circuit has considered it. Petitioner also does not meaningfully argue that the court of appeals misapplied its own precedent (which would not warrant certiorari anyway). Rather, his fact-specific challenges merely recycle his incorrect reading of this Court's decisions.

Even had petitioner presented a question worthy of certiorari, review would be unwarranted. First, there are multiple alternative grounds for affirmance,

including some logically antecedent to the question presented. To start, the discovery rule should not apply here at all. FISA is silent on which accrual rule governs, and this Court has declined to expand the discovery rule in such situations. And there is no dispute that, under this Court's traditional accrual rule, petitioner's claims are untimely. Even if the discovery rule controls, potentially applicable shorter limitations periods provide another ground for untimeliness. In any event, petitioner ignores the district court's merits dismissal and his forfeiture of both his theories of liability.

Second, FISA has been amended since this case began, including by imposing additional requirements on warrant applications and adding new bases for liability. It makes little sense to take a case involving a superseded version of FISA that will not govern future claims.

Third, the question presented—especially on these unusual facts, where petitioner was contemporaneously aware of his surveillance—is narrow and unlikely to recur, making it doubtful that any holding of this Court would provide meaningful guidance.

Finally, petitioner has been compensated for his purported surveillance-related injuries by settling his parallel claim against the United States, raising the possibility that further relief would be barred—and at the least diminishing any urgency of review.

The petition should be denied.

STATUTORY PROVISIONS INVOLVED

The text of various provisions of the 2010 and 2024 versions of the Foreign Intelligence Surveillance Act is reproduced in the Appendix.¹

¹ Petitioner's appendix reprints certain FISA provisions that do not apply here. Pet. App. G; *see infra* pp.34-35.

STATEMENT

A. Legal Background

FISA governs the procedures for “governmental electronic surveillance of communications for foreign intelligence purposes.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 402 (2013). To obtain a surveillance order, a federal officer must submit an application to a Foreign Intelligence Surveillance Court (FISC) judge that satisfies various statutory criteria. 50 U.S.C. §1804(a)(1)-(9) (2010).² The judge shall approve the application if, among other requirements, “there is probable cause to believe that *** the target of the electronic surveillance is a foreign power or an agent of a foreign power.” *Id.* §1805(a)(2), (a)(2)(A).

Under the version of FISA applicable to this case, an individual is liable (1) “if he intentionally *** engages in electronic surveillance under color of law except as authorized” by FISA, the Wiretap Act, and certain other federal statutes, or (2) “if he intentionally *** discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized” by the same statutes. *Id.* §1809(a)(1)-(2) (criminal prohibitions); *see id.* §1810 (civil cause for violations of §1809).

After this suit was filed, Congress amended FISA to add a third basis of liability if an individual “knowingly and willfully communicates, furnishes,

² As discussed below, FISA was significantly amended in 2024. Unless otherwise indicated, citations to the statute are to the pre-amendment version that governs this case.

transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States an application, in whole or in part, for an order for electronic surveillance.” 50 U.S.C.A. §1809(a)(3) (2024).

B. The Complaint’s Allegations

During the 2016 presidential election, petitioner volunteered on an informal foreign-policy-advisory committee to then-candidate Trump’s campaign. Pet. App. 4a. Petitioner alleged he became the target of an FBI surveillance program called Operation Crossfire Hurricane, which aimed to determine whether individuals associated with the Trump campaign were coordinating with the Russian government. Pet. App. 4a. Individual respondents worked at the FBI during part or all of Crossfire Hurricane’s duration. Pet. App. 76a. On September 19, 2016, the FBI received information from Christopher Steele, a confidential source, who alleged unlawful communications between petitioner and two Russian individuals with ties to President Putin. Pet. App. 5a. The CIA had identified this information as potentially containing false allegations. Pet. App. 5a.

Public reporting on the government’s investigation into petitioner started early. On September 23, 2016, a news article stated that “U.S. intelligence agencies ha[d] *** received reports that Page met with” Russian officials and that the U.S. government was “prob[ing] ties” between petitioner and the Kremlin. Pet. App. 6a (emphasis omitted). In response to that article, petitioner sent a letter to individual

respondent James Comey (then-director of the FBI) “in which he categorically denied” any such communications. Pet. App. 6a.

In October 2016, the FBI submitted its first FISA warrant application, relying on the September article “and other allegedly false and misleading information,” namely the Steele dossier. Pet. App. 6a; Pet. App. 89a-92a. The FBI submitted three additional applications to continue its surveillance of petitioner, in January, April, and June 2017. Pet. App. 7a, 10a.

On April 11, 2017, the *Washington Post* published an article titled “FBI obtained FISA warrant to monitor former Trump adviser Carter Page.” Pet. App. 7a. The article stated that “[t]he FBI and the Justice Department obtained [a] warrant targeting Carter Page’s communications after convincing a Foreign Intelligence Surveillance Court judge that there was probable cause to believe Page was acting as an agent of a foreign power, in this case Russia.” Pet. App. 7a (quoting Pet. App. 218a).

The article quoted petitioner as stating that this development “confirms all of my suspicions about unjustified, politically motivated government surveillance” and that “[he] ha[s] nothing to hide.” Pet. App. 8a. Petitioner “compared surveillance of him to the eavesdropping that the FBI and Justice Department conducted against civil rights leader Martin Luther King Jr.” Pet. App. 8a. He also “dismissed” the credibility of the underlying support for the warrant applications—in petitioner’s words, “‘the dodgy [Steele] dossier’ of false allegations”—and maintained that he wanted to testify before Congress to clear his name. Pet. App. 8a (quoting C.A. App.

100) (court’s alteration).³ On April 27, 2017, petitioner confirmed in an interview that he had read the *Post* article, expressed eagerness to obtain full disclosure about the warrant applications, and noted that the article had “pointed back to that dodgy dossier.” Pet. App. 9a.

In May 2017, petitioner sent a letter in response to a request to appear at a House Intelligence Committee hearing. Pet. App. 9a. Petitioner “referenced the ‘unfortunate front-page *Washington Post* article about the civil rights abuses committed against me which you might have seen: “Applications for FISA warrants” *** filled with a potpourri of falsehoods from the Clinton/Obama regime which fabricated this travesty from the outset.’” Pet. App. 9a-10a (quoting C.A. App. 102). Petitioner’s letter stated that “public access to the FISA warrants in advance of his testimony would be ‘essential’ to dispel ‘the continued delusional charade regarding Russia’s connections with the new Administration.’” Pet. App. 10a (quoting C.A. App. 102-103).

On November 2, 2017, petitioner testified before the House Intelligence Committee. Pet. App. 10a. He “stated that he was a victim of two felonies: the leaking of both his identity and classified information in relation to the FISA warrant documented in the *Washington Post* article.” Pet. App. 10a. He “further observed that although neither he nor the Committee ‘kn[e]w the details about how [he] was illegally hacked and wiretapped,’ they should ‘soon’ learn the

³ “C.A. App. __” citations are to the D.C. Circuit appendix.

information because of his and the Committee's requests for information." Pet. App. 10a-11a.

On February 2, 2018, a declassified government memorandum (the "Nunes memo") revealed even more information about the warrants. C.A. App. 106-107. It described "material and relevant information" allegedly "omitted" from the warrant applications, including information about the Steele dossier that formed the basis for the applications. C.A. App. 107. Petitioner commented that day that the memo substantiated his view that he was the victim of an "abuse of process." C.A. App. 108. Three days later, petitioner filed a letter in a federal district court case concerning petitioner's defamation claim based on press statements about his connections with Russians. C.A. App. 134-135. Petitioner asserted the Nunes memo discussed alleged errors and omissions in the FISA applications regarding the dossier and contended the warrants were "illegitimate" and "politically-motivated." C.A. App. 135. Finally, in April 2018, petitioner stated in another filing in that case that the Nunes memo provided "evidence that the defamatory articles" related to the Steele dossier "allegedly contributed to significant abuses of process" such as "the illegal surveillance that was enabled by this false evidence of defamatory reports submitted to the FISC." C.A. App. 137.

In late 2019, the Office of the Inspector General released a report containing further information about errors in the warrants and application process. Pet. App. 11a.

C. Procedural Background

1. *The district court dismisses petitioner's claims on the merits*

Despite petitioner's repeated statements in 2017 and 2018 decrying the allegedly unlawful surveillance, he did not sue until November 27, 2020: over three years after the April 2017 *Post* article and over two years after the Nunes memo.

Petitioner brought four FISA claims against individual respondents, one for each warrant application. Pet. App. 100a. He contended the applications were based on false and misleading information. He alleged individual respondents violated FISA both by unlawfully engaging in electronic surveillance and by using or disclosing the fruits of that surveillance. Pet. App. 102a. Petitioner also brought claims against the United States, DOJ, and FBI under the Patriot Act based on the same alleged facts. Pet. App. 2a.⁴

a. The district court dismissed petitioner's FISA claims on the merits.

The court first considered petitioner's "surveillance" claim under §1809(a)(1). Pet. App. 109a-128a. At the threshold, the court rejected petitioner's argument that FISA permits aiding-and-abetting liability and concluded that "Page must allege that the individual defendants *personally* engaged in

⁴ Petitioner originally asserted *Bivens* claims against individual respondents and Federal Tort Claims Act and Privacy Act claims against government respondents; he abandoned those claims after their dismissal by the district court. Pet. App. 12a-13a.

unauthorized surveillance.” Pet. App. 111a-112a (court’s emphasis). Then, reviewing FISA’s text, structure, precedent, historical context, and legislative purpose, the court ruled that “[o]ne who engages in acquisition” of electronic information under the statute is narrowly understood as “one who takes part in the act of obtaining communications by using a device.” Pet. App. 112a-122a. Because petitioner did not allege any individual respondent took such action, his claims failed. Pet. App. 122a-128a.

The district court also ruled that petitioner’s “use or disclosure” claims under §1809(a)(2) were “conclusory.” Pet. App. 128a-131a (noting that the allegations “do[] not allege that any particular defendant took” any relevant action; improperly “lump[ed]” individual respondents together; were speculative; and were fatally “vague in other respects”).

b. The district court declined to dismiss on timeliness grounds. The court observed that FISA’s civil cause of action lacks a statute of limitations and that no prior decision “has decided the appropriate statute of limitations.” Pet. App. 103a. It concluded the general three-year limitations period under D.C. law applied, rather than the one- or two-year periods from analogous state or federal claims that individual respondents proposed. Pet. App. 103a-104a. Thus, the court looked only to the April 2017 *Post* article reporting the surveillance and petitioner’s description of that surveillance as “unjustified” and “politically motivated,” and considered whether those facts put petitioner on inquiry notice. The district court acknowledged that the April 2017 *Post* article “disclosed quite a bit of information about Page’s claim”

and that “[i]n a typical case, that might be enough for a claim to accrue.” Pet. App. 105a-106a. Yet it reasoned that in the context of government surveillance, accrual under the discovery rule required more—namely, obtaining the warrant applications or learning their specific content. Pet. App. 106a-109a.

The district court recognized that even under the unique rule it fashioned, petitioner’s “suspicions of unlawful surveillance” in April 2017 required him “to make inquiries in the exercise of due diligence” to delay accrual under the discovery rule. Pet. App. 109a. The court concluded that it was “unclear from the complaint what investigative steps, if any, Page took or could have taken after April 2017,” and that it was “possible that he failed to search for the facts needed for his claim, or that he was adequately on notice of his claims well before” the limitations period—either of which would render his claims untimely. Pet. App. 109a. Yet the court treated this silence not as a pleading failure, but as reason to defer the timeliness inquiry. Pet. App. 109a.

The district court similarly dismissed petitioner’s Patriot Act claims against the government respondents as insufficiently pleaded rather than untimely. Pet. App. 13a.

2. The court of appeals dismisses petitioner’s claims as untimely

The court of appeals did not reach the merits because it held the complaint “on its face is conclusively time-barred.” Pet. App. 14a. The majority “assume[d] without deciding” that D.C. law’s residual three-year

statute of limitations applied. Pet. App. 18a.⁵ It concluded that petitioner’s FISA claims were time-barred under even that “most generous” of potentially applicable limitations periods. Pet. App. 18a.

First, a unanimous panel held petitioner’s surveillance claim under §1809(a)(1) was untimely. Under D.C. Circuit precedent, “the general rule of accrual” for claims where a plaintiff’s injury is not immediately ascertainable is “that a cause of action accrues and the limitations period begins to run only when the plaintiff discovers, or with due diligence should have discovered, the injury that is the basis of the action.” Pet. App. 18a (quoting *Sprint Commc’ns Co. v. FCC*, 76 F.3d 1221, 1226 (D.C. Cir. 1996)). Under that rule, “accrual is not delayed just because the plaintiff does not yet have ‘access to or constructive knowledge of *all* the facts required to support [a] claim.” Pet. App. 18a-19a (court’s emphasis) (quoting *Sprint*, 76 F.3d at 1228).

The majority concluded the “discovery” rule applied to petitioner’s FISA claims. Pet. App. 21a. Applying that rule, the court held that petitioner had “actual or inquiry notice of his FISA claims” by the April 2017 *Post* article because at that point he “knew that he was subject to surveillance by the FBI and DOJ, and he suspected that the allegations, and the ensuing warrants, were baseless.” Pet. App. 19a-21a. The court rejected petitioner’s novel argument that a FISA plaintiff must “have access to a warrant’s supporting affidavit before claim accrual starts” as inconsistent with its precedent. Pet. App. 20a.

⁵ Judge Henderson noted separately that she would have held the three-year limitations period applied. Pet. App. 46a.

Second, the majority held the April 2017 *Post* article put petitioner on actual or inquiry notice of his “use or disclosure” claim under §1809(a)(2). Pet. App. 21a. That article “inform[ed] *** Page[] that the FBI had submitted multiple warrant renewal applications,” and public information, including the text of FISA itself, made clear that such renewal applications require describing “information gathered from previous surveillance.” Pet. App. 21a-23a.⁶

Although the panel held the April 2017 *Post* article alone was sufficient to deem petitioner’s claims untimely, the majority observed that his May 2017 letter to the House Intelligence Committee provided “confirmation” that petitioner “thought the government had intentionally misrepresented his connection to Russia and surveilled him in reliance on that pretense.” Pet. App. 23a-24a.

Finally, the court of appeals dismissed petitioner’s Patriot Act claim against the government respondents as untimely for the same reasons. Pet. App. 26a-30a.

Judge Henderson dissented in part. She explained that under the “standard” accrual rule, a “claim for retrospective relief becomes complete, and thus accrues, at the moment of injury.” Pet. App. 46a. Judge Henderson “disagree[d]” that the exception to that rule—the discovery rule—was “‘the general rule’ in federal courts.” Pet. App. 47a. In Judge Henderson’s view, that position “may no longer be good law”

⁶ The court rejected petitioner’s other theory of liability under §1809(a)(2) regarding purported media leaks as implausibly alleged (Pet. App. 24a-26a); petitioner does not seek review of that decision (Pet. 15 n.27).

following this Court’s recent statements discouraging liberal adoption of the discovery rule. Pet. App. 47a-48a. Yet she assumed without deciding that the discovery rule applied because no party had challenged its applicability. Pet. App. 48a. While Judge Henderson agreed that petitioner’s surveillance claims under §1809(a)(1) were untimely under that rule (Pet. App. 48a), she believed his “use or disclosure” claims under §1809(a)(2) were timely (Pet. App. 60a-67a).

The court of appeals denied petitioner’s petition for rehearing en banc without any recorded request for a vote. Pet. App. 156a-157a.

3. Petitioner and the United States settle petitioner’s Patriot Act claim

The day before the then-operative deadline for certiorari responses, the United States informed the Court it had settled petitioner’s Patriot Act claim against the United States. U.S. Br. 6. It was later reported that the United States paid petitioner \$1.25 million as part of the settlement. Charlie Savage, *U.S. Settles Carter Page Wiretap Lawsuit for \$1.25 Million*, N.Y. Times (Apr. 22, 2026).

The United States stated that the settlement moots petitioner’s claim against the United States and argued the petition thus should be denied to the extent it seeks review of that claim. U.S. Br. 6. “The United States expresse[d] no opinion on whether the Court should review petitioner’s claim that the court of appeals erred in affirming the dismissal of his FISA claims against the individual defendants.” U.S. Br. 6.

REASONS FOR DENYING THE PETITION**I. THE PETITION IDENTIFIES NO CONFLICT WITH ANY DECISION OF THIS COURT OR OTHER COURTS OF APPEALS****A. There Is No Conflict With This Court's Precedent**

Petitioner's only argument for review is that the court of appeals' application of its discovery rule conflicts with this Court's precedent. According to petitioner, this Court's decisions delay accrual until a plaintiff has "*knowledge* of the injury such that an injured party can sue and obtain relief." Pet. 1 (emphasis added). Petitioner reads "can sue and obtain relief" to mean that a claim does not accrue until a party learns all the facts necessary to survive a motion to dismiss. Pet. 18.

But there are no such decisions of this Court. As petitioner admits, this Court has never adopted the discovery rule for FISA claims (or any others beyond a few narrowly cabined instances). Pet. 6 (acknowledging that "[w]hatever the justifications for a discovery rule in some circumstances, the Court has never broadly adopted it"). Rather, the Court's standard accrual rule is the more restrictive incident-of-injury rule: the limitations clock starts upon a plaintiff's injury, not upon his potentially later discovery of that injury. Thus, the court of appeals' application of the discovery rule, even if erroneous, cannot conflict with this Court's decisions.

What's more, the novel accrual rule petitioner proposes bears no resemblance to this Court's analysis of the discovery rule in the few instances where it

has considered it. Petitioner’s expansive discovery rule would defeat the entire purpose of limitations periods by permitting a plaintiff to sit on his rights until he passively comes into possession of all evidence relevant to his claims, not just knowledge of his injury. There is no basis for granting review to entertain such an unprecedented theory.

1. *This Court’s precedent does not require application of a discovery rule in this context, and thus there can be no conflict*

The court of appeals cannot have violated this Court’s precedent by supposedly misapplying the discovery rule to petitioner’s FISA claim because this Court has never held that rule applicable to FISA claims in the first place.

In determining when a cause of action accrues, this Court generally applies the “incident of injury rule,” under which a claim accrues at the moment of injury. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 & n.4 (2014) (describing the discovery rule as a lower-court-fashioned exception to the incident-of-injury rule in copyright cases); *Rotkiske v. Klemm*, 589 U.S. 8, 12-15 (2019) (rejecting argument that discovery rule applied to a provision of the Fair Debt Collection Practices Act based solely on statutory silence); *see* Pet. 5 (admitting this Court “[o]ften” applies “incident of injury” rule). The plaintiff-friendly discovery rule, by contrast, “arose in 18th-century fraud cases as an ‘exception’ to the standard rule.” *Gabelli v. SEC*, 568 U.S. 442, 449 (2013) (declining to apply discovery rule to SEC enforcement action). Outside those fraud cases, this Court has

recognized a “prevailing” discovery rule in only “two contexts, latent disease and medical malpractice.” *TRW Inc. v. Andrews*, 534 U.S. 19, 27 (2001). It has expressly “not adopted th[e] position” taken by some lower federal courts that the discovery rule applies whenever a statute is silent on the issue. *Ibid.*; see Pet. App. 47a (Judge Henderson making this point). And it has never deemed the discovery rule applicable to FISA claims; indeed, it has never even considered that question.

Petitioner seizes on a handful of statements in this Court’s decisions that a claim does not accrue “until the plaintiff can sue *and obtain relief*.” Pet. 1-2 (petitioner’s emphasis) (citing *Corner Post, Inc. v. Board of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 810 (2024)); Pet. 19 (quoting *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)). Petitioner would draw from that phrase (and from the related phrase “complete and present cause of action”) a rule of this Court that a claim does not accrue until a plaintiff learns all the facts that would allow him to “survive[] a motion to dismiss.” Pet. 18.

Those decisions say nothing of the sort. Placing petitioner’s isolated quotations in context shows that “file suit and obtain relief” refers to the “standard rule” of accrual: that a claim accrues when a plaintiff is injured. *Bay Area Laundry*, 522 U.S. at 201. In *Bay Area Laundry*, the Court held that a pension plan could not “file suit and obtain relief” under the Multiemployer Pension Plan Amendments Act until an employer actually defaulted on a payable installment payment and thus “violated an obligation owed the plan under the Act.” *Id.* at 202 (rejecting argument

that accrual began at an earlier point when employer merely withdrew from an account because that action, standing alone, did not violate the statute). Indeed, the Court expressly contrasted that incident-of-injury accrual rule with a separate discovery-rule provision in the same statute. *Id.* at 203-204.

And in *Corner Post*, the Court applied *Bay Area Laundry*'s rule to explain that “a claim does not ‘accrue’ as soon as the defendant acts, but only after the plaintiff *suffers the injury* required to press her claim in court.” 603 U.S. at 811 (emphasis added). An “APA plaintiff does not have a complete and present cause of action until she suffers an injury from final agency action, so the statute of limitations does not begin to run until she is injured.” *Id.* at 809. The Court made clear that “can file suit and obtain relief” describes a person’s legal entitlement to file suit, not their ability to win—that is, it treated “can” as equivalent to “is permitted to.” *See, e.g., id.* at 811 (“It is ‘unquestionably the traditional rule’ that ‘[a]bsent other indication, a statute of limitations begins to run at the time the plaintiff has *the right* to apply to the court for relief.’” (emphasis added) (quoting *TRW*, 534 U.S. at 37 (Scalia, J., concurring in the judgment)). A claim thus accrues under *Corner Post* when a plaintiff has legal entitlement to seek relief—not evidence guaranteed to win or survive a motion to dismiss.

In short, the decisions petitioner cites do not hold that accrual awaits a plaintiff’s awareness of all the factual proof on each element of their claim; they hold only that accrual awaits injury. The same is true for this Court’s other cases discussing claim accrual. *See Petrella*, 572 U.S. at 670 (explaining that because “the limitations period generally begins to run at the point

when ‘the plaintiff can file suit and obtain relief,’” a “copyright claim thus arises or ‘accrue[s]’ when an infringing act occurs” (Court’s alteration) (quoting *Bay Area Laundry*, 522 U.S. at 201)); *Gabelli*, 568 U.S. at 448 (describing argument that limitations period begins “when a defendant’s allegedly fraudulent conduct occurs” as embracing “the ‘standard rule’ *** that a claim accrues ‘when the plaintiff has a complete and present cause of action’”). And because none of these decisions applied the discovery rule, they cannot shed any light on the discovery-rule-specific error petitioner alleges here. Indeed, the separate *TRW* opinion petitioner cites would have expressly *rejected* the discovery rule. Pet. 19; *see TRW*, 534 U.S. at 37 (Scalia, J., concurring in the judgment) (calling the “injury-discovery rule” “bad wine of recent vintage”).

Petitioner is thus correct (at 20) that the court of appeals “applied a different rule” than this Court’s prevailing accrual rule. But it did so by applying a more plaintiff-friendly rule, not a more restrictive one. Petitioner’s reasoning that “the Court will not need to decide whether a discovery rule applies to claims under FISA” to grant relief (Pet. 29) thus gets it entirely backwards. For the Court to grant petitioner relief, it would need to create new law in two ways. First, it would have to hold that a discovery rule applies to FISA claims because it is undisputed that petitioner’s claims are untimely under the ordinary incident-of-injury rule. *Compare supra* p.6 (warrant applications submitted between October 2016 and June 2017), *with supra* p.9 (petitioner suing in November 2020). Second, as explained below, the Court would have to fashion a novel discovery rule that bears no resemblance to that of any court.

2. *The radical accrual rule petitioner seeks is contrary to this Court's existing view of the discovery rule*

The court of appeals' decision also presents no conflict with this Court's prior statements regarding the discovery rule.

a. On the few occasions this Court has discussed the discovery rule applied by lower courts, it has explained that “discovery of the injury, *not discovery of the other elements of a claim*, is what starts the clock.” *Rotella v. Wood*, 528 U.S. 549, 555 (2000) (emphasis added) (considering discovery rule applied by lower courts to civil RICO claims); *see id.* at 554 n.2 (leaving open possibility that RICO claim might accrue upon “injury occurrence,” making “discovery” of the injury “irrelevant” (citing *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 198 (1997) (Scalia, J., concurring in part and concurring in the judgment))). *Rotella* relied on the longstanding operation of the discovery rule in medical malpractice: accrual starts once a person discovers the injury, and “[a] person suffering from inadequate treatment is thus responsible for determining within the limitations period then running whether the inadequacy was malpractice.” *Id.* at 556. This is true even if “considerable enquiry and investigation may be necessary before he can make a responsible judgment about the actionability of the unsuccessful treatment he received.” *Ibid.*; *see id.* at 556-557 (imposing same requirement on RICO plaintiffs because “[a] RICO plaintiff's ability to investigate the cause of his injuries is no more impaired by his ignorance of the underlying RICO pattern than a malpractice plaintiff is thwarted by ignorance of the

details of treatment decisions or of prevailing standards of medical practice”).

Thus, to the extent this Court’s decisions speak to the question presented at all, they foreclose petitioner’s argument. Even if the discovery rule were to apply here—a question the Court has never addressed—that would mean petitioner’s claim accrued when he discovered or should have discovered *his injury*: the surveillance. At that point, he was “responsible for determining within the limitations period then running whether” that surveillance occurred unlawfully, even if doing so would have required additional investigation. *Ibid.*

b. Petitioner’s scattershot citations to other decisions do not suggest otherwise.

First, petitioner invokes this Court’s pleading-sufficiency decisions to argue that a claim cannot accrue until the plaintiff has enough information to survive a dismissal motion. Pet. 19-20 (citing, among other cases, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). But the rule that a speculative complaint cannot survive dismissal does not guarantee that a plaintiff can wait to sue until she has discovered all facts supporting her claim. This Court rejected a similar argument in *Rotella*. There, the plaintiff argued that RICO claims should accrue when a plaintiff discovers a *pattern* of racketeering, not merely his injury, because otherwise “a RICO plaintiff will sometimes be barred from suit by Federal Rule of Civil Procedure 9(b).” 528 U.S. at 560. The Court declined to “allow[] speculation about that” potential pleading problem to “control the resolution of the issue,” given the possibility of “equitable tolling” and “the flexibility

provided” by rules allowing pleading “based on evidence reasonably anticipated after further investigation or discovery.” *Id.* at 560-561 (citing Fed. R. Civ. P. 11(b)(3)); *cf. Kowal v. MCI Commc’ns Corp.*, 16 F.3d 1271, 1279 n.3 (D.C. Cir. 1994) (explaining that even if “the necessary information lies within defendants’ control,” a plaintiff may submit “pleadings on information and belief”). And like the plaintiff in *Rotella*, petitioner has no support for his theory that his claims would have been dismissed as speculative had he brought them within the limitations period (as opposed to the other reasons they were dismissed on the merits, *supra* pp.9-10).

Petitioner next suggests a conflict because the Court has observed that “individuals affected by FISA surveillance are very often unaware of the surveillance *unless it is revealed by the Government.*” Pet. 21 (petitioner’s emphasis) (quoting *FBI v. Fazaga*, 595 U.S. 344, 356 (2022)). But *Fazaga* addressed a completely different issue: why certain FISA procedures were unlikely to implicate the state-secrets privilege. 595 U.S. at 356. The Court’s observation in that context has no relevance here, where petitioner *was* undisputedly aware of the surveillance by April 2017. *Supra* pp.6-8. In any event, this Court has rejected the notion that the discovery rule should bend merely because some claim elements might be difficult to ascertain. *Rotella*, 528 U.S. at 556.

B. There Is No Circuit Conflict

Petitioner does not argue that the courts of appeals are divided on whether and how to apply the discovery rule on these particular facts. And they are not. No other court of appeals has applied the

discovery rule, or any other accrual rule, to FISA claims—meaning the decision below cannot have created or contributed to a circuit split.

To the extent other circuits have considered accrual under analogous statutes, the D.C. Circuit’s holding is consistent with those decisions. In claims under the Wiretap Act, which prohibits the unauthorized interception of communications, courts of appeals have ruled that claims accrue when a plaintiff learns of the interception—not whether or why that interception was unauthorized. *E.g.*, *Davis v. Zirkelbach*, 149 F.3d 614, 618 (7th Cir. 1998) (claim against prosecutors and police officers accrued when plaintiff “had a reasonable opportunity to discover” that “his telephone conversation had been taped”); *Lanier v. Bryant*, 332 F.3d 999, 1004 (6th Cir. 2003) (claim against law enforcement and prosecutors accrued when plaintiff “suspected[] that his telephone conversations were being taped”).

And in other contexts, courts of appeals have similarly held that a claim accrues when a plaintiff discovers or should have discovered his injury—not when he discovers or should have discovered that the injury resulted from unlawful conduct. *E.g.*, *Lukovsky v. City & Cnty. of San Francisco*, 535 F.3d 1044, 1051 (9th Cir. 2008) (claim accrued when “plaintiffs knew they had been injured and by whom *** even if at that point in time the plaintiffs did not know of *the legal injury*, i.e., that there was an allegedly discriminatory motive underlying the failure to hire” (emphasis added)); *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1386 (3d Cir. 1994) (“[A] claim accrues in a federal cause of action upon awareness of the actual injury, not upon awareness

that this injury constitutes a legal wrong.”); *Amini v. Oberlin Coll.*, 259 F.3d 493, 500 (6th Cir. 2001) (claim accrues at time of “the discriminatory act itself,” not when plaintiff “discovered the facts that led him to suspect discrimination” as the motive); *Merrill v. S. Methodist Univ.*, 806 F.2d 600, 604-605 (5th Cir. 1986) (similar); see also, e.g., *GO Comput., Inc. v. Microsoft Corp.*, 508 F.3d 170, 178 (4th Cir. 2007) (explaining that “inquiry notice should not await the dawn of complete awareness” because “[f]ull knowledge often awaits discovery” (quotation marks omitted)).

These decisions mirror the court of appeals’ understanding of its discovery rule: that accrual occurs when a plaintiff has or should have discovered his injury, as opposed to all other elements of his claim. *Supra* p.12.

II. THE COURT OF APPEALS’ DECISION IS CORRECT

Petitioner never argues that the panel incorrectly applied D.C. Circuit precedent on the discovery rule. Pet. 18-30. And any case-specific “misapplication of a properly stated rule of law” would not warrant this Court’s review anyway. Sup. Ct. R. 10. Regardless, the D.C. Circuit’s application of the discovery rule is correct.

1. Under the court of appeals’ discovery-rule precedents, “a cause of action accrues when the injured party discovers—or in the exercise of due diligence should have discovered—that it has been injured.” *Sprint*, 76 F.3d at 1228. Once on notice of a potential claim, a prospective plaintiff is “required to make a diligent inquiry into the facts and

circumstances that would support th[e] claim.” *Ibid.* That mirrors this Court’s interpretation of the diligence requirement. *See Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010) (holding that statutory discovery rule “encompasses not only those facts the plaintiff actually knew, but also those facts a reasonably diligent plaintiff would have known”). Accordingly, “there is no need that someone actually ‘discover’ or be aware of the violation.” *Sparshott v. Feld Ent.*, 311 F.3d 425, 429 (D.C. Cir. 2002). “Rather, the question is whether the person had a *reasonable opportunity* to discover [it].” *Ibid.* (court’s emphasis). And “[a]ccrual does not wait until the injured party has access to or constructive knowledge of all the facts required to support its claim.” *Sprint*, 76 F.3d at 1228; *see Rotella*, 528 U.S. at 555-556.

The court of appeals correctly analogized this case to its precedent in *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984). Pet. App. 19a. There, the court held that “as a matter of law,” plaintiffs were “on notice of their claims” of unconstitutional surveillance when they “knew that they were subjects of FBI investigation” *and* had read articles that described the investigation as unlawful. *Hobson*, 737 F.2d at 38-41. The combination of those two facts meant that plaintiffs had “timely information to claim that *they* were victims of unconstitutional FBI activities.” *Ibid.* (court’s emphasis).

So too here. Petitioner admits that he “suspected from the” April 2017 “news articles that he had been illegally surveilled.” Pet. 8; *accord* Pet. App. 19a-20a. As the court of appeals held, nothing more was needed to put petitioner on actual or inquiry notice of his injury. Indeed, his counsel conceded as much at oral

argument before the court of appeals. *See* C.A. Oral Arg. Audio at 15:43 (“certainly the *Washington Post* article gave him notice that he was injured from the original surveillance”); *id.* at 22:44, 40:11.⁷

Even were more required, petitioner’s May 2017 letter to the House Intelligence Committee described the warrants as “filled with a potpourri of falsehoods” and expressed his belief that the April 2017 *Post* article was based on “illegal” leaks from within the government. Pet. App. 23a-24a. Petitioner’s only explanation for this letter is to characterize his own words as “hyperbolic” and ask that they be ignored on that basis. Pet. 14-15. And petitioner’s November 2, 2017, sworn testimony before the House Intelligence Committee, where he stated he had been “illegally hacked and wiretapped,” further confirms his knowledge of his alleged injury as of that date. Pet. App. 10a-11a.

The court of appeals also correctly held that petitioner’s use-or-disclosure claims accrued when the April 2017 *Post* article was published. That article stated that the FBI had renewed the warrant “more than once,” and FISA’s plain text “requires warrant renewal applications to describe information gathered from previous surveillance.” Pet. App. 21a-22a; *see* 50 U.S.C. §1804(a)(8), (a)(11). Thus, learning that the warrants had been renewed informed petitioner that information gathered from the first warrant had been “used” within the meaning of §1809(a)(2)—and that renewal applications containing that same

⁷ Available at <https://media.cadc.uscourts.gov/recordings/docs/2024/09/23-5038.mp3>.

allegedly false information had been submitted to the FISC.

2. Petitioner’s fact-specific challenges to the ruling below (at 22-26)—besides being unworthy of certiorari—ignore the court of appeals’ reasoning and precedent, none of which conflicts with this Court’s precedent.

Petitioner argues that the “injury” in question is not secret surveillance itself, but surveillance without probable cause. Pet. 21. Even if so, the court of appeals correctly ruled that petitioner was on at least inquiry notice of that lack of probable cause by April 2017. *Supra* pp.12-13. Indeed, later that year petitioner had already publicly stated that the FISA applications included “falsehoods” and that the surveillance was “illegal[.]” Pet. App. 9a-11a. In any event, petitioner cites no authority for his probable-cause theory, which wrongly conflates injury with other claim elements. *Cf. Rotella*, 528 U.S. at 555-557 (holding that accrual of a RICO claim under injury-discovery rule did not require discovery of pattern of racketeering, a distinct claim element). One need not know that surveillance violated the law to be injured by it. *See supra* pp.23-24 (discussing uniform court of appeals precedent on when surveillance-related injury accrues).

As *Rotella* explained, a medical-malpractice plaintiff suffers injury when harmed by inadequate care; what he must discover during the ensuing limitations period is “whether the inadequacy was *malpractice*”—i.e., whether it violated a legal standard. 528 U.S. at 556 (emphasis added). Similarly, petitioner’s claim accrued when he learned he was

being surveilled. Whether the surveillance lacked probable cause is what he was required to investigate during the limitations period.

Repackaging this argument, petitioner contends his claims could not have accrued by 2017 because he did not know all the details underlying them at that point. Pet. 22-23. That just repeats his erroneous interpretation of what it means to “sue and obtain relief.” Accrual, whether under the discovery rule or otherwise, turns on injury, not all claim elements. Similarly, he argues his statements about “politically motivated” surveillance were insufficient to establish notice because politically motivated investigations “can still be supported by probable cause.” Pet. 23. Yet petitioner cites no decisions suggesting accrual is delayed until a plaintiff has gathered evidence sufficient to conclusively rebut any defense. Accepting petitioner’s arguments would impose an unworkable standard, requiring speculation into when a plaintiff obtained (or should have obtained) evidence supporting each element of his claims.

Petitioner lastly argues that any inquiry (which he concededly did not conduct) would have been “fruitless” because the government would not have provided him with the warrant applications. Pet. 2, 23-26. Any questions about what an investigation might have revealed are beside the point where petitioner had *actual* knowledge of his injury in 2017 without need for further investigation. Even assuming otherwise, the obligation to investigate does not disappear when, as petitioner speculatively posits, it might involve “considerable effort.” *Rotella*, 528 U.S. at 556. Petitioner also has no response to the court of appeals’ rejection of this argument as “erroneously

focus[ing] on [petitioner's] lack of access to the affidavits, rather than whether he took reasonable measures to uncover his cause of action once he learned of the defendants' alleged wrongful conduct." Pet. App. 20a. Under that court's precedent, it is "irrelevant" to consider when the government agency would have made relevant documents available to the plaintiff" because "[t]he test of due diligence measures the plaintiff's efforts to uncover his cause of action against what a reasonable person would have done in his situation *given the same information.*" Pet. App. 20a (court's emphasis) (citation omitted).

III. THERE ARE MULTIPLE FURTHER REASONS TO DENY REVIEW

Even if petitioner presented a question worthy of this Court's review, the petition should nonetheless be denied for multiple other reasons.

A. Petitioner's FISA Claims Are Untimely And Otherwise Fail For Reasons Independent Of The Court Of Appeals' Holding

Even had petitioner identified a cert-worthy error in the court of appeals' timeliness holding, there are two other reasons his claims are untimely, either of which could prevent the Court from reaching the question presented. And petitioner's claims lack merit, providing a ground for affirmance independent of timeliness.

1. First, petitioner's question presented simply assumes the discovery rule applies to his FISA claim, but this Court may well disagree. Unlike the statutes underlying some of petitioner's other claims, such as

the Patriot Act, FISA is silent on which accrual rule governs. *Compare* 50 U.S.C. §§1809, 1810, *with* 18 U.S.C. §2712(b)(2) (Patriot Act expressly providing for discovery rule by stating that a “claim shall accrue on the date upon which the claimant first has a reasonable opportunity to discover the violation”). In analogous cases of silence, this Court has deemed “[a] textual judicial supplementation” to add a discovery rule “inappropriate”—particularly when other statutes providing for discovery rules indicate that “Congress has shown that it knows how to adopt the omitted language or provision.” *Rotkiske*, 589 U.S. at 14 (refusing to read discovery rule into statute); *see TRW*, 534 U.S. at 27. Indeed, the Court has cautioned against an “expansive approach to the discovery rule,” describing its broad use as a “bad wine of recent vintage.” *Rotkiske*, 589 U.S. at 14 (quoting *TRW*, 534 U.S. at 37 (Scalia, J., concurring in the judgment)). Consistent with that caution, the Court has adopted the discovery rule in just a few rare instances. *TRW*, 534 U.S. at 27; *Gabelli*, 568 U.S. at 449.

It is thus far from clear that petitioner could avail himself of the discovery rule at all, as opposed to the standard incident-of-injury rule. *See* Pet. App. 46a-48a (Judge Henderson expressing doubt as to whether discovery rule should apply to FISA claims). Under that standard rule, petitioner’s claims would be untimely because he filed suit more than three years after the allegedly unlawful surveillance. *Supra* pp.20-21.

Petitioner believes the Court need not address this argument because respondents did not advance it below. Pet. 29. But this Court regularly addresses issues “‘predicate to an intelligent resolution’ of the

question presented,” even if raised for the first time here. *E.g.*, *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996) (quoting *Ohio v. Robinette*, 519 U.S. 33, 38 (1996)). Even if the Court could not address this logically anterior question, that would be yet another reason to deny certiorari. The Court should not expend resources deciding the precise contours of a FISA discovery rule when it might later decide the rule does not apply at all.

2. Second, even if the Court were to determine that the discovery rule applied here, the appropriate limitations period might be either one or two years, not the three years the court of appeals assumed. *See* Pet. App. 18a (reserving this question). Under either alternative period, petitioner’s claims would be untimely for reasons independent of his arguments to this Court. Again, petitioner’s question presented simply assumes the answer to a logically predicate question (what statute of limitations period applies to a FISA claim) that this Court has never decided.

Where, as here, a federal action contains no statute of limitations, this Court applies the limitations period from the “state law” claims that is “most closely analogous.” *N. Star Steel Co. v. Thomas*, 515 U.S. 29, 34-35 (1995). In doing so, courts look to the “gist” of a plaintiff’s particular claim. *Doe v. U.S. Dep’t of Just.*, 753 F.2d 1092, 1114 (D.C. Cir. 1985). Here, as individual respondents argued below (Pet. App. 17a-18a; C.A. Individual Respondents’ Br. 51-53), the most analogous state law claims are defamation and invasion of privacy, which carry a one-year limitations period, D.C. Code §12-301(4): Petitioner’s alleged harms are that the (truthful) reporting on the surveillance “falsely portrayed [him] as a traitor” and

damaged his reputation. Pet. App. 159a, 226a-227a, 229a-232a.

Alternatively, this Court may apply the limitations period of another federal law that “clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.” *N. Star Steel*, 515 U.S. at 35. Two such statutes—the Wiretap Act and the Stored Communications Act—provide a close analogy to FISA and have two-year limitations periods. 18 U.S.C. §§2707(f), 2520(e). And FISA’s animating policies of national security and foreign relations, plus the cross-border nature of surveillance, favor applying a single federal limitations period rather than varying state periods. *E.g.*, *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 153-154 (1987) (borrowing Clayton Act’s statute of limitations for RICO claims rather than allowing “the statute of limitations of several States” to “govern”).

Under either a one- or two-year limitations period, petitioner was put on notice of his claims not just by the April 2017 *Post* article, but also by the Nunes memo, which became public in February 2018 (over two years before petitioner filed suit). That memo detailed “material and relevant information” that was allegedly “omitted” from the applications, including further information about the Steele dossier. C.A. App. 106-107, 135. Shortly after that release, petitioner publicly stated (including in court filings) that the memo substantiated his view that he was the victim of an “abuse of process”; that it showed the warrants were “illegitimate” and “politically-

motivated”; and that it provided “evidence that the defamatory articles” related to the dossier “allegedly contributed to significant abuses of process” such as “the illegal surveillance that was enabled by this false evidence of defamatory reports submitted to the FISC.” C.A. App. 108, 135, 137. Even the district court acknowledged that, based on these statements, “Page had notice of the alleged violations before September 30, 2018.” Pet. App. 141a.

3. Petitioner’s FISA claims also fail on the merits, meaning any favorable timeliness ruling from this Court would still provide petitioner no relief.

As the district court ruled, because Congress passed FISA “to counter the abuses of *warrantless* surveillance,” the plain text of the statute “applies to agents who conduct unauthorized surveillance *** without a court order[,] rather than those who help obtain faulty warrants.” Pet. App. 122a (court’s emphasis). Because petitioner concededly does not allege that any individual respondent personally conducted the surveillance, his surveillance claims fail. Pet. App. 122a-128a. Moreover, as the district court correctly ruled, FISA does not permit aiding-and-abetting liability. Pet. App. 111a-112a. Taken together, those conclusions preclude petitioner’s claim under §1809(a)(1) regardless of timeliness. What’s more, petitioner has forfeited both arguments: at the district court, he never argued that the text of FISA supports liability beyond those who personally conduct surveillance, and at the court of appeals, he abandoned his aiding-and-abetting argument. C.A. Individual Respondents’ Br. 18-20. Thus, there is no properly preserved avenue for petitioner to obtain relief on his FISA claims.

As to the sole “use or disclosure” theory petitioner continues to press, the district court correctly ruled that those allegations were “vague” and “conclusory,” including because they did not state which respondents “used and disclosed FISA-acquired information” and did “not explain what information was leaked, to whom it was leaked, or when or how it was leaked.” Pet. App. 128a-131a.⁸

B. Petitioner’s FISA Claims Arise Under An Outdated Law

This case also presents a poor vehicle because FISA has been significantly amended, and those amendments will apply to all future cases. In April 2024, after the events underlying this case (and after the district court’s dismissal), Congress amended FISA to impose stricter requirements on electronic surveillance. *See* Reforming Intelligence and Securing America Act, Pub. L. No. 118-49, 138 Stat. 862 (2024). Among other things, those amendments require that warrant applications include known “potentially exculpatory” information. 50 U.S.C.A. § 1804(a)(13) (2024). They also add a new basis of liability: when an individual “knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes *** an application, in whole or in part, for an

⁸ Individual respondents have additional, respondent-specific merits arguments against petitioner’s FISA claims. For instance, petitioner fails to allege the requisite intent for some individuals (like Pientka, Auten, and Somma) and fails to allege involvement in the warrant application process for others (like Comey, McCabe, Page, and Strzok). C.A. Individual Respondents’ Br. 10 n.6; Dist. Ct. Docs. 80-87.

order for electronic surveillance.” *Id.* §1809(a)(3) (2024). The Court need not expend resources on a case involving pre-amendment FISA—particularly when those amendments would likely be relevant to any future case presenting similar issues.

Moreover, some of these FISA amendments were made “[i]n response to this very case” to “increase oversight and impose new penalties on individuals” who are subject to FISA’s requirements. Pet. App. 73a (Judge Henderson discussing amendments); *see, e.g.*, 170 Cong. Rec. S2921-01, at S2927 (2024). Thus, to the extent petitioner’s (and amici’s) concerns about potential abuse of the FISA process have any weight, those concerns have already been addressed by Congress. There is no need for this Court’s intervention.

C. The Issue Presented Is Narrow And Unlikely To Recur

This Court’s review is not warranted because the FISA-timeliness question petitioner presents is narrow and unlikely to recur. As the district court observed (Pet. App. 120a n.15), there is a dearth of FISA authority: neither the district court nor the court of appeals cited a previous FISA decision bearing on the timeliness questions here. That shows the issues presented are not recurring, making this Court’s intervention unnecessary.

Regardless, this case would be a particularly poor vehicle to review the applicability of the discovery rule to FISA claims because this is one of the rare government-surveillance cases where the target of the surveillance knew about the surveillance as it was happening. *Supra* pp.6-8; *see* Pet. 21 (admitting that most government-surveillance cases do not feature

contemporaneous knowledge of surveillance). Thus, the Court's analysis of accrual on these facts would likely have little applicability to other FISA-accrual cases.

While petitioner deems the presented question "exceptionally important," he has nothing to back that up besides the truism that those who bring untimely FISA claims will be unable to obtain relief. Pet. 26-28. That is true for all claims, and for good reason: statutes of limitations are "fundamental to a well-ordered judicial system." *Bd. of Regents v. Tomanio*, 446 U.S. 478, 487 (1980). Petitioner also urges this Court to intervene to set "clear rules." Pet. 27. But the existing accrual rules are clear. It is petitioner who would disrupt them with a new, unsupportable regime allowing plaintiffs to "sleep[] on their rights." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983).

D. Petitioner's Settlement With The United States Further Weakens The Case For Review

Petitioner's settlement of his Patriot Act claim against the United States presents yet further complications counseling against review.

First, the settlement creates potential law-of-the-case and preclusion issues that could bar relief on petitioner's FISA claims. The United States argues the petition must be denied as to petitioner's Patriot Act claim because it is moot. U.S. Br. 6; *see U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994) (when appeal becomes moot due to settlement, underlying decision is not vacated because "the losing party has voluntarily forfeited his legal remedy by the

ordinary processes of appeal or certiorari”). The court of appeals’ decision on that claim will thus be final and unreviewable. Critical to that decision was the court’s holding that “by April 2017, [petitioner] was on notice” of “the FISA violation supporting his Patriot Act claim.” Pet. App. 29a. That undisturbed holding could preclude petitioner’s effort to secure a contrary conclusion on his FISA claims. *Cf. Moore v. Harper*, 600 U.S. 1, 17 (2023) (“The res judicata consequences of a final, unappealed judgment on the merits are not altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.” (alteration, internal quotation marks, and citation omitted)).

Second, the settlement raises the possibility that petitioner would be entitled to no further relief even were his FISA claims allowed to proceed. FISA limits plaintiffs to their “actual damages” from any unlawful surveillance. 50 U.S.C. §1810(a). It is unclear petitioner could establish any harm not already compensated by his \$1.25 million recovery on his Patriot Act claim, which is based on the same underlying conduct.

Regardless of those potential legal complications, the fact that petitioner has already been generously compensated counsels against a discretionary grant of certiorari so that he can seek even more.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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APPENDIX

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APPENDIX A

United States Code
Title 50. War and National Defense
Chapter 36. Foreign Intelligence Surveillance
Subchapter I. Electronic Surveillance

50 U.S.C. § 1804 (2010)

§ 1804. Applications for court orders

Effective: October 7, 2010

(a) Submission by Federal officer; approval of Attorney General; contents

Each application for an order approving electronic surveillance under this subchapter shall be made by a Federal officer in writing upon oath or affirmation to a judge having jurisdiction under section 1803 of this title. Each application shall require the approval of the Attorney General based upon his finding that it satisfies the criteria and requirements of such application as set forth in this subchapter. It shall include—

- (1) the identity of the Federal officer making the application;
- (2) the identity, if known, or a description of the specific target of the electronic surveillance;
- (3) a statement of the facts and circumstances relied upon by the applicant to justify his belief that—
 - (A) the target of the electronic surveillance is a foreign power or an agent of a foreign power;and

(B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power;

(4) a statement of the proposed minimization procedures;

(5) a description of the nature of the information sought and the type of communications or activities to be subjected to the surveillance;

(6) a certification or certifications by the Assistant to the President for National Security Affairs, an executive branch official or officials designated by the President from among those executive officers employed in the area of national security or defense and appointed by the President with the advice and consent of the Senate, or the Deputy Director of the Federal Bureau of Investigation, if designated by the President as a certifying official—

(A) that the certifying official deems the information sought to be foreign intelligence information;

(B) that a significant purpose of the surveillance is to obtain foreign intelligence information;

(C) that such information cannot reasonably be obtained by normal investigative techniques;

(D) that designates the type of foreign intelligence information being sought according to the categories described in section 1801(e) of this title; and

(E) including a statement of the basis for the certification that—

(i) the information sought is the type of foreign intelligence information designated; and

(ii) such information cannot reasonably be obtained by normal investigative techniques;

(7) a summary statement of the means by which the surveillance will be effected and a statement whether physical entry is required to effect the surveillance;

(8) a statement of the facts concerning all previous applications that have been made to any judge under this subchapter involving any of the persons, facilities, or places specified in the application, and the action taken on each previous application; and

(9) a statement of the period of time for which the electronic surveillance is required to be maintained, and if the nature of the intelligence gathering is such that the approval of the use of electronic surveillance under this subchapter should not automatically terminate when the described type of information has first been obtained, a description of facts supporting the belief that additional information of the same type will be obtained thereafter.

(b) Additional affidavits or certifications

The Attorney General may require any other affidavit or certification from any other officer in connection with the application.

(c) Additional information

The judge may require the applicant to furnish such other information as may be necessary to make the determinations required by section 1805 of this title.

(d) Personal review by Attorney General

(1)(A) Upon written request of the Director of the Federal Bureau of Investigation, the Secretary of Defense, the Secretary of State, the Director of National Intelligence, or the Director of the Central Intelligence Agency, the Attorney General shall personally review under subsection (a) of this section an application under that subsection for a target described in section 1801(b)(2) of this title.

(B) Except when disabled or otherwise unavailable to make a request referred to in subparagraph (A), an official referred to in that subparagraph may not delegate the authority to make a request referred to in that subparagraph.

(C) Each official referred to in subparagraph (A) with authority to make a request under that subparagraph shall take appropriate actions in advance to ensure that delegation of such authority is clearly established in the event such official is disabled or otherwise unavailable to make such request.

(2)(A) If as a result of a request under paragraph (1) the Attorney General determines not to approve an application under the second sentence of subsection (a) of this section for purposes of making the application under this section, the Attorney General shall provide written notice of

the determination to the official making the request for the review of the application under that paragraph. Except when disabled or otherwise unavailable to make a determination under the preceding sentence, the Attorney General may not delegate the responsibility to make a determination under that sentence. The Attorney General shall take appropriate actions in advance to ensure that delegation of such responsibility is clearly established in the event the Attorney General is disabled or otherwise unavailable to make such determination.

(B) Notice with respect to an application under subparagraph (A) shall set forth the modifications, if any, of the application that are necessary in order for the Attorney General to approve the application under the second sentence of subsection (a) of this section for purposes of making the application under this section.

(C) Upon review of any modifications of an application set forth under subparagraph (B), the official notified of the modifications under this paragraph shall modify the application if such official determines that such modification is warranted. Such official shall supervise the making of any modification under this subparagraph. Except when disabled or otherwise unavailable to supervise the making of any modification under the preceding sentence, such official may not delegate the responsibility to supervise the making of any modification under that preceding sentence. Each such official shall take appropriate actions in advance

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to ensure that delegation of such responsibility is clearly established in the event such official is disabled or otherwise unavailable to supervise the making of such modification.

APPENDIX B

United States Code Annotated
Title 50. War and National Defense
Chapter 36. Foreign Intelligence Surveillance
Subchapter I. Electronic Surveillance

50 U.S.C.A. § 1804 (2024)

§ 1804. Applications for court orders

Effective: April 20, 2024

(a) Submission by Federal officer; approval of Attorney General; contents

Each application for an order approving electronic surveillance under this subchapter shall be made by a Federal officer in writing upon oath or affirmation to a judge having jurisdiction under section 1803 of this title. Each application shall require the approval of the Attorney General based upon his finding that it satisfies the criteria and requirements of such application as set forth in this subchapter. It shall include—

- (1) the identity of the Federal officer making the application;
- (2) the identity, if known, or a description of the specific target of the electronic surveillance;
- (3) a sworn statement of the facts and circumstances relied upon by the applicant to justify his belief that—
 - (A) the target of the electronic surveillance is a foreign power or an agent of a foreign power, and, in the case of a target that is a United States person alleged to be acting as an agent

of a foreign power (as described in section 1801(b)(2)(B) of this title), that a violation of the criminal statutes of the United States as referred to in section 1801(b)(2)(B) of this title has occurred or is about to occur; and

(B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power;

(4) a statement of the proposed minimization procedures;

(5) a description of the nature of the information sought and the type of communications or activities to be subjected to the surveillance;

(6) a certification or certifications by the Assistant to the President for National Security Affairs, an executive branch official or officials designated by the President from among those executive officers employed in the area of national security or defense and appointed by the President with the advice and consent of the Senate, or the Deputy Director of the Federal Bureau of Investigation, if designated by the President as a certifying official—

(A) that the certifying official deems the information sought to be foreign intelligence information;

(B) that a significant purpose of the surveillance is to obtain foreign intelligence information;

(C) that such information cannot reasonably be obtained by normal investigative techniques;

(D) that designates the type of foreign intelligence information being sought according to the categories described in section 1801(e) of this title;

(E) including a statement of the basis for the certification that—

(i) the information sought is the type of foreign intelligence information designated; and

(ii) such information cannot reasonably be obtained by normal investigative techniques; and

(F) that none of the information included in the statement described in paragraph (3) was solely produced by, derived from information produced by, or obtained using the funds of, a political organization (as such term is defined in section 527 of Title 26), unless—

(i) the political organization is clearly identified in the body of the statement described in paragraph (3);

(ii) the information has been corroborated; and

(iii) the investigative techniques used to corroborate the information are clearly identified in the body of the statement described in paragraph (3); and

(G) that none of the information included in the statement described in paragraph (3) is attributable to or derived from the content of a media source unless the statement includes a clear identification of each author of that content, and where applicable, the publisher of that content, information to corroborate that which was derived from the media source, and an explanation of the investigative techniques used to corroborate the information;

(7) a summary statement of the means by which the surveillance will be effected and a statement whether physical entry is required to effect the surveillance;

(8) a statement of the facts concerning all previous applications that have been made to any judge under this subchapter involving any of the persons, facilities, or places specified in the application, and the action taken on each previous application;

(9) a statement of the period of time for which the electronic surveillance is required to be maintained, and if the nature of the intelligence gathering is such that the approval of the use of electronic surveillance under this subchapter should not automatically terminate when the described type of information has first been obtained, a description of facts supporting the belief that additional information of the same type will be obtained thereafter; and

(10) with respect to a target who is a United States person, a statement summarizing the investigative techniques carried out before making the application;

(11) in the case of an application for an extension of an order under this subchapter for a surveillance targeted against a United States person, a summary statement of the foreign intelligence information obtained pursuant to the original order (and any preceding extension thereof) as of the date of the application for the extension, or a reasonable explanation of the failure to obtain such information; and

(12) a certification by the applicant or declarant that, to the best knowledge of the applicant or declarant, the Attorney General or a designated attorney for the Government has been apprised of all information that might reasonably—

(A) call into question the accuracy of the application or the reasonableness of any assessment in the application conducted by the department or agency on whose behalf the application is made; or

(B) otherwise raise doubts with respect to the findings required under section 1805(a) of this title.

(13) non-cumulative information known to the applicant or declarant that is potentially exculpatory regarding the requested legal findings or any assessment in the application.

(b) Additional affidavits or certifications

The Attorney General may require any other affidavit or certification from any other officer in connection with the application.

(c) Additional information

The judge may require the applicant to furnish such other information as may be necessary to make the determinations required by section 1805 of this title.

(d) Personal review by Attorney General

(1)(A) Upon written request of the Director of the Federal Bureau of Investigation, the Secretary of Defense, the Secretary of State, the Director of National Intelligence, or the Director of the Central Intelligence Agency, the Attorney General shall personally review under subsection (a) an application under that subsection for a target described in section 1801(b)(2) of this title.

(B) Except when disabled or otherwise unavailable to make a request referred to in subparagraph (A), an official referred to in that subparagraph may not delegate the authority to make a request referred to in that subparagraph.

(C) Each official referred to in subparagraph (A) with authority to make a request under that subparagraph shall take appropriate actions in advance to ensure that delegation of such authority is clearly established in the event such official is disabled or otherwise unavailable to make such request.

(2)(A) If as a result of a request under paragraph (1) the Attorney General determines not to approve an application under the second sentence of subsection (a) for purposes of making the application under this section, the Attorney General shall provide written notice of the determination to the official making the request for the review of the application under that paragraph. Except when disabled or otherwise unavailable to make a determination under the preceding sentence, the Attorney General may not delegate the responsibility to make a determination under that sentence. The Attorney General shall take appropriate actions in advance to ensure that delegation of such responsibility is clearly established in the event the Attorney General is disabled or otherwise unavailable to make such determination.

(B) Notice with respect to an application under subparagraph (A) shall set forth the modifications, if any, of the application that are necessary in order for the Attorney General to approve the application under the second sentence of subsection (a) for purposes of making the application under this section.

(C) Upon review of any modifications of an application set forth under subparagraph (B), the official notified of the modifications under this paragraph shall modify the application if such official determines that such modification is warranted. Such official shall supervise the making of any modification under this subparagraph. Except when disabled or otherwise unavailable to supervise the making of any modification under the preceding sentence,

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such official may not delegate the responsibility to supervise the making of any modification under that preceding sentence. Each such official shall take appropriate actions in advance to ensure that delegation of such responsibility is clearly established in the event such official is disabled or otherwise unavailable to supervise the making of such modification.

APPENDIX C

United States Code
Title 50. War and National Defense
Chapter 36. Foreign Intelligence Surveillance
Subchapter I. Electronic Surveillance

50 U.S.C. § 1809

§ 1809. Criminal sanctions

Effective: October 7, 2010

(a) Prohibited activities

A person is guilty of an offense if he intentionally—

(1) engages in electronic surveillance under color of law except as authorized by this chapter, chapter 119, 121, or 206 of Title 18, or any express statutory authorization that is an additional exclusive means for conducting electronic surveillance under section 1812 of this title;

(2) discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by this chapter, chapter 119, 121, or 206 of Title 18, or any express statutory authorization that is an additional exclusive means for conducting electronic surveillance under section 1812 of this title.

(b) Defense

It is a defense to a prosecution under subsection (a) that the defendant was a law enforcement or investigative officer engaged in the course of his official duties and the electronic surveillance was authorized

by and conducted pursuant to a search warrant or court order of a court of competent jurisdiction.

(c) Penalties

An offense described in this section is punishable by a fine of not more than \$10,000 or imprisonment for not more than five years, or both.

(d) Federal jurisdiction

There is Federal jurisdiction over an offense under this section if the person committing the offense was an officer or employee of the United States at the time the offense was committed.

APPENDIX D

United States Code
Title 50. War and National Defense
Chapter 36. Foreign Intelligence Surveillance
Subchapter I. Electronic Surveillance

50 U.S.C. § 1810 (2015)

§ 1810. Civil liability

Effective: October 7, 2010

An aggrieved person, other than a foreign power or an agent of a foreign power, as defined in section 1801(a) or (b)(1)(A) of this title, respectively, who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of section 1809 of this title shall have a cause of action against any person who committed such violation and shall be entitled to

- recover—
- (a) actual damages, but not less than liquidated damages of \$1,000 or \$100 per day for each day of violation, whichever is greater;
 - (b) punitive damages; and
 - (c) reasonable attorney's fees and other investigation and litigation costs reasonably incurred.