

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

PETITIONER'S REPLY BRIEF

GENE C. SCHAERR

Counsel of Record

ERIK S. JAFFE

BRIAN J. FIELD

HANNAH C. SMITH

JOSHUA J. PRINCE

SCHAERR | JAFFE LLP

1717 K Street NW, Suite 900

Washington, DC 20006

(202) 787-1060

gschaerr@schaerr-jaffe.com

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	3
I. Respondents Cannot Avoid the Conflict that the Decision Below Created with This Court’s Accrual Precedents.	3
II. Respondents’ Attempts to Downplay the Importance of the Question Presented are Unpersuasive.	8
III. Respondents’ Vehicle Arguments are Meritless.....	9
CONCLUSION	12

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007)	3
<i>City of Pontiac Gen. Emps.' Ret. Sys.</i> <i>v. MBIA, Inc.</i> , 637 F.3d 169 (2d Cir. 2011)	6
<i>Clapper v. Amnesty Int'l USA</i> , 568 U.S. 398 (2013)	10
<i>Corner Post, Inc. v. Board of Governors of</i> <i>Fed. Rsrv. Sys.</i> , 603 U.S. 799 (2024)	1, 3, 6, 7
<i>Davis v. Zirkelbach</i> , 149 F.3d 614 (7th Cir. 1998)	6, 7
<i>FBI v. Fazaga</i> , 595 U.S. 344 (2022)	1, 5
<i>Lanier v. Bryant</i> , 332 F.3d 999 (6th Cir. 2003)	7
<i>Merck & Co. v. Reynolds</i> , 559 U.S. 633 (2010)	6
<i>Schaerr v. United States Dep't of Just.</i> , 69 F.4th 924 (D.C. Cir. 2023)	5
<i>SEC v. Jarkesy</i> , 603 U.S. 109 (2024)	11
<i>Sprint Commc'ns Co. v. FCC</i> , 76 F.3d 1221 (D.C. Cir. 1996)	4
<i>Turkiye Halk Bankasi A.S. v. United States</i> , 598 U.S. 264 (2023)	10

Statutes

18 U.S.C. §2520..... 7
18 U.S.C. §2712..... 11
28 U.S.C. §1658..... 6
50 U.S.C. §1810..... 8, 11

Other Authority

Off. of Inspector Gen., U.S. Dep't of Just.,
*No. 20-012, Review of Four FISA
Applications and Other Aspects of the
FBI's Crossfire Hurricane Investigation*
(Dec. 2019)..... 4, 5

INTRODUCTION

The individual respondents (“respondents”) merely confirm that parties and courts alike need this Court’s guidance to know when claims challenging unlawful and secret surveillance contrary to the Foreign Intelligence Surveillance Act (“FISA”) accrue. Respondents have no answer to the petition’s showing, for example, that the D.C. Circuit created a Catch-22 in cases challenging secret FISA proceedings: Under that court’s rule, to avoid a statute of limitations, victims of secret unlawful surveillance must sue as soon as they *suspect* they have been unlawfully surveilled, no matter how speculative the resulting claims—and thus vulnerable to immediate dismissal. And, although they try unsuccessfully (at 22) to downplay the point, respondents do not contest the petition’s showing (at 21) that a surveillance target will almost *never* be able to plead a non-speculative claim challenging surveillance “unless it is revealed by the Government” because surveillance is, by definition, secretive. See *FBI v. Fazaga*, 595 U.S. 344, 356 (2022).

Rather than seriously defend the legal rule the D.C. Circuit announced and applied, respondents (at 1, 19, 27) recast the panel decision as a harmless “fact-specific application” of some unspecified and “more plaintiff-friendly” “discovery accrual rule.” But, however hard respondents spin the decision below, the D.C. Circuit’s decision cannot be squared with this Court’s “standard rule” that a claim does not accrue “until the plaintiff can file suit and obtain relief” because he has a “complete and present cause of action.” *Corner Post, Inc. v. Board of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 810-811 (2024) (citations omitted). A victim who only suspects harm cannot

show an injury, and she therefore lacks a complete and present cause of action.

And respondents have no answer to the broader stakes of getting this question wrong. For example, they devote (at 22-24) two pages to the undisputed lack of a circuit split. But for a host of reasons, as *Amici* showed, FISA surveillance takes place “almost invariably” in the federal courts based in the District of Columbia. Brief of *Amici Curiae* Southern Policy Law Institute and Unify.US 2-3 (“SPLI Br.”). Consequently, as a practical matter, “the D.C. Circuit functions as the court of last resort for FISA civil liability questions.” *Id.* at 3. Thus, unlike in a normal case, this Court should not wait for a split to arise when it is unlikely that another federal appellate court will ever face the question about when FISA claims accrue. And in any event, a conflict with this Court’s decisions on an issue as important as this one is sufficient grounds for review.

In short, this Court’s review is warranted to vindicate those precedents, to restore accountability for concealed government misconduct, and to ensure that victims of unlawful surveillance are not left without a remedy. It cannot be that the government can anonymously sprinkle enough information into the public record to make victims suspect abuses while strictly gatekeeping the information needed to challenge those abuses long enough for the statute of limitations to run. The petition should be granted.

ARGUMENT**I. Respondents Cannot Avoid the Conflict that the Decision Below Created with This Court's Accrual Precedents.**

As the petition showed (at 18-26), the decision below conflicts with this Court's standard accrual rule by requiring Dr. Page to file suit based on speculative allegations that cannot provide a basis for relief. Respondents have no real answer to that showing and instead respond by misconstruing the rule and by claiming that Dr. Page seeks a discovery rule that the D.C. Circuit already applied. They are wrong on both counts.

1. Respondents first argue (at 15) that "there are no * * * decisions of this Court" holding that a claim does not accrue until the party knows all the facts necessary to survive a motion to dismiss. Not so. Respondents acknowledge that the standard rule provides that a claim will not accrue before a plaintiff has "the right to apply to the court for relief." BIO 18 (emphasis omitted) (quoting *Corner Post*, 603 U.S. at 811). But they ignore the next step. As the petition showed (at 19-20), plaintiffs like Dr. Page who believe they have been targeted by unlawful surveillance have no "right" to apply for relief: To survive a motion to dismiss, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Thus, far from requiring what respondents call (at 18) "evidence guaranteed to win," this Court's precedents require at least enough non-speculative allegations to avoid filing speculative claims. If a court can dismiss a claim based on the speculative nature of the allegations, then the plaintiff lacks a right to apply

for relief, and his claim has not accrued. This conclusion flows directly from this Court's standard rule.

2. As the petition showed (at 20), rather than applying the standard rule, the D.C. Circuit applied a "different rule" that would have required Dr. Page to file suit before he had "knowledge of *all* the facts required to support [a] claim." App.18a-19a (quoting *Sprint Commc'ns Co. v. FCC*, 76 F.3d 1221, 1228 (D.C. Cir. 1996)). Respondents largely ignore the tension between this rule and the standard rule. They claim (at 19), for example, that the D.C. Circuit's discovery rule is *more* plaintiff-friendly than the standard rule. Wrong again.

To be sure, in the mine run of cases, the discovery rule operates as a plaintiff-friendly doctrine, deferring accrual until the injured party (or a reasonably diligent one) discovers—or should discover—the injury and its cause. But secret government surveillance is categorically different. The government alone controls the facts establishing the violation, including the contents of its surveillance applications, the omissions and misstatements they contained, and the full scope of its unauthorized use or disclosure of surveillance-derived information. In this context, a "discovery" rule that triggers accrual upon mere suspicion from an anonymous, unverified press leak (which the government itself refused to confirm) is not plaintiff-friendly at all. It effectively immunizes FISA abuse.

On the facts, as the petition shows (at 21-26), until the report of the Office of the Inspector General

(“OIG Report”),¹ Dr. Page could not have brought his claims. The 2017 article that served as the basis for the D.C. Circuit’s decision provided Dr. Page with none of the critical details about the first three FISA applications necessary to support either Dr. Page’s surveillance claim or his use-and-disclosure claim. Nor, as the petition showed (at 15 n.26), could the April 2017 article have given Dr. Page any information at all about the June 2017 application that served as the basis for independent surveillance and use-or-disclosure claims. Respondents rightly do not argue otherwise.

And nothing else that Dr. Page could have done would have given him the information needed to bring his claims. As Dr. Page explained, the government categorically rejected requests under the Freedom of Information Act seeking similar information, and it would have responded to any efforts on Dr. Page’s part to obtain discovery with assertions of the state-secret privilege. Pet. 25-26 (discussing *Schaerr v. United States Dep’t of Just.*, 69 F.4th 924, 926 (D.C. Cir. 2023), and *Fazaga*, 595 U.S. at 351-352). It is thus unclear how application of a discovery rule that allows claims to accrue based only on uninvestigable speculation could help plaintiffs like Dr. Page.

3. In any event, even if this Court were to read the decision below to be plaintiff-friendly, the Court has held in other contexts where a discovery rule applied that “the ‘discovery’ of facts that put a plaintiff on ‘inquiry notice’ does not automatically begin the

¹ Off. of Inspector Gen., U.S. Dep’t of Just., *No. 20-012, Review of Four FISA Applications and Other Aspects of the FBI’s Crossfire Hurricane Investigation* viii-xii (Dec. 2019), <https://perma.cc/AQC6-6QE5>.

running of the limitations period.” *Merck & Co. v. Reynolds*, 559 U.S. 633, 653 (2010) (applying the accrual standard of 28 U.S.C. §1658(b)(1)). Instead, claims subject to a discovery rule accrue only when a plaintiff “can set forth facts in the complaint” to establish the relevant elements of the claim. *Id.* at 649. As the Second Circuit correctly recognized, by “specifically referenc[ing] pleading requirements when discussing the limitations trigger,” *Merck* framed the “requirements for ‘discovering’ a fact in terms of what was required to adequately plead that fact and survive a motion to dismiss.” *City of Pontiac Gen. Emps.’ Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 175 (2d Cir. 2011) (citing *Merck*, 559 U.S. at 649).

That a plaintiff needs to know enough to survive a motion to dismiss before his claims will accrue is, of course, exactly the point Dr. Page made—whether under this Court’s standard rule or under the D.C. Circuit’s contrary discovery rule. Yet the D.C. Circuit required him to bring his claims before he even had all the facts necessary to show that the FBI lacked probable cause or that it unlawfully used or disclosed FISA-acquired information. App.18a-19a. In so doing, the D.C. Circuit did not apply a “fact-specific application of a discovery accrual rule” as respondents claim. BIO 1. Instead, in applying a discovery rule, the D.C. Circuit required Dr. Page to sue before he had the “complete and present cause of action” required by the standard rule. *Corner Post*, 603 U.S. at 810-811 (citation omitted). That is a quintessential conflict.

4. Respondents’ invocation (at 32-33) of the Wiretap Act precedents only highlights the mismatch. Those cases involved plaintiffs who knew that their conversations had been recorded. In *Davis v. Zirkelbach*, for example, the Seventh Circuit held that

the plaintiff's claims had accrued because "the other party to the conversation" told the plaintiff "that the police had a tape of them talking." 149 F.3d 614, 618 (7th Cir. 1998). And in *Lanier v. Bryant*, the Sixth Circuit held that claims accrued once the plaintiff "knew that his telephone line had been tapped" after (1) "other people were able to repeat the content of his seemingly private telephone conversations" and (2) others had told him about a recorded tape. 332 F.3d 999, 1003-1004 (6th Cir. 2003). The facts in these cases thus provided the plaintiffs with a "reasonable opportunity to discover the violation"—the standard Congress set for the accrual of Wiretap Act claims. See 18 U.S.C. §2520(e).

Equating the unverified press report about possible surveillance at issue here with actual knowledge of an interception stretches the Wiretap Act analogies too far: It ignores the realities of concealed government misconduct and fails to address this Court's "standard rule" under *Corner Post* to boot.² And because the decision below is in tension with this Court's "standard rule" for when claims accrue, the Court should grant the petition.

² Respondents' reliance (at 23-24) on cases involving "other contexts" that are even less secretive than wiretaps should be rejected for the same reason.

II. Respondents' Attempts to Downplay the Importance of the Question Presented are Unpersuasive.

Respondents' efforts to minimize the stakes fare no better.

As the petition explained (at 26-27), Congress passed 50 U.S.C. §1810 to provide a right of action to victims of an expansive surveillance state. And it did so after the Foreign Intelligence Surveillance Court identified systemic FBI inaccuracies and omissions in FISA applications. As multiple *amici* explain, without judicial review of these and other abuses, they will continue. See Br. of Liberty Justice Center as Amicus Curiae 4-10; SPLI Br. 7-11. This Court's review—and, ultimately, reversal—is thus critically important to prevent future surveillance abuses.

Undeterred, respondents argue (at 34) that claims like Dr. Page's are unlikely to recur because they arise under an "[o]utdated [l]aw." But this is a red herring: Despite respondents' summarizing (at 34-35) these amendments in detail, they never claim that the amendments provide any guidance on the question presented, that is, when FISA claims accrue. And the amendments did not. Thus, however helpful recent amendments to FISA may be to future victims of unlawful surveillance on the merits, they do not purport to alter the accrual analysis for the claims of those like Dr. Page whose rights have been violated by surveillance abuses.

Nor do respondents say why Congress's recent expansion of FISA's protections somehow translates into fewer FISA claims. The surveillance activities that Dr. Page challenges were already illegal under

FISA as it existed at the time. But respondents violated the law anyway.

In short, the question presented remains incredibly important to ensure that FISA's right of action serves as a check on the government's surveillance activities. As the petition showed (at 3), the D.C. Circuit here answered the accrual question in a way that all but guarantees that future "surveillance claims [will be] too speculative until they are untimely." If the FISA cause of action is to have any teeth, that can't be the rule.

III. Respondents' Vehicle Arguments are Meritless.

Nor is there any merit to respondents' vehicle challenge.

1. They first argue (at 29-30) that the question presented "simply assumes the discovery rule applies to his FISA claim," a point on which "this Court may well disagree." But respondents make no effort to explain why this Court's ultimate view on the merits is relevant to whether the question is worthy of this Court's review.

Moreover, the question presented makes no assumption about the rule that applies. Instead, it is phrased neutrally and asks (at i) whether claims challenging surveillance accrue based on suspicions of unlawful surveillance "rather than on facts that would establish a basis for relief[.]" Respondents seem to think that a person who suspects, but does not know, that she has been surveilled has been injured. But this Court rejected that very argument when it found that a party could not even show injury in fact based only on "mere speculation" about potential surveillance.

See *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410-411 (2013).

2. Respondents then argue (at 31-32) that the lack of a clearly defined limitations period hinders this Court's review. But that's wrong too. True, as respondents acknowledge, the D.C. Circuit assumed a three-year statute of limitations for the FISA claim. But Dr. Page explained (at 29) that, if his claims accrued with the April 2017 article, they are time-barred under any statute of limitations. Conversely, if they accrued with the OIG Report, they are timely under any statute of limitations since Dr. Page filed within a year of the report.³ Accordingly, no matter how this Court resolves the question presented, it will not need to decide the appropriate statute of limitations for FISA claims.

3. Nor can respondents hide (at 33-34) behind the fact that the D.C. Circuit did not resolve Dr. Page's case on the merits. When a lower court fails to "fully consider the various arguments" raised by the parties, the Court often decides some issues while "express[ing] no view" on others, instead "leav[ing] them for the Court of Appeals to consider on remand." *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 280-281 (2023). It should do so here too. All that this Court would need to decide is whether the D.C. Circuit's legal rule about when Dr. Page's claim accrued was correct.

³ Respondents also suggest (at 32) that Dr. Page's claims may have accrued with a February 2018 memorandum. But that document—a partisan congressional staff memorandum—played no part in the D.C. Circuit's decision and, no less than the April 2017 article, failed to provide Dr. Page with information sufficient to survive a motion to dismiss.

4. Finally, respondents halfheartedly suggest (at 36-37) that Dr. Page's settlement *with the United States* undermines this case as a vehicle by creating "potential law-of-the-case and preclusion issues." This argument fares no better than the others. True, as respondents argue (at 37), the D.C. Circuit concluded that both Dr. Page's FISA claims and his PATRIOT Act claims accrued at the same time. But they were still distinct claims. Respondents cite no authority to support their view that a holding about when the PATRIOT Act claim against the United States accrued would bind this Court's review of the FISA claim against the individual respondents. Nor could they. As the United States acknowledged, Congress has established by statute when a PATRIOT Act claim accrues. See U.S. Br. 2 (citing 18 U.S.C. §2712(b)(2)). It has provided no such guidance for FISA claims.

Respondents then argue (at 37) that Dr. Page has already been compensated because 50 U.S.C. §1810(a) "limits plaintiffs to their 'actual damages.'" But Dr. Page's settlement with the federal government covers only a small fraction of his actual damages. In any event, it only resolved his PATRIOT Act claim, not his FISA claim, and the amount of "actual damages," 50 U.S.C. §1810(a), that Dr. Page suffered is a "prototypical common law remedy" that presents an equally prototypical jury question. See *SEC v. Jarkesy*, 603 U.S. 109, 122-123 (2024).

If this Court resolves this case in Dr. Page's favor, respondents will ultimately be able to argue that, notwithstanding the inadequacy of Dr. Page's settlement with the government, he has been adequately compensated to the jury. But the fact that the jury might theoretically find that Dr. Page has been adequately compensated is no reason to avoid

review on the vitally important question this case presents.

CONCLUSION

Respondents violated Dr. Page's FISA rights, and Dr. Page brought claims challenging those violations less than a year after the government acknowledged those violations for the first time. The Court should grant the petition to clarify that claims do not accrue with a plaintiff's uninvestigable *suspicious* of wrongdoing. Instead, consistent with the standard rule, such claims accrue only when a plaintiff knows or could learn enough to survive a motion to dismiss.

Respectfully submitted,

GENE C. SCHAERR

Counsel of Record

ERIK S. JAFFE

BRIAN J. FIELD

HANNAH C. SMITH

JOSHUA J. PRINCE

SCHAERR | JAFFE LLP

1717 K Street NW

Suite 900

Washington, DC 20006

(202) 787-1060

gschaerr@schaerr-jaffe.com

Counsel for Petitioner

MAY 26, 2026