No. _____

IN THE

Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

The questions presented are:

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

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

PARTIES TO THE PROCEEDINGS

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

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

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

CORPORATE DISCLOSURE STATEMENT

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

RELATED PROCEEDINGS

There are no directly related proceedings.

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JURISDICTION

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT OF THE CASE

Statutory Background

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

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

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

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

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

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

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

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

Public Access to the FISC's Opinions

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

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

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

Prior Related Proceedings

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

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

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

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

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

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

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

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

The Right-of-Access Motion at Issue Here

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

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

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

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

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

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

REASONS FOR GRANTING THE PETITION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. The decisions below were incorrect.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. 28 U.S.C. § 1254(1)

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

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

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

2. 50 U.S.C. § 1803(b)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

Respectfully Submitted,

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APPENDIX

APPENDIX A

UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE
COURT OF REVIEW WASHINGTON, D.C.

IN RE OPINIONS AND ORDERS OF THE FISC
CONTAINING NOVEL OR SIGNIFICANT
INTERPRETATIONS OF LAW

Docket No. Misc. 20-02

[Filed November 19, 2020]

OPINION AND ORDER

Earlier this year, this Court dismissed for lack of jurisdiction a petition filed by a group oforganizations who were seeking, based on an asserted First Amendment right of public access, disclosure of certain opinions and orders that were issued by the United States Foreign Intelligence Surveillance Court (FISC) and that contained redacted, non-public material classified by the Executive Branch. *In re Opinions & Orders by the FISC Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, 957 F.3d 1 344 (FISA Ct. Rev. 2020) *(In re Opinions & Orders by the FISC on Bulk Collection).* Following our decision in that case, the FISC, considering a separate motion that sought disclosure of other FISC classified opinions and orders but likewise was based on a First Amendment right of access claim, dismissed the motion after applying our reasoning in *In re Opinions & Orders by the FISC on Bulk Collection. See In re Opinions &*

Orders of this Court Containing Novel or Significant Interpretations of Law, FISC Docket No. Misc. 16-01 (FISA Ct. Sept. 15, 2020), *available at* https://www.fisc.uscourts.gov/ public-filings/opinion-and-order-8. This appeal followed.

Movant American Civil Liberties Union filed with this Court a Petition for Review seeking to appeal the FISC's September 2020 dismissal decision or, in the alternative, a Petition for a Writ of Mandamus (Petition). In its accompanying Notice of Appeal, the Movant, citing to *In re Opinions & Orders by the FISC on Bulk Collection,* "recognize[d] that this Court has previously determined that it does not have jurisdiction to consider an appeal or petition for a writ of mandamus filed by a movant claim in g a First Amendment right of public access to the FISC's legal opinions." Movant Notice of Appeal, filed Oct. 1 4, 2020.

On October 16, 2020, we ordered the Movant to file a brief and show cause as to why this Court has the authority to entertain the Movant's Petition. The Government also was provided the opportunity to file a response, and both Parties timely filed their briefs.

The Movant now asks this Court to "clarify or revisit" its earlier ruling in *In re Opinions & Orders by the FISC on Bulk Collection,* or in the alternative, to certify jurisdictional questions raised by the Movant's Petition to the Supreme Court of the United States. Movant Brief at 2. The Movant acknowledges that its position relies, among other things, on an interpretation of the Foreign Intelligence Surveillance Act that was rejected by this Court just over six months ago in *In re Opinions & Orders by the FISC on Bulk Collection. Id*. at 3. The Government

counters that our decision in that case controls disposition of the Movant's Petition, and the Petition therefore should be dismissed for lack of jurisdiction.

After careful consideration of the Parties' briefs, we decline the Movant's invitation to revisit our recent decision. We conclude that *In re Opinions & Orders by the FISC on Bulk Collection* applies to our consideration of the Movant's Petition, and we are unpersuaded that the Movant has shown cause as to why this Court has jurisdiction to consider its current claims. In light of that conclusion, this case does not present a question of law as to which instructions from the Supreme Court are desired. 50 U.S.C. § 1803(k); 28 U.S.C. § 1254(2).

The September 15, 2020 decision of the FISC is AFFIRMED, and the Movant's Petition is DISMISSED.

So ORDERED this 19th day of November, 2020.

/s/ David B. Sentelle
Presiding Judge
United States Foreign
Intelligence Surveillance Court
of Review

APPENDIX B

UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

IN RE OPINIONS AND ORDERS OF THIS COURT CONTAINING NOVEL OR SIGNIFICANT INTERPRETATIONS OF LAW

Docket No. Misc. 16-01

[Filed September 15, 2020]

OPINION AND ORDER

Pending before the Court is a motion for the release of court records that the American Civil Liberties Union, the ACLU of the Nation's Capital, and the Media Freedom and Information Access Clinic filed on October 19, 2016. The motion invokes Rule 62 of the United States Foreign Intelligence Surveillance Court Rules of Procedure and the qualified First Amendment right of access to compel the Court to disclose classified opinions and orders that contain novel or significant interpretations of law and were issued between September 11, 2001, and June 2, 2015. *See* ACLU's Mot. at 1, https://www.fisc.uscourts.gov/sites/defauJt/files/Misc%2016%2001%20Motion%20of l/o20the%20ACLU%20for%20the%20Release%20of% >20Court%20Records%20161019.pdf.

In 2013, these same movants filed a motion arguing that both FISC Rule 62 and the qualified First Amendment right of access authorized this Court to

exercise jurisdiction over their request for the disclosure of classified judicial opinions addressing the legal basis for bulk collection. *See* Mot. of the ACLU, the ACLU of the Nation's Capital, & MFIAC for the Release of Ct. Rs., Misc. No. 13-08 (Foreign Intel. Surv. Ct. 2013), https:// www.fisc.uscourts.gov/ sites/default/files/Misc%2013-08%20Motion-2.pdf.
Four months ago, the United States Foreign Intelligence Surveillance Court of Review dismissed that motion in *In re Opinions and Orders by the FISC Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act,* 957 F.3d 1344 (Foreign Intel. Surv. Ct. of Review Apr. 24, 2020) (per curiam). The FISCR held that it lacked jurisdiction over the petition seeking appellate review of then-Presiding Judge Rosemary M. Collyer's February 11, 2020, decision denying the motion. *Id.* at 1358.

This Court is now convinced that exercising jurisdiction over the pending motion in this matter would be inconsistent with the Foreign Intelligence Surveillance Court of Review's decision. The FISCR determined that it lacked statutory subject-matter jurisdiction because Congress did not empower the federal courts established under FISA to consider constitutional claims, a freestanding motion asserting a qualified First Amendment right of access did not fall within any of the FISCR's jurisdictional categories enumerated in the statute, and the movants were not among the parties authorized by the statute to seek FISCR review. *Id.* at 1350–51. Noting its "significantly limited powers carefully delineated by Congress," the FISCR also declined to rely on the doctrine of ancillary jurisdiction to exercise discretionary authority over the petition. *Id.* at 1356–57. It explained that such authority must be exercised

with restraint, discretion, and great caution, *id*. at 1356, n.69 (citing Ex Parte Burr, 22 U.S. 529, 53l (1824)), and that the movants had not been involuntarily haled into court, did not seek to assert rights inan ongoing action, did not establish a factual connection to the classified material, and did not present circumstances warranting the exercise of the FISCR's inherent judicial power to enforce its mandates and orders or protect the integrity of its proceedings and processes. *Id*. at 1356. In addition, because the "crux" of the movants' claim to disclosure "[lay] within the Executive's clear authority to determine what material should remain classified," the FISCR concluded that "respect for the separation of powers dictates that we dismiss the Petition for lack of jurisdiction, as we have no business deciding the merits of the Movants' constitutional claim." *Id*. at 1357 (internal quotation marks omitted).

Applying the FISCR's reasoning to whether this lower Court has jurisdiction over the pending motion leads to the same result. Like the FISCR, the FISC is not empowered by Congress to consider constitutional claims generally, First Amendment claims specifically, or freestanding motions filed by persons who are not authorized by FISA to invoke this Court's jurisdiction. *See id*. at 1355 (stating that "specialized courts like the FISC" are not "empowered to consider claims arising under the First Amendment to the Constitution"), 1350–51; 50 U.S.C. §§ 1801–l885c. And because all of the above-described reasons why the FISCR found it unwarranted to exercise ancillary jurisdiction apply to the pending motion, the FISC is foreclosed from doing so here.

Accordingly, it is **ORDERED** that the Motion of the American Civil Liberties Union for the Release of Court Records is **DISMISSED** for lack of jurisdiction.

SO ORDERED this 15th day of September, 2020.

/s/ James E. Boasberg
Presiding Judge, United States Foreign Intelligence Surveillance Court

APPENDIX C

UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

IN RE OPINIONS AND ORDERS OF THIS COURT CONTAINING NOVEL OR SIGNIFICANT INTERPRETATIONS OF LAW

Docket No. Misc. 16-01

[Filed October 19, 2016]

Motion of the American Civil Liberties Union for the Release of Court Records

PRELIMINARY STATEMENT

Under the authority of the First Amendment and pursuant to Rule 62 of this Court's Rules of Procedure, the American Civil Liberties Union (the "ACLU" or "Movant") respectfully moves the Foreign Intelligence Surveillance Court ("FISC") to unseal its opinions and orders containing novel or significant interpretations of law issued between September 11, 2001, and the passage of the USA FREEDOM Act on June 2, 2015.[1] Based on public disclosures, it is clear that over the past fifteen years the FISC has developed an extensive body of law—one that defines the reach of the government's surveillance powers and broadly

[1] Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act ("USA FREEDOM Act"), Pub. L. No. 114-23, 129 Stat. 267 (2015).

affects the privacy interests of Americans. Yet, even today, many of the FISC's significant opinions and orders have not been disclosed to the public. These rulings appear to address a range of novel surveillance activities, including the government's bulk searches of email received by Yahoo! customers; the government's use of so-called "Network Investigative Techniques" ("NITs"), more commonly known as "malware"; and the government's use of "cybersignatures" as a basis for surveillance conducted pursuant to the Foreign Intelligence Surveillance Act ("FISA").[2] The Court's undisclosed rulings also appear to address the lawfulness of surveillance conducted under Section 702 of FISA—a controversial authority scheduled to expire in December 2017. The significant legal interpretations of this Court are subject to the public's First Amendment right of access, and no proper basis exists to keep that legal analysis secret.

Congress created this Court in 1978 to "hear applications for and grant orders approving electronic surveillance" within the United States of foreign powers and their agents. FISA, Pub. L. No. 95-511, § 103, 92 Stat. 1783 (1978) (codified at 50 U.S.C. § 1803). Since the disclosures that began in June 2013, however, it has become increasingly apparent that the Court does more than review individualized surveillance applications on a case-by-case basis. Rather, the Court's role expanded over the past fifteen years to include programmatic approval and review of government surveillance activities that affect countless Americans.

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[2] In the attached Appendix, Movant has provided a non-exhaustive list of FISC rulings that it believes fall within the scope of this motion and have not yet been publicly released.

The Court's new role was accompanied by a growing body of secret law. In at least some instances, the Court's interpretations departed significantly from the public understanding of the laws at issue. *See, e.g.*, *ACLU v. Clapper*, 785 F.3d 787, 812 (2015) (describing the "expansive concept of 'relevance'" adopted by this Court in interpreting Section 215). During the past three years, the Court has responded by making more of its precedent available to the public, including in response to a previous motion filed by the ACLU. *See In re Orders of this Court Interpreting Section 215 of the PATRIOT Act* ("*In re Section 215 Orders*"), No. Misc. 13-02, 2013 WL 5460064, at *7 (FISC Sept. 13, 2013); Opinion and Order Directing Declassification of Redacted Opinion ("Declassification Order"), *In re Section 215 Orders*, No. Misc. 13-02 (FISC Aug. 7, 2014), http://1.usa.gov/1yekcfM. Congress, too, has responded by directing the government to publicly release significant opinions of this Court to the greatest extent practicable, as part of the USA FREEDOM Act. *See* 50 U.S.C. § 1872. However, the government has taken the position that its statutory disclosure obligation does *not* apply to opinions that predate the Act's passage on June 2, 2015.[3] As a result, a number of significant opinions and orders of this Court issued prior to June 2015 remain secret.

[3] *See* Gov't Mem., *Elec. Frontier Found. v. DOJ*, No. 14-cv-00760 (D.D.C. Feb. 5, 2016) (ECF No. 28). *But see* Pl. Mot. for Partial Summ. J. & Opp., *Elec. Frontier Found. v. DOJ*, No. 14-cv-00760 (N.D. Cal. Oct. 13, 2016) (ECF No. 32); Sen. Ron Wyden, Press Statement (Oct. 7,2016) ("The USA Freedom Act requires the executive branch to declassify Foreign Intelligence Surveillance Court opinions that involve novel interpretations of laws or the Constitution.").

Through this Motion, the ACLU seeks access to these opinions and orders for two reasons. First, some of the opinions and orders pertain to surveillance programs that are already the subject of considerable public debate—including the government's PRISM and Upstream collection programs conducted pursuant to Section 702 of FISA. The public is entitled under the First Amendment to access the legal interpretations that define the limits of those programs. Second, and more broadly, some of the opinions and orders relate to novel legal questions the Court addressed as the government's surveillance activities expanded after September 11, 2001, such as the use of court-authorized malware and the extension of FISA to cybersecurity activities. These rulings are necessary to inform the public about the scope of the government's surveillance powers today.

The ACLU's request for access to opinions and orders of this Court seeks to vindicate the public's overriding interest in understanding how federal statutes are being construed and implemented, and how constitutional protections for personal privacy and expressive and associational activities are being enforced. The First Amendment guarantees the public a qualified right of access to those opinions because judicial opinions interpreting constitutional and statutory limits on governmental authorities—including those relevant to foreign-intelligence surveillance—have regularly been available for inspection by the public, and because their release is manifestly fundamental in a democracy committed to the rule of law. Public disclosure serves to improve the functioning of the Court itself, to enhance its perceived fairness and independence, and to educate citizens about the Court's role in ensuring the

integrity of the FISA system. This First Amendment guarantee of public access may be overcome only if the government is able to demonstrate a substantial probability of harm to a compelling interest and the absence of any alternative means to protect that interest. Any limits on the public's right of access must then be narrowly tailored and demonstrably effective in avoiding that harm.

The ACLU respectfully asks this Court to order the government to promptly process and prepare for publication opinions and orders of this Court containing novel or significant interpretations of law, including but not limited to those identified in the Appendix.[4] Because the opinions are of critical importance to the ongoing public debate about the legitimacy and wisdom of the government's surveillance activities, the ACLU respectfully requests that the Court order the publication of the opinions as quickly as possible, with only those redactions justified under the stringent First Amendment standard.

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[4] Movant notes that, since 2004, the government has been required to identify, summarize, and provide to the Intelligence and Judiciary Committees of both houses of Congress "significant" legal interpretations of FISA. 50 U.S.C. § 1871(a)(4)–(5); *see also id.* § 1871(c). Similarly, for FISC opinions related to § 702 of FISA, the executive branch is required to categorize the Court's opinions as containing a significant legal interpretation or not. 50 U.S.C. § 1881f(b)(1)(D) (requiring the government to provide copies to Congress of any FISC opinion "that contains a significant legal interpretation of the provisions of [Section 702 of FISA]").

Where there is a question as to whether an opinion or order constitutes a significant interpretation of law, Movant requests that the Court make a determination as to the ruling's significance.

FACTUAL BACKGROUND

In June 2013, various press outlets disclosed the existence of previously unknown government surveillance programs, including the National Security Agency's bulk collection of telephone metadata pursuant to 50 U.S.C. § 1861, and the PRISM and Upstream programs operated under Section 702 of FISA, which the government uses to seize and search vast quantities of Internet communications.[5] These news stories and subsequent reporting and disclosures alerted the public to the existence of a growing body of important FISC rulings on matters of significant public interest. While the FISC was created to hear individualized surveillance demands, the orders and opinions that were published with the leaked documents revealed that the FISC was also authorizing and overseeing several broad programs of surveillance, relying on a body of its own opinions interpreting statutory and constitutional law. Because FISC opinions were rarely published, the disclosures made the public aware that it was being (and had for some time been) denied access to a growing body of secret law.

To address the public's concerns that developed in the wake of these disclosures about the legal foundations of the government's various surveillance programs, the government began to declassify and release significant information related to its

[5] *See, e.g.*, Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, Guardian, June 6, 2013, http://gu.com/p/3gc62; Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in BroadSecret Program*, Wash. Post, June 7, 2013, http://wpo.st/eW7Y1.

surveillance activities. For example, in the months immediately following the initial news stories about the government's bulk call-records program, the government released a white paper providing more details about the program, its purported value, and its legal underpinnings.[6] And the Office of the Director of National Intelligence ("ODNI") began a marked increase in its communications with the public about the government's national-security surveillance programs.[7]

This Court also grasped the immense public interest surrounding the government's surveillance activities and the need for public access to its opinions and orders. After the initial disclosures in June 2013, this Court began to makes more of its opinions and orders available to the public as a matter of course.[8] In *In re Section 215 Orders*, the Court acknowledged the important values served by the disclosure of these opinions. It noted that previous public disclosures had "engendered considerable public interest and debate" and that further "[p]ublication of FISC opinions . . . would contribute to that debate."[9] The Court also underscored the assertions by legislators of the "value

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[6] *Administration White Paper: Bulk Collection of Telephony Metadata Under Section 215 ofthe USA PATRIOT Act* (Aug. 9, 2013), http://big.assets.huffingtonpost.com/Section215.pdf.

[7] As one example of its increased outreach efforts, the ODNI began utilizing social media toaddress these important matters of public concern and to release declassified documents, including opinions of this Court, to the public. *See* ODNI, IC on the Record, https://icontherecord.tumblr.com/.

[8] *See generally* Public Filings–FISC, http://www.fisc.uscourts.gov/public-filings.

[9] *In re Section 215 Orders*, 2013 WL 5460064, at *7.

of *public* information and debate in representing their constituents and discharging their legislative responsibilities," and affirmed that "[p]ublication would also assure citizens of the integrity of this Court's proceedings."[10] Likely for the same reason, the Court's then-Presiding Judge published his correspondence with Congress explaining the FISC's operating procedures and detailing certain statistics concerning the Court's approval of government applications.[11]

The intense public interest triggered by the June 2013 surveillance disclosures has only grown in the ensuing years. For almost three years, the American people have taken part in a wide-ranging public debate about the scope, interpretations, and appropriate bounds of our nation's surveillance laws. New details have continued to emerge about the government's programs.[12] Executive-branch bodies have engaged in significant public oversight of surveillance programs, conducting hearings with government and outside experts, and issuing reports

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[10] *Id.*; *see* Mem. Op., *In re Application of the FBI for an Order Requiring the Production of Tangible Things from [Redacted]*, No. BR 13-158 (FISC Oct. 11, 2013), http://bit.ly/2e2yB1y; *In re Application of the FBI for an Order Requiring the Production of Tangible Things from [Redacted]*, No. BR 13-109, 2013 WL 5741573, at *1 (FISC Aug. 29, 2013).

[11] *See, e.g.*, Letter from Hon. Reggie B. Walton, Presiding Judge, FISC, to Hon. Patrick J. Leahy, Chairman, Comm. on the Judiciary (Oct. 11, 2013), http://bit.ly/2e2H8BH.

[12] *See, e.g.*, Charlie Savage et al., *Hunting for Hackers, N.S.A. Secretly Expands Internet Spying at U.S. Border*, N.Y. Times, June 4, 2015, http://nyti.ms/1GmFXE0 (reporting that in 2009 the NSA began conducting warrantless searches using patterns associated with computer intrusions—*i.e.*, "cybersignatures"—and Internet protocol addresses as selectors).

on several programs that assess their legality and make recommendations on areas of concern.[13] And Congress has actively engaged on the issue, including by passing legislation to end the government's bulk-collection activities and to require the publication of the very sorts of significant legal opinions sought through the ACLU's Motion.[14]

Yet many of this Court's significant opinions and orders—some of which have been explicitly referenced or described by the Court—have never been released to the public. For example, news reports published earlier this month revealed the existence of a previously undisclosed order from this Court requiring Yahoo! to scan, in real time, all incoming email traffic for a particular computer "signature."[15] To comply, Yahoo! reportedly developed a custom scanning system and searched hundreds of millions of emails, storing and making available to the FBI copies of any emails containing the signature(s) specified by the government.[16] The revelation of Yahoo!'s bulk email searching has drawn public alarm. Other major email providers, including Google and Microsoft,

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[13] *See, e.g.*, Privacy & Civil Liberties Oversight Bd. ("PCLOB"), *Report on the Telephone Records Program Conducted under Section 215* (2014), http://bit.ly/1SRiPke; President's Review Grp. on Intelligence & Commc'ns Techs., *Liberty and Security in a Changing World: Report and Recommendations* (2013), http://1.usa.gov/1cBct0k.

[14] USA FREEDOM Act §§ 103, 201, 501; *id.* § 402.

[15] Joseph Menn, *Exclusive – Yahoo Secretly Scanned Customer Emails for U.S. Intelligence Sources*, Reuters (Oct. 4, 2016), http://yhoo.it/2cQh5vB; Charlie Savage & Nicole Perlroth, *Yahoo Said to Have Aided U.S. Email Surveillance by Adapting Spam Filter*, N.Y. Times (Oct. 5,2016), http://nyti.ms/2dFsC0q.

[16] Menn, *supra* note 15; Savage & Perlroth, *supra* note 15.

quickly moved to reassure their users that they had not engaged in similar surveillance.[17] Senator Ron Wyden expressed dismay and called on the executive branch to notify the public of any substantial changes to its surveillance authorities, while Representative Ted Lieu challenged the program's constitutionality.[18] Yet the public still does not know the legal basis for the Yahoo! order.

As the revelation of the Yahoo! order underscores, an unknown number of legal opinions and orders assessing the constitutionality of and statutory basis for the government's surveillance activities remain hidden from the public. Based on official disclosures and media reports, that body of law appears to encompass, among other things: the government's use of malware, or NITs, in foreign-intelligence investigations, *see* Appendix, No. 2; the government's use of FISA to compel technology companies to weaken or circumvent encryption protocols, *see id.* No. 3; the government's use of FISA to compel disclosure of source code from technology companies, *see id.* No. 4; the government's use of "cybersignatures" as a basis for FISA surveillance, *see id.* No. 5; the government's use of "stingrays" and other cell-site simulator technology in foreign- intelligence investigations, *see id.* No. 7; and the CIA's and FBI's bulk collection of Americans' financial records, *see id.* No. 11. While Movant has identified many undisclosed opinions based on existing public information, there are surely additional rulings of this Court that should likewise

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[17] Menn, *supra* note 15.

[18] Cyrus Farivar, *Yahoo's CISO Resigned in 2015 over Secret E-mail Search Tool Ordered byFeds*, Ars Technica, Oct. 4, 2016, http://bit.ly/2dHtyhQ.

be disclosed pursuant to the public's First Amendment right of access.[19]

Movant, through this motion, seeks the public release of those controlling legal interpretations.

JURISDICTION

As a federal court established by Congress under Article III, this Court possesses inherent powers, including "supervisory power over its own records and files." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978); *accord Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) ("It has long been understood that [c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution."). As this Court has previously determined, the FISC therefore has "jurisdiction in the first instance to adjudicate a claim of right to the court's very own records and files." *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 487 (FISC 2007).

ARGUMENT

I. MOVANT HAS STANDING TO BRING THIS PUBLIC-ACCESS MOTION.

To demonstrate Article III standing, a party seeking judicial action must show "(1) that it has suffered an 'injury in fact'; (2) that the injury is caused by or fairly traceable to the challenged actions of the

[19] By one estimate, there are at least 25 to 30 significant FISC opinions and orders issued between mid-2003 and mid-2013 that remain sealed, and several more that were issued in the two years prior to the passage of the USA FREEDOM Act. *See* Elizabeth Goitein, Brennan Ctr. for Justice, *The New Era of Secret Law* 60–61 (2016), http://bit.ly/2eNep2g.

defendant; and (3) that it is likely that the injury will be redressed by a favorable decision." *Ethyl Corp. v. EPA*, 306 F.3d 1144, 1147 (D.C. Cir. 2002) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). As the Court found when addressing the ACLU's 2013 motion, each element is met here. *See In re Section 215 Orders*, 2013 WL 5460064, at *2–4.

The ACLU's injury here—a denial of access to court opinions—is concrete and particularized. *See Globe Newspaper Co. v. Superior Court for Cty. of Norfolk*, 457 U.S. 596 (1982); *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 576 (1980); *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.* ("*NYCTA*"), 684 F.3d 286, 294–95 (2d Cir. 2011); *In re Wash. Post,* 807 F.2d 383, 388 n.4 (4th Cir. 1986). The ACLU actively participates in the legislative and public debates about the proper scope of the government's surveillance authorities, including the lawfulness of Section 702 surveillance, the government's deployment of malware, and the meaning of FISA's provisions.[20] And plainly, the ACLU's injury is both caused by the denial of public access to the opinions and orders sought here, *see Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 472 (1982), and would be redressed by the requested relief, *see Town of Barnstable v. FAA*, 659 F.3d 28, 31 (D.C. Cir. 2011).

[20] *See, e.g.*, Submission of ACLU Deputy Legal Director Jameel Jaffer, PCLOB PublicHearing on Section 702 of FISA (Mar. 19, 2014), http://bit.ly/2djfoqM; Joe Uchill, *ACLUQuestions How Tor Email Users Got FBI-Deployed Malware*, Hill, Sept. 6, 2016, http://bit.ly/2cIZ82T.

II. THE FIRST AMENDMENT REQUIRES THE RELEASE OF THIS COURT'S OPINIONS AND ORDERS CONTAINING NOVEL OR SIGNIFICANT INTERPRETATIONS OF LAW.

A. The First Amendment Right of Access Attaches to Judicial Opinions, Including the Opinions of this Court Concerning Novel or Significant Interpretations of Law.

That the judicial process should be as open to the public as possible is a principle enshrined in both the Constitution and the common law. *See Richmond Newspapers*, 448 U.S. at 564–73; *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006) ("The common law right of public access to judicial documents is firmly rooted in our nation's history."); *cf.* Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 *Writings of James Madison* at 103 (G. Hunt ed. 1910) ("A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."). Under the Supreme Court's prevailing "experience and logic" test, the First Amendment right of public access attaches to judicial proceedings and records where (a) the type of judicial process or record sought has historically been available to the public, and (b) public access plays a "significant positive role" in the functioning of the process itself. *Press-Enter. Co. v. Superior Court* ("*Press-Enter. II*"), 478 U.S. 1, 9, 11 (1986); *see Globe Newspaper*, 457 U.S. at 605–07; *Wash. Post v. Robinson*, 935 F.2d 282, 287–92 (D.C. Cir. 1991). Proceedings and records to which the right of access attaches are presumptively open to the public and may be closed only where there is a

substantial probability of harm to a compelling government interest, and where no alternative to a narrow limitation of access can effectively protect against that harm. *NYCTA*, 684 F.3d at 296. In other words, the right of access is qualified but may not be denied without "specific, on the record findings" that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enter. II*, 478 U.S. at 13–14 (quoting *Press-Enter. Co. v. Superior Court* ("*Press-Enter. I*"), 464 U.S. 501, 510 (1984)).

Here, there is a nearly unbroken tradition of public access to judicial rulings and opinions interpreting the Constitution and our laws. Moreover, public access to such rulings allows the public to function as an essential check on the government and improves judicial decisionmaking. Those interests are particularly acute in the context of this Court's opinions interpreting the reach and constitutionality of the government's surveillance authorities. Access would enhance the functioning of this Court and the FISA system by facilitating effective public oversight; increasing the legitimacy and independence of this Court; subjecting this Court's legal opinions to scrutiny within our common-law system; and permitting Congress, subject-matter experts, and the broader public to evaluate this Court's legal interpretations as they consider changes to the law. For these reasons, and as explained more fully below, the constitutional right of access extends to the opinions and orders of this Court concerning novel or significant interpretations of law.

1. "Experience"

Not only is there a nearly unbroken tradition of public access to judicial rulings and opinions interpreting the Constitution and the laws governing the American people, but Congress has recently reaffirmed that tradition with respect to this very Court. *See* USA FREEDOM Act § 402 (codified at 50 U.S.C. § 1872) (requiring decisions, orders, and opinions of the FISC containing "significant construction[s] or interpretation[s] of any provision of law" be made "publicly available to the greatest extent practicable").

No type of judicial record enjoys a more uninterrupted history of openness than judicial opinions. As explained by the Third Circuit:

> As ours is a common-law system based on the "directive force" of precedents, its effective and efficient functioning demands wide dissemination of judicial decisions Even that part of the law which consists of codified statutes is incomplete without the accompanying body of judicial decisions construing the statutes. Accordingly, under our system of jurisprudence the judiciary has the duty of publishing and disseminating its decisions.

Lowenschuss v. W. Publ'g Co., 542 F.2d 180, 185 (3d Cir. 1976) (quoting Benjamin N. Cardozo, *The Nature of the Judicial Process* 20, 21–22 (1963)); *see Scheiner v. Wallace*, No. 93-cv-0062, 1996 WL 633226, at *1 (S.D.N.Y. Oct. 31, 1996) ("The public interest in an accountable judiciary generally demands that the reasons for a judgment be exposed to public scrutiny."

(citing *United States v. Amodeo*, 71 F.3d 1044, 1048–49 (2d Cir. 1995))).

Dissemination of judicial opinions is necessary both for the public to understand what the law is and to preserve the legitimacy of the judicial process. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) ("[J]udicial precedents are valuable to the legal community as a whole. They are not merely the property of private litigants."); *accord Lowenschuss*, 542 F.2d at 185; *see also Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) (Easterbrook, J.) ("What happens in the halls of government is presumptively public business. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification."). Accordingly, appellate courts have recognized that public access to opinions is protected by the First Amendment. *Company Doe v. Public Citizen*, 749 F.3d 246, 267–68 (4th Cir. 2014) (finding that "it would be anomalous" for the First Amendment to apply to some judicial records but not to "the court's opinion itself"); *United States v. Mentzos*, 462 F.3d 830, 843 n.4 (8th Cir. 2006) (denying motion to file opinion under seal "because the decisions of the court are a matter of public record"); *Union Oil*, 220 F.3d at 568 ("[I]t should go without saying that the judge's opinions and orders belong in the public domain.").

Given this history, courts have customarily disclosed opinions dealing with the government's authority to conduct investigations and gather

information about individuals, particularly U.S. citizens. For example, the First Amendment right of access has been held to apply to judicial opinions construing the government's search and seizure powers. *See In re Application of N.Y. Times Co. for Access to Certain Sealed Court Records*, 585 F. Supp. 2d 83, 88 (D.D.C. 2008). And federal courts have routinely published their opinions interpreting the scope and constitutionality of intelligence collection permitted under FISA and related authorities—the very type of opinions the ACLU seeks here. *See, e.g.*, *United States v. U.S. Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297 (1972) (considering constitutionality of warrantless- wiretapping program conducted by the government to "protect the national security"); *United States v. Duggan*, 743 F.2d 59, 72–74, 77 (2d Cir. 1984) (analyzing FISA's original "purpose" requirement, and holding that "FISA does not violate the probable cause requirement of the Fourth Amendment"); *Jewel v. NSA*, 673 F.3d 902, 905 (9th Cir. 2011) (reversing dismissal of lawsuit challenging "widespread warrantless eavesdropping in the United States"); *In re Application for Pen Register & Trap/Trace Device with Cell Site Location Auth.* ("*In re PR/TT with CSLI*"), 396 F. Supp. 2d 747, 748–49 (S.D. Tex. 2005) (refusing government request to seal opinion "because it concerns a matter of statutory interpretation" and the issue explored "has serious implications for the balance between privacy and law enforcement, and is a matter of first impression").

Critically, Congress has made the judgment that significant legal opinions and orders of this Court do not fall outside our long tradition of judicial transparency. *See* USA FREEDOM Act § 402.

Recognizing the importance of the FISC's jurisprudence, Congress has explicitly required this Court's opinions and orders involving "significant construction[s] or interpretation[s] of any provision of law" be made "publicly available to the greatest extent practicable." 50 U.S.C. § 1872(a); *see also id.* § 1872(b) (stating that redacted versions of opinions and orders may meet the statutory requirement). Congress set a high bar for withholding such opinions and orders, and even where they can properly be withheld, the Attorney General must publicly release an unclassified statement summarizing their contents. *Id.* § 1872(c) (indicating non-disclosure is appropriate only where "necessary to protect the national security of the United States" and outlining Attorney General's obligations when opinions and orders are withheld).

That until recently FISC opinions were ordinarily sealed is of no moment to the First Amendment's "experience" test. The Supreme Court has instructed that the experience prong of its two-part test "does not look to the particular practice of any one jurisdiction, but instead 'to the experience in that *type* or *kind* of hearing throughout the United States . . . .'" *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 150 (1993) (per curiam) (quoting *Rivera-Puig v. Garcia- Rosario*, 983 F.2d 311, 323 (1st Cir. 1992)). In other words, the proper focus of the "experience" analysis is the *type* of governmental process or record to which a petitioner seeks access, not the past practice of the specific forum in which such access is being sought. *See, e.g.*, *NYCTA*, 684 F.3d at 301 (rejecting view that "*Richmond Newspapers* test looks to the formal description of the forum"); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 94 (2d Cir. 2004) (examining First Amendment right of access to court "docket sheets and their

historical counterparts," beginning with early English courts); *In re Bos. Herald, Inc.*, 321 F.3d 174, 184 (1st Cir. 2003) (experience test includes examination of "analogous proceedings and documents").

In assessing how the past experience of access applies to a *new* forum, it is inappropriate to analyze only the history of that forum itself. Because there will never be a tradition of public access in new forums, this approach would permit Congress to circumvent the constitutional right of access altogether—even as to, say, criminal trials—simply by providing that such trials henceforth be heard in a newly created forum. *See, e.g.*, *NYCTA*, 684 F.3d at 299 ("Immunizing government proceedings from public scrutiny by placing them in institutions the Framers could not have imagined . . . would make avoidance of constitutional protections all too easy."); *In re Copley Press, Inc.*, 518 F.3d 1022, 1027 (9th Cir. 2008). The proper approach, therefore, is to examine whether the type of proceeding or record at issue—here, judicial opinions interpreting the meaning and constitutionality of public statutes—has historically been open or available to the public. *See, e.g.*, *NYCTA*, 684 F.3d at 299.

2. "Logic"

Just as fundamentally, public access to the opinions of this Court is important to the functioning of both the law in general and the FISA system in particular.

The "significant positive role" of *public* judicial decisionmaking in a democracy is so essential that it is hardly ever questioned. Courts have repeatedly recognized that public access to judicial opinions serves a vital function:

> The decisions and opinions of the justices are the authorized expositions and interpretations of the laws, which are binding upon all the citizens. They declare the unwritten law, and construe and declare the meaning of the statutes. Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this, or to suppress and keep from the earliest knowledge of the public the statutes, or the decisions and opinions of the justices. *Such opinions stand, upon principle, on substantially the same footing as the statutes enacted by the legislature*. It can hardly be contended that it would be within the constitutional power of the legislature to enact that the statutes and opinions should not be made known to the public. The policy of the state always has been that the opinions of the justices, after they are delivered, belong to the public.

Nash v. Lathrop, 142 Mass. 29, 35–36 (1886) (emphasis added) (cited by *Banks v. Manchester*, 128 U.S. 244, 253–54 (1888)); *see also Lowenschuss*, 542 F.2d at 185. The importance of public access to judicial opinions flows from two bedrock principles: (1) the public's right to know what the law is, as a condition of democratic governance; and (2) the founding recognition that, in our political system, it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v.*

Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Because courts determine what the law means—and therefore what the law is—the societal need for access to judicial opinions is paramount.

The value in making judicial opinions available to the public only increases where, as here, the opinions concern both the power of the executive branch and the constitutional rights of citizens. *See FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) (access to court files "accentuated" where "the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch"); *In re PR/TT with CSLI*, 396 F. Supp. 2d at 748–49 (refusing government request to seal order that "has serious implications for the balance between privacy and law enforcement").

This principle applies with equal force in the context of national security, where the courts routinely recognize and give effect to the public's right of access to judicial opinions and orders. *See, e.g.*, *United States v. Aref*, 533 F.3d 72, 82–83 (2d Cir. 2008); *In re Wash. Post*, 807 F.2d at 393; *United States v. Rosen*, 487 F. Supp. 2d 703, 710, 716–17 (E.D. Va. 2007). In fact, where matters of national security are at stake, the role of public evaluation of judicial decisions takes on an even weightier role. *See, e.g.*, *In re Wash. Post*, 807 F.2d at 393; *United States v. Ressam*, 221 F. Supp. 2d 1252, 1262 (W.D. Wash. 2002); *see also N.Y. Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring) (stating that "fully aware of . . . the need to defend a new nation," the Framers wrote the First Amendment "to give this new society strength and security"); *Det. Free Press v. Ashcroft*, 303 F.3d 681, 709–10 (6th Cir. 2002)

(finding invocation of non-specific "national security" concerns insufficient to overcome public's qualified right of access to quasi-judicial proceedings).

Public access to the opinions of this Court is important to the functioning of the law and the FISA system in several respects.

First, public access to the opinions of this Court will promote public confidence in the integrity, reliability, and independence of the FISC and the FISA system. Access to the reasoning and actions of this Court will allow the public to evaluate for itself the operation of the FISA system and the legal bases for the government's actions. As the Supreme Court has explained, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Press-Enter. II*, 478 U.S. at 13 (quotation marks omitted); *see, e.g.*, *Globe Newspaper*, 457 U.S. at 606 (public access to court documents and proceedings "fosters an appearance of fairness, thereby heightening public respect for the judicial process"); *Aref*, 533 F.3d at 83 ("Transparency is pivotal to public perception of the judiciary's legitimacy and independence."); *In re Orion Pictures Corp.*, 21 F.3d 24, 26 (2d Cir. 1994) (public access "helps safeguard the integrity, quality, and respect in our judicial system, and permits the public to keep a watchful eye on the workings of public agencies" (quotation marks and citations omitted)); *Ressam,* 221 F. Supp. 2d at 1263 (explaining that "the general practice of disclosing court orders to the public not only plays a significant role in the judicial process, but is also a fundamental aspect of our country's open administration of justice").

Second, and relatedly, access to this Court's opinions will improve democratic oversight. Because the information released to date does not fully describe the constitutional and statutory bases for the government's surveillance activities under FISA, the release of the requested opinions would permit the public—and Congress itself—to more properly assess these programs and to take action accordingly. *See generally* Br. of Amici Curiae U.S. Representatives Amash et al. in Support of the Motion of the ACLU and MFIAC for the Release of Court Records, *In re Section 215 Orders*, No. 13-02 (FISC June 28, 2013), http://1.usa.gov/1ORRcc4. Members of Congress have acknowledged the importance of proper oversight, but that oversight has been impeded by the secrecy surrounding the Court's interpretations of the government's surveillance powers. *See, e.g.*, Letter from Sens. Dianne Feinstein, Jeff Merkley, Ron Wyden & Mark Udall to Hon. John Bates, Presiding Judge, FISC (Feb. 13, 2013), http://bit.ly/2eeW0cf. Indeed, members of this Court have recognized the value of public disclosure of its opinions construing the government's surveillance authority. *See, e.g.*, *In re Section 215 Orders*, 2013 WL 5460064, at *7; *cf.* Ellen Nakashima & Carol D. Leonnig, *Effort Underway to Declassify Document that Is Legal Foundation for NSA Phone Program*, Wash. Post, Oct. 12, 2013, http://wpo.st/qsYb1 ("[Judge] Kollar-Kotelly told associates this summer that she wanted her legal argument out, according to two people familiar with what she said. Several members of the intelligence court want more transparency about the court's role to dispel what they consider a misperception that the court acted as a rubber stamp for the administration's top-secret spying programs."). As the Supreme Court noted in *Richmond Newspapers*, "[w]ithout publicity,

all other checks are insufficient: in comparison of publicity, all other checks are of small account." 448 U.S. at 569 (quotation marks omitted) (quoting Jeremy Bentham, *Rationale of Judicial Evidence* 524 (1827)). In enacting the USA FREEDOM Act, Congress acknowledged these interests and sought to give the public access to the Court's significant legal pronouncements. *See* 50 U.S.C. § 1872; 161 Cong. Rec. S2772–01, S2778–79 (statement of Sen. Blumenthal).

Third, allowing the public to review and assess the reasoning of the opinions of this Court will support more refined judicial decisionmaking in future cases. For example, since public attention focused on FISA surveillance and this Court's rulings beginning in June 2013, there has been a proliferation of highly sophisticated legal and technical debate over the foundations of the government's various national-security surveillance programs.[21] *In camera* decisionmaking cannot provide the Court with the same breadth of analysis and expertise, especially over the long-term, because it does not allow for the same interplay and development of various viewpoints. The detailed public discussion that has begun today was impossible prior to the release of this Court's opinions, and it can only benefit the FISA system.

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[21] *See, e.g.*, Laura K. Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 Harv. J.L. & Pub. Pol'y 117 (2015), http://www.harvard-jlpp.com/wp-content/uploads/2015/02/Donohue_Final.pdf; David S. Kris, *On the Bulk Collection of Tangible Things*, Lawfare Res. Paper Series (Sep. 29, 2013), http://bit.ly/2eKWyZT; Steven M. Bellovin et al., *It's Too Complicated: How the Internet Upends* Katz*,* Smith*, and Electronic Surveillance Law*, Harv. J. of L. & Tech. (forthcoming 2016), http://bit.ly/2ectB8K.

Fourth, publishing this Court's opinions of broad legal significance will contribute to the body of decisional law essential to the functioning of our common-law system. Article III courts have always built upon the work of their predecessors by refining, reworking, or even, at times, abandoning decisions issued in the past. *See, e.g.*, *Penny v. Little*, 4 Ill. (3 Scam.) 301, 304 (1841) ("The common law is a beautiful system; containing the wisdom and experience of ages."). This iterative process lies at the foundation of our legal system but has been stunted by the continued secrecy of this Court's significant legal opinions. Other courts should have access to this Court's determinations relating to surveillance, new technologies, privacy, and First Amendment protections so that they may rely on, respond to, or distinguish this Court's reasoning.[22] Both the FISC and ordinary federal courts have important perspectives to offer on emerging legal issues related to surveillance that inescapably cut across jurisdictions and even statutes. That courts might, when permitted to engage in an open and good-faith debate about such matters, disagree—or agree—about the proper outcomes, is a strength of the common-law system—not a reason to keep one jurisdiction's law

[22] *See also, e.g.*, *California v. Carney*, 471 U.S. 386, 400–01 (1985) (Stevens, J., dissenting) ("The only true rules governing search and seizure have been formulated and refined in the painstaking scrutiny of case-by-case adjudication. . . . To identify rules that will endure, we must rely on the state and lower federal courts to debate and evaluate the different approaches to difficult and unresolved questions of constitutional law. Deliberation on the question over time winnows out the unnecessary and discordant elements of doctrine and preserves 'whatever is pure and sound and fine.'" (quoting Benjamin Cardozo, *The Nature of the Judicial Process* 179 (1921))).

siloed and unavailable for logical development. *See, e.g.*, *Clapper*, 785 F.3d 787; *Cent. States, Se. & Sw. Areas Pension Fund v. Int'l Comfort Prods., LLC*, 585 F.3d 281, 287 (6th Cir. 2009) (agreeing with the FISCR that it is important to avoid a "snowballing of precedent unconnected to the 'actual statutory language at issue'") (citing *In re Sealed Case*, 310 F.3d 717, 725–27 (FISCR 2002)).

For these reasons, disclosure of this Court's opinions addressing novel interpretations of the government's surveillance authorities would contribute to the functioning of the FISA system and benefit the public interest. *Cf. In re Section 215 Orders*, 2013 WL 5460064, at *7 (stating that "movants and *amici* have presented several substantial reasons why the public interest might be served by the[] publication" of FISC opinions interpreting Section 215).

* * *

In sum, because there is a longstanding American tradition of public access to judicial opinions; because such access positively contributes to the integrity of the judicial process, the democratic legitimacy of this Court, and the public understanding of laws passed in its name; and because the release of the requested opinions and orders would illuminate crucial gaps in the public knowledge about the legal justifications for its government's surveillance activities, the public's First Amendment right of access attaches to the Court's legal opinions containing novel or significant interpretations of law.

This Court erred in concluding otherwise in denying a 2007 public-access motion brought by the ACLU. First, by limiting its analysis to whether two

previously published opinions of this Court "establish a tradition of public access," the Court took too narrow a view of the "experience" prong of the Supreme Court's test. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d at 493 (emphasis omitted). Again, "the 'experience' test of *Globe Newspaper* does not look to the particular practice of any one jurisdiction, but instead to the experience in that *type* or *kind* of hearing throughout the United States." *El Vocero*, 508 U.S. at 150 (quotation marks omitted). Second, the Court erred in concluding that public access would "result in a diminished flow of information, to the detriment of the process in question." *See In re Motion for Release of Court Records*, 526 F. Supp. 2d at 496. Instead, disclosure of the requested opinions would serve weighty democratic interests by informing the governed about the meaning of public laws enacted on their behalf.

B. The First Amendment Requires Disclosure of the Court's Opinions Containing Novel or Significant Interpretations of Law.

Although the First Amendment right of access is a qualified one, judicial records that are subject to the right may be kept from the public only upon a rigorous showing. Different formulations have been used by various courts to define the showing that must be made, but the governing standard applied by the Supreme Court encompasses four distinct factors:

1. **There must be a "substantial probability" of prejudice to a compelling interest.** A party seeking to restrict the right of access must demonstrate a substantial probability that openness will cause harm to a compelling

governmental interest. *See*, *e.g.*, *Press-Enter. II*, 478 U.S. at 13–14; *Press-Enter. I*, 464 U.S. at 510; *Richmond Newspapers*, 448 U.S. at 580–81. In *Press-Enterprise II*, the Court specifically held that a "reasonable likelihood" standard is not sufficiently protective of the right and that a "substantial probability" standard must be applied. 478 U.S. at 14–15. This standard applies equally in the context of national security. *See In re Wash. Post*, 807 F.2d at 392.

2. **There must be no alternative to adequately protect the threatened interest.** A party seeking to defeat access must further demonstrate that nothing short of a limitation on the constitutional right of access can adequately protect the threatened interest. *See Press- Enter. II*, 478 U.S. at 13–14; *see also Presley v. Georgia*, 558 U.S. 209, 214–15 (2010) (per curiam) ("[T]rial courts are required to consider alternatives to closure even when they are not offered by the parties" and "are obligated to take every reasonable measure to accommodate public attendance at criminal trials."); *In re Herald Co.*, 734 F.2d 93, 100 (2d Cir. 1984) (A "trial judge must consider alternatives and reach a reasoned conclusion that closure is a preferable course to follow to safeguard the interests at issue."); *Robinson*, 935 F.2d at 290.

3. **Any restriction on access must be narrowly tailored.** Even "legitimate and substantial" governmental interests "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v.*

Tucker, 364 U.S. 479, 488 (1960). Any limitation imposed on public access thus must be no broader than necessary to protect the threatened interest. *See, e.g.*, *Press-Enter. II*, 478 U.S. at 13–14; *Lugosch*, 435 F.3d at 124; *Robinson*, 935 F.2d at 287.

4. **Any restriction on access must be effective.** Any order limiting access must be effective in protecting the threatened interest for which the limitation is imposed. As articulated in *Press-Enterprise II*, the party seeking secrecy must demonstrate "that closure would prevent" the harm sought to be avoided. 478 U.S. at 14; *see Robinson*, 935 F.2d at 291–92 (disclosure could not pose any additional threat in light of already publicized information); *In re Herald Co.*, 734 F.2d at 101 (closure order cannot stand if "the information sought to be kept confidential has already been given sufficient public exposure"); *United States v. Hubbard*, 650 F.2d 293, 322 (D.C. Cir. 1980) ("One possible reason for unsealing is that the documents were already made public through other means.").

The party seeking to restrict access bears the burden of presenting specific facts that satisfy this four-part test. *See Press-Enter. II*, 478 U.S. at 15 ("The First Amendment right of access cannot be overcome by [a] conclusory assertion.").

The government cannot satisfy these strict standards in order to justify withholding the FISC's significant and novel opinions and orders in full. The proposition that the government has an interest—let alone a "compelling" one—in preventing disclosure of

this Court's opinions on novel or significant interpretations of FISA is insupportable. In fact, a public accounting of this Court's legal analysis would *serve* governmental interests by clarifying the scope of the government's surveillance powers and the legal reasoning supporting them. *See, e.g.*, Nakashima & Leonnig, *supra* (quoting current and former government officials advocating for release of original FISC bulk-collection opinion). Even the General Counsel of the ODNI has recognized the importance of publicly discussing the legal framework under which the government conducts its surveillance programs and of "demystify[ing] and correct[ing] misimpressions" the public may have about the government's surveillance activities. ODNI, *General Counsel Robert Litt's as Prepared Remarks on Signals Intelligence Reform*, IC on the Record (Feb. 4, 2015), http://bit.ly/2e2J1OM.

Of course, portions of the Court's opinions may be sealed to serve compelling governmental interests—for example, to protect intelligence sources and methods that have not been previously disclosed—but the First Amendment requires the Court itself to ensure that any redactions are narrowly tailored to serve that interest. *Cf. Pepsico, Inc. v. Redmond*, 46 F.3d 29, 31 (7th Cir. 1995) (Easterbrook, J.) ("The judge must make his own decision about what should be confidential . . . and what may be spoken of openly. I regret that this means extra work for the judge, but preserving the principle that judicial opinions are available to the public is worth at least that much sacrifice."); Nakashima & Leonnig, *supra* (quoting former senior DOJ attorney Kenneth Wainstein as arguing that "[e]specially when it comes to legal decisions about big programs, . . . we can talk about

them in a sanitized way without disclosing sources and methods"). This Court itself has rejected the government's overbroad classification claims in releasing opinions in the past. *See* Declassification Order at 6–7, *In re Section 215 Orders*. Important to the analysis here will be the numerous disclosures made to date, which provide critical context for assessing any claim that disclosure of the rulings sought here would harm the government's interests. *See, e.g.*, *Merrill v. Lynch*, 151 F. Supp. 3d 342, 350 (S.D.N.Y. 2015) (ordering release of details of challenged national-security letter and relying heavily on previous disclosures to find that the government had "not demonstrated a good reason" to expect harm would arise as a result of the ordered release); *Doe v. Gonzales*, 386 F. Supp. 2d 66, 78 (D. Conn. 2005) (relying in part on "the nature and extent of information about the [national-security letter] that has already been disclosed by the defendants" in determining that "the government has not demonstrated a compelling interest in preventing disclosure of the recipient's identity").

III. THE COURT SHOULD ORDER DECLASSIFICATION REVIEW UNDER RULE 62 AND APPLY THE FIRST AMENDMENT STANDARD TO ANY PROPOSED SEALING BY THE GOVERNMENT.

In implementing the constitutional right of access to opinions concerning novel or significant interpretations of law, the Court should first order the government to conduct a declassification review of the opinions pursuant to FISC Rule 62(a). *See, e.g.*, *In re Section 215 Orders*, 2013 WL 5460064, at *7;

Declassification Order at 5–7, *In re Section 215 Orders* (discussing FISC judge's review of proposed redactions); Order, *In re Application of the FBI for an Order Requiring the Production of Tangible Things from [Redacted]*, No. BR 13-109 (FISC Aug. 23, 2013), http://www.fisc.uscourts.gov/sites/default/files/BR%2013-109%20Order-2.pdf (discussing *sua sponte* request by FISC judge to publish memorandum opinion under FISC R.P. 62(a)); *In re Directives [Redacted] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1016 (FISCR 2008).

If, after the completion of that review, the government proposes to redact any information in the Court's opinions, the Court should set a briefing schedule, requiring the government to justify how its sealing request meets the constitutional standard set out above, and allowing the ACLU to contest any sealing it believes to be unjustified. Although the Court should give due consideration to the government's predictive judgments of harm to national security, it should not simply defer to those judgments or to the results of the government's declassification review. *See, e.g.*, *In re Wash. Post*, 807 F.2d at 392. The First Amendment right of access is a *constitutional* right that belongs to the public, and that right can be overcome only upon specific findings by a court, including a finding that disclosure would risk a substantial probability of harm to a compelling interest. *See supra* Part II.B.[23]

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[23] In evaluating the government's declassification review of FISC opinions in response to theACLU's prior motion in this Court, the Court noted that the government's proposed redactions "passe[d] muster" under the First Amendment standard, even while declining to reach the ultimate question

Independent judicial review of any proposed redactions from this Court's opinions is necessary because—as was made clear in *In re Section 215 Orders* when the ACLU moved this Court for public access to other FISC opinions—the standards that justify classification do not always satisfy the strict constitutional standard, and because executive-branch decisions cannot substitute for the judicial determination required by the First Amendment. Declassification Order at 10–11, *In re Section 215 Orders* (applying First Amendment standard to this Court's review of the government's second redaction proposal). Specifically, information may be classified on a simple determination by the executive branch that "the unauthorized disclosure of [the information] *reasonably could be expected* to cause damage to the national security." Exec. Order No. 13,526, 75 Fed. Reg. 707, § 1.2(a) (Dec. 29, 2009) (emphasis added). The First Amendment, however, can be overcome only upon a showing of a "substantial probability" of harm, a standard that the Supreme Court has specifically held to be more stringent than a "reasonable likelihood" test. *Press-Enter. II*, 478 U.S. at 14. Moreover, under the classification regime, the executive branch alone decides whether to consider the public's interest in disclosure, and it does so only in "exceptional cases." Exec. Order No. 13,526 § 3.1(d). Applying that standard to judicial records would flatly contradict the First Amendment right of access, which presumes that the public's interest is in disclosure, and permits sealing only if there are no less-restrictive

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whether the First Amendment right of access applied. *See* Declassification Order at 9, n.10, *In re Section 215 Orders*.

alternatives and if the limitation on access is narrowly tailored.

Indeed, judicial intervention in and oversight of government declassification of sealed judicial opinions has led to the release of additional information to which the public was entitled. In *In re Section 215 Orders*, after this Court ordered a declassification review of a FISC opinion, the government determined that the opinion should be "withheld in full," but the FISC judge demanded "a detailed explanation" of why the opinion could not be released in redacted form. Order, *In re Section 215 Orders*, No. Misc. 13-02 (FISC Nov. 20, 2013), http://1.usa.gov/258tRH8. In response, the government agreed to release the opinion in redacted form, but it took multiple proposals before this Court was satisfied that all redactions were sufficiently narrowly tailored. Declassification Order at 5–7, *In re Section 215 Orders* (describing this Court's back-and-forth with the government on proposed redactions to the opinion). Similarly, careful judicial review of redactions in other cases has led to greater disclosure than the government initially proposed. *See, e.g.*, Order, *In re Directives Pursuant to § 105B of FISA*, No. 105B(g) 07-01 (FISC Feb. 5, 2016), http://1.usa.gov/1OIbC1C (ordering the government to respond to FISC judge's concerns "about the scope of certain proposed redactions" in response to an earlier order to conduct a declassification review of documents filed in the case).

Furthermore, whether the public's constitutional right of access is outweighed by a compelling interest in continued sealing is a question for the courts, not one that rests with the executive. *See Press-Enter. II*, 478 U.S. at 13–14. As the Fourth Circuit has forcefully explained,

> [T]roubled as we are by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants, we are equally troubled by the notion that the judiciary should abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present. History teaches us how easily the spectre of a threat to "national security" may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse.

In re Wash. Post, 807 F.2d at 391–92; *see United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985) ("[E]ven when the interest sought to be protected is national security, the Government must demonstrate a compelling need to exclude the public . . . ." (emphasis omitted)); *United States v. Grunden*, 2 M.J. 116, 122 (C.M.A. 1977) (although classification and the policy determinations it involves "are not normal judicial functions, immunization from judicial review cannot be countenanced in situations where strong countervailing constitutional interests exist").

In other contexts, too, courts routinely scrutinize executive-branch classifications. *See, e.g.*, *Campbell v. DOJ*, 164 F.3d 20, 30 (D.C. Cir. 1999); *Goldberg v.*

DOS, 818 F.2d 71, 76 (D.C. Cir. 1987). This principle is not controversial, and in other forums, the government has expressly accepted it. *See, e.g.*, Final Reply Br. for Appellants at 8 n.1, *Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Rep.*, No. 12-5136 (D.C. Cir. Nov. 27, 2012), 2012 WL 5940305 (clarifying that the government has not "suggested that the Executive's determination that a document is classified should be conclusive or unreviewable").

For these reasons, merely ordering discretionary release under Rule 62(a) after executive declassification review would not satisfy the constitutional right of access. The Court should thus order declassification review as a first step and then test any sealing proposed by the government against the standard required by the First Amendment. Of course, even if the Court holds that the First Amendment right of access does not attach to the legal opinions requested by Movant, it should nonetheless exercise its discretion—as it has in the past and in the public interest—to order the government to conduct a declassification review of its opinions pursuant to Rule 62. *See, e.g.*, *In re Section 215 Orders*, 2013 WL 5460064, at *7.

CONCLUSION

For the foregoing reasons, Movant respectfully requests that this Court unseal its opinions and orders containing novel or significant interpretations of law, including but not limited to those described in the Appendix, with only those limited redactions that satisfy the strict test to overcome the constitutional right of access.

Dated: October 18, 2016

APPENDIX

Undisclosed Opinions and Orders of the Foreign Intelligence Surveillance Court Issued Between September 11, 2001, and June 2, 2015

	Date	Subject of Opinions or Orders	Source Identifying Opinions or Orders	Description
1	2015	Authorizing bulk searches of incoming Yahoo! email for a computer "signature" pursuant to FISA	Charlie Savage & Nicole Perlroth, *Yahoo Said to Have Aided U.S. Email Surveillance by Adapting Spam Filter*, N.Y. Times (Oct. 5, 2016).[1]	"A system intended to scan emails for child pornography and spam helped Yahoo satisfy a secret court order requiring it to search for messages containing a computer 'signature' tied to the communications of a state-sponsored terrorist organization. . . ." "Two government officials who spoke on the condition of anonymity said the Justice Department obtained an individualized order from a judge of the Foreign Intelligence Surveillance Court last year."

[1] *Available at*: http://nyti.ms/2dFsC0q.

	Date	Subject of Opinions or Orders	Source Identifying Opinions or Orders	Description
2		Addressing the government's use of malware—for example, NITs and Computer and Internet Protocol Address Verifiers ("CIPAVs" or "IPAVs")	FBI records released via FOIA, including FBI email dated Dec. 8, 2004.[2]	The FBI emails describe, for example, the use of the "IPAV tool" in "both criminal and FISA cases."

[2] *Available at*: https://www.eff.org/files/filenode/cipav/fbi_cipav-01.pdf (PDF page 5). *See also* https://www.eff.org/files/filenode/cipav/fbi_cipav-08.pdf; https://www.eff.org/files/filenode/cipav/fbi_cipav-15.pdf.

	Date	Subject of Opinions or Orders	Source Identifying Opinions or Orders	Description
3		Addressing the use of FISA or Section 702 to compel private companies to provide technical assistance, including measures that weaken or circumvent encryption	Glenn Greenwald, *Microsoft Handed the NSA Access to Encrypted Messages*, Guardian, July 12, 2013.[3]	The report describes assistance provided by technology companies to facilitate NSA and FBI access to encrypted communications of their users and quotes a joint statement by NSA and ODNI officials: "The article[] describe[s] court-ordered surveillance—and a US company's efforts to comply with these legally mandated requirements."

[3] *Available at*: https://www.theguardian.com/world/2013/jul/11/microsoft-nsa-collaboration-user-data.

	Date	Subject of Opinions or Orders	Source Identifying Opinions or Orders	Description
4		Addressing the use of FISA to compel the disclosure of source code by technology companies	Zack Whittaker, *US Government Pushed Tech Firms to Hand Over Source Code*, ZDNet, Mar. 17, 2016.[4]	"The US government has made numerous attempts to obtain source code from tech companies in an effort to find security flaws that could be used for surveillance or investigations." "The government has demanded source code in civil cases filed under seal but also by seeking clandestine rulings authorized under the secretive Foreign Intelligence Surveillance Act (FISA), a person with direct knowledge of these demands told ZDNet."

[4] *Available at*: http://www.zdnet.com/article/us-government-pushed-tech-firms-to-hand-over-source-code/.

	Date	Subject of Opinions or Orders	Source Identifying Opinions or Orders	Description
5	2009	Addressing the use of "cyber-signatures" and Internet Protocol addresses to conduct FISA and Section 702 surveil-lance	Charlie Savage et al., *Hunting for Hackers, N.S.A. Secretly Expands Internet Spying at U.S. Border*, N.Y. Times, June 4, 2015.[5]	"About that time [in May 2009], the documents show, the N.S.A.— whose mission includes protecting military and intelligence networks against intruders—proposed using the warrantless surveillance program for cybersecurity purposes. The agency received 'guidance on targeting using the signatures' from the Foreign Intelligence Surveillance Court, according to an internal newsletter."

5 *Available at*: http://www.nytimes.com/2015/06/05/us/hunting-for-hackers-nsa-secretly-expands-internet-spying-at-us-border.html.

	Date	Subject of Opinions or Orders	Source Identifying Opinions or Orders	Description
6	2011 and ear-lier	Addressing FISA surveillance directed at computer intrusions	NSA, Memorandum re: SSO's Support to the FBI for Implementation of their Cyber FISA Orders 1–2 (Mar. 27, 2012).[6]	"The FISC has issued a number of orders at the request of the FBI authorizing electronic surveillance directed at communications related to computer intrusions being conducted by foreign powers. The orders include some that are limited to pen register/trap and trace (PR/TT) as well as other that authorize collection of content."
7		Addressing the use of "stingrays" or cell-site simulator technology pursuant to FISA	DOJ, *Policy Guidance: Use of Cell-Site Simulator Technology* 1 n.1 (Sept. 3, 2015).[7]	"When acting pursuant to the Foreign Intelligence Surveillance Act, Department of Justice components will make a probable-cause based showing and appropriate disclosures to the [FISC] in a manner that is consistent with the guidance set forth in this policy."

[6] *Available at*: http://www.nytimes.com/interactive/2015/06/04/us/document-cyber-surveillance-documents.html (PDF pages 5–6).

[7] *Available at*: https://www.justice.gov/opa/file/767321/download.

	Date	Subject of Opinions or Orders	Source Identifying Opinions or Orders	Description
8	Feb. and Mar. 2006	Addressing First Amendment restrictions on Section 215 surveillance	DOJ Office of the Inspector General, *A Review of the FBI's Use of Section 215 for Business Records in 2006* at 68 (Mar. 2008).[8]	"The Section 215 request was presented to the FISA Court as a read copy application in February and March 2006. On both occasions the Court declined to approve the application and order. . . . OIPR and NSLB e-mails state that the FISA Court decided that 'the facts were too thin and that this request implicated the target's First Amendment rights.'"

[8] *Available at*: https://assets.documentcloud.org/documents/1385905/savage-nyt-foia-doj-ig-reports-patriot-act.pdf#page=187 (PDF page 187).

	Date	Subject of Opinions or Orders	Source Identifying Opinions or Orders	Description
9		Addressing the collection of location information under FISA or Section 215	Charlie Savage, *In Test Project, N.S.A. Tracked Cellphone Locations,* N.Y. Times, Oct. 2, 2013.[9]	Director of National Intelligence James Clapper said that "the N.S.A. had promised to notify Congress and seek the approval of a secret surveillance court in the future before any locational data was collected using Section 215." Senator Ron Wyden, a member of the Intelligence Committee, said that "[a]fter years of stonewalling on whether the government has ever tracked or planned to track the location of law-abiding Americans through their cellphones, once again, the intelligence leadership has decided to leave most of the real story secret—even when the truth would not compromise national security."

[9] *Available at*: http://www.nytimes.com/2013/10/03/us/nsa-experiment-traced-us-cellphone-locations.html.

	Date	Subject of Opinions or Orders	Source Identifying Opinions or Orders	Description
10		Addressing FISA's criminal penalties provision, 50 U.S.C. § 1809(a)	October 3, 2011 FISC Opinion at 17 n.15.[10]	FISC opinion "concluding that Section 1809(a)(2) precluded the Court from approving the government's proposed use of, among other things, certain data acquired by the NSA without statutory authority through its 'upstream collection.'"

[10] *Available at*: https://www.aclu.org/sites/default/files/field_document/October 2011 John Bates FISC Opinion.pdf.

	Date	Subject of Opinions or Orders	Source Identifying Opinions or Orders	Description
11		Addressing bulk collection of financial records by the CIA and FBI under Section 215	Siobhan Gorman et al., *CIA's Financial Spying Bags Data on Americans*, Wall St. J., Jan. 25, 2014.[11]	"The program, which collects information from U.S. money-transfer companies including Western Union, is carried out under the same provision of the Patriot Act that enables the National Security Agency to collect nearly all American phone records, the officials said. Like the NSA program, the mass collection of financial transactions is authorized by a secret national-security court, the Foreign Intelligence Surveillance Court."

[11] *Available at*: http://on.wsj.com/1dO2n2T.

	Date	Subject of Opinions or Orders	Source Identifying Opinions or Orders	Description
12	Aug. 20, 2008[12]	Addressing NSA queries of records collected in bulk	Declaration of Jennifer L. Hudson ¶ 40–46, *ACLU v. FBI*, No. 11-cv-07562 (S.D.N.Y. Apr. 4, 2014) (ECF No. 87).	"The August 2008 FISC Opinion addresses the NSA's use of a specific intelligence method in the conduct of queries of telephony metadata or call detail records. . . ."

[12] This Court previously denied without prejudice the ACLU's motion for disclosure of this opinion because the same record was at issue in then- pending FOIA litigation. *See In re Section 215 Orders*, No. Misc. 13-02, 2013 WL 5460064, at *6–7 (FISC Sept. 13, 2013). The district court ultimately declined to order disclosure of the August 20, 2008 opinion under FOIA. *See ACLU v. FBI*, No. 11-cv-07562, 2015 WL 1566775 (S.D.N.Y. Mar. 31, 2016). Accordingly, the ACLU renews its request for disclosure of the opinion based upon the First Amendment right of access and the grounds set forth in this motion.

	Date	Subject of Opinions or Orders	Source Identifying Opinions or Orders	Description
13	Oct. 2006; Feb. 2006; Dec. 2005[13]	Addressing collection of records under Section 215, including collection of records in bulk	*See, e.g., Elec. Frontier Found. v. DOJ*, No. 11-cv-05221, 2014 WL 3945646, at *2 (N.D. Cal. Aug. 8, 2014).	Opinions or orders previously identified by the government pursuant to FOIA as containing "significant" legal interpretations of Section 215.
14		Addressing unauthorized NSA surveillance	NSA, Memorandum for the Chairman, Intelligence Oversight Board at 10–11 (May 16, 2013).[14]	"[Redacted] NSA notified Congressional intelligence committees about the FISC's opinion relating to [redacted]. NSA purged the unauthorized collection and recalled all reporting based on those communications. [Redacted] the FISC authorized such collection to be undertaken prospectively."

[13] The district court in *ACLU v. FBI*, 2015 WL 1566775, declined to order disclosure of the October 2006 records to the ACLU under FOIA.

[14] *Available at*: https://www.aclu.org/sites/default/files/field_document/May%2016%2C%202013%20--%20Report%20to%20the%20Presidents%20Intelligence%20Oversight%20Board%20-%202Q%20FY%202013_0.pdf.

	Date	Subject of Opinions or Orders	Source Identifying Opinions or Orders	Description
15	2013	Addressing changes to 2013 NSA minimization procedures for Section 702 surveillance	NSA Office of the Inspector General, Implementation of § 215 of the USA PATRIOT Act and § 702 of the FISA Amendments Act of 2008 (dated Feb. 20, 2015).[15]	"An amendment to the Minimization procedures was made in late 2013. A section was added precluding NSA from using information acquired pursuant to FAA §702 unless NSA determines, based on the totality of the circumstances, that the target is reasonably believed to be outside the United States at the time the information was acquired."

[15] *Available at*: https://assets.documentcloud.org/documents/2712306/Savage-NYT-FOIA-IG-Reports-702-2.pdf (PDF page 312).

	Date	Subject of Opinions or Orders	Source Identifying Opinions or Orders	Description
16	Aug. 30, 2013	Addressing sharing of Section 702 information with private entities to mitigate computer intrusions	August 26, 2014 FISC Opinion at 18–19 n.19.[16]	"The FISC approved the current version of this provision under Section 702 on August 30, 2013. *See* August 30, 2013 Opinion at 17–19."

[16] *Available at*: https://www.aclu.org/sites/default/files/field_document/fisc_opinion_and_order_re_702_dated_26_august_2014_ocrd.pdf.

	Date	Subject of Opinions or Orders	Source Identifying Opinions or Orders	Description
17	Sept. 20, 2012	Addressing sharing of Section 702 information with private entities to mitigate computer intrusions	August 26, 2014 FISC Opinion at 18 n.19.[17]	"The FISC first approved a version of this provision under Section 702 on September 20, 2012, in connection with a prior Section 702 certification. *See* [Redacted] Memorandum opinion entered on Sept. 20, 2012, at 22 ("September 20, 2012 Opinion"). At that time, the FISC noted that the provision at issue [redacted]."

[17] *Available at*: https://www.aclu.org/sites/default/files/field_document/fisc_opinion_and_order_re_702_dated_26_august_2014_ocrd.pdf.

	Date	Subject of Opinions or Orders	Source Identifying Opinions or Orders	Description
18	2008 to 2010	Addressing NSA's targeting and minimization procedures for Section 702 surveillance	NSA Office of the Inspector General, Final Report of the Audit on the FISA Amendments Act § 702 Detasking Requirements (dated Nov. 24, 2010).[18]	"Although this section of the draft report notes that the FISC has expressed 'concern' about the modifications the Government proposed [redacted] to NSA's FAA 702 targeting and minimization procedures, the report fails to note that the Court's concern was with the [redacted] issue. [The Office of General Counsel]'s understanding is that the Court concluded that even the modest changes proposed [redacted] to address one aspect of the [redacted] were incompatible with the current statutory framework."

[18] *Available at*: https://assets.documentcloud.org/documents/2712306/Savage-NYT-FOIA-IG-Reports-702-2.pdf (PDF page 53).

	Date	Subject of Opinions or Orders	Source Identifying Opinions or Orders	Description
19		Addressing FISA pen-register surveillance and/or collection of post-cut through dialed digits	*See, e.g.*, Second Decl. of David M. Hardy ¶¶ 10–13, *Elec. Privacy Info. Ctr. v. DOJ*, No. 13-cv-1961 (D.D.C. Nov. 7, 2014), ECF No. 24-1.[19]	"The FISC orders discuss classified investigative information regarding the underlying FISA applications, the type and character of information to be collected through the PR/TT order as well as details regarding that particular FISC court proceeding."
20	Dec. 10, 2010	Addressing retention of information obtained through unauthorized electronic surveillance	November 6, 2015 FISC Opinion at 56–57.[20]	"Opinion and Order Regarding Fruits of Unauthorized Surveillance issued on December 10, 2010."

[19] *Available at*: https://epic.org/foia/doj/pen-reg-trap-trace/24-Second-Hardy-Decl.pdf.

[20] *Available at*: https://www.dni.gov/files/documents/20151106-702Mem_Opinion_Order_for_Public_Release.pdf.

	Date	Subject of Opinions or Orders	Source Identifying Opinions or Orders	Description
21	May 13, 2011	Requiring destruction of information obtained through unauthorized electronic surveillance	November 6, 2015 FISC Opinion at 56–57.[20]	"Opinion and Order Regarding Fruits of Unauthorized Surveillance issued on December 10, 2010."
22	2007 or earlier	Authorizing surveillance of targets outside the United States prior to the Protect America Act	January 15, 2008 FISC Opinion at 3 n.1.[22]	"Prior to the PAA, the government had argued that, in some contexts, surveillances of targets outside the United States *did* constitute electronic surveillance as defined by FISA, such that the FISC had jurisdiction. The FISC judges concluded that they did have jurisdiction over certain types of such surveillances."

21 *Available at*: https://www.dni.gov/files/documents/20151106-702Mem_Opinion_Order_for_Public_Release.pdf.

22 *Available at*: https://cdt.org/files/2014/09/49-yahoo702-memorandum-opinion-and-order-dni-ag-certification.pdf.

	Date	Subject of Opinions or Orders	Source Identifying Opinions or Orders	Description
23		Addressing the scope of searches and seizures of electronic data, including computer hard-drives and other large data repositories, and applicable minimization requirements	*See, e.g.,* FBI, Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search Conducted under FISA (Nov. 1, 2008).[23]	The FISC reviews and approves rules governing electronic surveillance and physical searches for foreign-intelligence purposes, including searches and seizures of electronic data that may encompass large volumes of personal information.

23 *Available at*: https://www.aclu.org/files/pdfs/natsec/faafoia20101129/FAAFBI0707.pdf.

APPENDIX D

UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE
COURT OF REVIEW

IN RE OPINIONS & ORDERS BY THE FISC
ADDRESSING BULK COLLECTION
OF DATA UNDER THE
FOREIGN INTELLIGENCE SURVEILLANCE ACT

Docket No. FISCR 20-01

On Petition for Review of a Decision of the United States Foreign Intelligence Surveillance Court

[Decided: APRIL 24, 2020]

Before: CABRANES, TALLMAN, and SENTELLE, *Judges*.

Patrick Toomey, Brett Max Kaufman, American Civil Liberties Union Foundation, New York, NY; Arthur B. Spitzer, Scott Michelman, Michael Perloff, American Civil Liberties Union Foundation of the District of Columbia, Washington, D.C.; David Schulz, Charles Crain, Media Freedom & Information Access Clinic, Abrams Institute at Yale Law School, New Haven, CT; Alex Abdo, Jameel Jaffer, Knight First Amendment Institute at Columbia University, *for Petitioners*.

John C. Demers, J. Bradford Wiegmann, Melissa MacTough, Jeffrey M. Smith, National Security Division, United States Department of Justice, Washington, D.C., *for United States of America*.

PER CURIAM:

On February 11, 2020, the United States Foreign Intelligence Surveillance Court (the "FISC") (Rosemary M. Collyer, *Judge)* dismissed a motion filed by the American Civil Liberties Union, the American Civil Liberties Union of the District of Columbia[1], and the Media Freedom and Information Access Clinic (jointly, the "Movants")[2] for the release of certain opinions and orders by the FISC addressing the bulk collection of data[3] under the Foreign Intelligence Surveillance Act ("FISA").[4] In a thoughtful and careful opinion, the FISC rejected the Movants' claim that the withholding of redacted, non-public material classified by the Executive Branch violates the Movants' First Amendment right of public access.[5] The Movants now seek to appeal that decision to our Court in the form of a Petition for Review (the "Petition"); in the alternative, they seek a Writ of Mandamus.

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[1] The name that was used in the FISC was the "American Civil Liberties Union of the Nation's Capital."

[2] Although the parties filing the Petition for Review or, in the alternative, for a Writ of Mandamus are technically "Petitioners" before this Court, we will refer to them as "Movants" throughout this opinion to ensure uniformity and consistency with our earlier opinions and orders on this matter.

[3] *See In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act (*"*In re Bulk Collection")*, No. Misc. 13-08, 2020 WL 897659, at *l, *16 (Foreign Intel. Surv. Ct. Feb. 11, 2020).

[4] 50 U.S.C. §§ 1801–1885c.

[5] *See In re Bulk Collection,* 2020 WL 897659, at *7–16.

For the reasons stated below, we decline to consider the merits of the Movants' Petition and **DISMISS** the Petition for lack of jurisdiction.

BACKGROUND

On November 7, 2013, the Movants filed a motion seeking disclosure of the FISC's opinions addressing the Government's bulk collection of data under the FISA (the "Motion"). The Government identified four such opinions. Two of the opinions had been made public in redacted form by the FISC prior to the Movants' Motion.[6] The other two opinions were released subsequently, also in redacted form, by the Government.[7] The material that has been redacted in these four opinions consists of highly sensitive information that, following a declassification review, the Executive Branch concluded remains classified and, if released, could be damaging to our country's national security.[8]

On January 25, 2017, then-Presiding Judge Rosemary M. Collyer dismissed the Motion on the basis that the Movants lacked standing under Article III of the Constitution to seek public disclosure of the redacted, classified material in the FISC opinions.[9] On November 9, 2017, the FISC, sitting en banc,

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[6] *See id*. at *l.

[7] *See id*. at *2.

[8] *See id*. at *l.

[9] *See In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, No. Misc. 13-08, 2017 WL 427591 (Foreign Intel. Surv. Ct. Jan. 25, 2017).

concluded otherwise by a vote of six to five.[10] The FISC held that the Movants have Article III standing to bring their First Amendment claim and thus vacated the dismissal.[11]

On January 5, 2018, the FISC certified the question of the Movants' Article III standing to this Court,[12] and on January 9, 2018, we accepted the certification. On March 16, 2018, we issued our decision answering the certified question by agreeing with the standing analysis of the majority of the en banc FISC and concluding that the Movants had established their constitutional standing to raise their First Amendment claim.[13] Specifically, in answering the certified question, we noted that the "denial of access to the redacted material constitutes an injury in fact" and that the Movants thus satisfied the irreducible minimum of Article III standing.[14] We

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[10] *See In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, No. Misc. 13-08, 2017 WL 5983865 (Foreign Intel. Surv. Ct. Nov. 9, 2017) (en banc).

[11] *Id*. at *9.

[12] *See In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, No. Misc. 13-08, 2018 WL 396244, at "1 (Foreign Intel. Surv. Ct. Jan. 5, 2018).

[13] *In re Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review* ("*In re Certification*"), No. FISCR 18-01, 2018 WL 2709456 (Foreign Intel. Surv. Ct. of Rev. Mar. 16, 2018).

[14] *Id*. at *4 (explaining that a "plaintiff must satisfy three minimum requirements: First, the plaintiff must have suffered an 'injury in fact.' Second, there must be a causal connection between the injury and the conduct complained of. Third, it must be likely that the injury will be redressed by a favorable decision"

also emphasized that we did not reach, much less decide, any other question beyond the Movants' standing, including whether "other jurisdictional impediments exist to this challenge" or whether the Movants could succeed on the merits of their First Amendment claim.[15] These remaining questions, including the existence of subject matter jurisdiction over the Motion, were left for the FISC to address on remand.

On remand by the FISC en banc, on February 11, 2020, Judge Collyer issued an Opinion concluding primarily that the FISC "has subject matter jurisdiction over the Motion" and that "the First Amendment does not confer a qualified right of public access to the material sought by the Movants."[16] Accordingly, she rejected the Movants' First Amendment claim and dismissed the Motion. This appeal followed.

DISCUSSION

It is beyond dispute that all federal courts, including our own, "are courts of limited jurisdiction."[17] Federal courts "possess only that power authorized by Constitution and statute, which

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(citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

[15] *Id.* at *7.

[16] *In re Bulk Collection*, 2020 WL 897659, at *3.

[17] *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *see In re Certification*, 2018 WL 2709456, at *4 (noting that we "have held that the FISC's authority and inherent secrecy is cabined by—and consistent with—Article III of the Constitution" and that we "assume the FISC's jurisdiction is governed by Article III, section 2, of the Constitution" (citing *In re Sealed Case,* 310 F.3d 717, 731, 732 n.19 (Foreign Intel. Surv. Ct. of Rev. 2002))).

is not to be expanded by judicial decree."[18] A lower federal court's power to resolve legal disputes is limited in at least three independent and equally important ways.[19] *First*, an action invoking our "judicial Power" must involve a "Case[ ]" or "Controvers[y]" within the meaning of Article III of the Constitution[20]—a requirement that the Supreme Court has defined through various jurisdictional doctrines, such as standing, ripeness, mootness, and the prohibition against advisory opinions. *Second*, the action must arise under the Constitution, a law, or a treaty, of the United States, "or fall within one of the other enumerated categories of Art[icle] III, § 2."[21] *Third*, the action must be "described by any

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[18] *Kokkonen*, 511 U.S. at 377 (citations omitted).

[19] *See Baker v. Carr*, 369 U.S. 186, 198 (1962).

[20] U.S. Const. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United Stat and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."); *see Doremus v. Bd. of Ed. of Borough of Hawthorne*, 342 U.S. 429, 434 (1952) ("[B]ecause our own jurisdiction is cast in terms of 'case or controversy,' we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute [a true case or controversy].").

[21] *Baker*, 369 U.S. at 198.

jurisdictional statute"[22] as the kind of action that Congress intended to be subject to "a court's adjudicatory authority."[23]

It is this third limitation that is directly implicated here. Because federal courts have an independent duty to ensure that jurisdiction exists at all stages of a case, and because we must determine that we have jurisdiction before proceeding to the merits of a claim,[24] we firstaddress our own authority to consider the Movants' Petition.

I.

At the crux of the instant appeal is the question of whether we have been authorized by Congress to review the Movants' First Amendment claim. In other words, we must decide whether the Movants' Petition falls within the class of cases carefully delineated by the FISA as within our authority as a court of appellate review. We conclude that it does not.

We begin by recognizing the well-settled principle that Congress has the exclusive authority to invest all courts inferior to the Supreme Court "with jurisdiction . . . in the exact degrees and character which to Congress may seem proper for the public good."[25] As

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[22] *Id.*

[23] *Eberhart v. United States*, 546 U.S. 12, 16 (2005) (*quoting Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)).

[24] *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94 (1998) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (internal quotation marks omitted)).

[25] *Ankenbrandt v. Richards*, 504 U.S. 689, 698 (1992) (quoting *Cary v. Curtis,* 44 U.S. 236, 245 (1845) (other citations omitted)).

creatures of Congress, all courts inferior to the Supreme Court, including our own, are empowered to adjudicate only those disputes prescribed by Congress in its "relevant jurisdictional statutes."[26] If a dispute is not of the kind that Congress has determined should be adjudicated, we "have no business deciding it, or expounding the law in the course of doing so."[27] That is especially so where it is clear from the text of the relevant federal statute that Congress has considered carefully the scope of the court's jurisdiction.[28]

That is the case here. In comparison with other federal courts, the nature of the FISC's work is strictly limited in scope. The FISC is tasked primarily with "reviewing applications for surveillance and other investigative activities relating to foreign intelligence collection."[29] Equally limited, if not more so, is the work of our Court of Review, which, like the FISC, is "a unique court" within the federal judiciary and our system of government.[30]

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[26] *Id.*

[27] *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (making the statement in the context of Article III's case-or-controversy requirement).

[28] *Cf. Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 107 (2d Cir. 2018) ("The Supreme Court has made clear that, for a provision to define a federal court's jurisdiction, there must be a 'clear statement' from Congress to that effect." (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013)).

[29] *In re Certification*, 2018 WL 2709456, at *1.

[30] *Id.*

A.

The FISA clearly delineates the types of disputes that fall within our appellate jurisdiction. Generally, the statute provides for the creation of "a court of review which shall have jurisdiction to review the denial of any application made under this chapter [36 of Title 50 of the United States Code].[31] More specifically, the statute provides that the Court of Review "shall have jurisdiction to consider" a petition for review of a decision by the FISC[32] on: (1) a FISA "production" or "nondisclosure order";[33] (2)

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[31] 50 U.S.C. § 1803(b).

[32] *Id*. § 1861(f)(3) (jurisdictional provision for appellate review of FISA production and nondisclosure orders); *id*. § 1881a(i)(6)(A) (jurisdictional provision for appellate review of a FISA directive); *id*. § 1881a(j)(4)(A) (jurisdictional provision for appellate review of FISA certifications and procedures); *id*. § 1881b(f)(1) (jurisdictional provision for appellate review of an order approving the targeting of a United States person reasonably believed to be located outside the United States for the acquisition of foreign intelligence information utilizing means that constitute electronic surveillance or the acquisition of stored electronic data that requires an order under [Chapter 36 of Title 50], and conducted in the United States); *id*. § 1881c(e)(1) (jurisdictional provision for appellate review of an order approving the targeting of a United States person reasonably believed to be located outside the United States for acquisitions of foreign intelligence information utilizing other means).

[33] A "production order" is "an order to produce any tangible thing[, such as books, records, papers, and other items] under [§ 1861]," which governs the access to certain business records for foreign intelligence and international terrorism investigations. *Id*. § 1861(f)(1)(A). A "nondisclosure order" is "an order imposed under [§ 1861(d)]" to prohibit the disclosure that the Government has sought or obtained tangible things pursuant to, for example, a production order. *Id*. § 1861(f)(1)(B). We note, however, that many of the provisions in § 1861, including those authorizing judicial review and nondisclosure orders, are no

"directives" issued in writing by the Attorney General and the Director of National Intelligence to an "electronic communication service provider";[34] (3) orders approving the "certification" and the "targeting, minimization, and querying procedures" for "acquisitions" of non-United States persons abroad;[35] and (4) orders approving the targeting of United States persons abroad to acquire foreign intelligence information.[36] The FISA also authorizes our consideration of questions of law that are certified by the FISC in certain circumstances.[37]

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longer effective, as they were subject to certain amendments that Congress allowed to expire on March 15, 2020. As a result, § 1861 now reads as it read on October 25, 2001. *See* Pub. L. 116–69, Div. B, Title VII, § 1703(a), Nov. 21, 2019, 133 Stat. 1143 (providing that, effective March 15, 2020, with certain exceptions, this section was amended to read as it read on October 25, 2001).

[34] A "directive" refers to a governmental instruction provided in writing to an electronic communication service provider to undertake certain actions relating to the acquisition of foreign intelligence information under § 1881a(a). *See id*. § 1881a(i)(1). And an "electronic communication service provider" refers to a "telecommunications carrier," "a provider of electronic communication service," "a provider of a remote computing service," "any other communication service provider who has access to wire or electronic communications either as such communications are transmitted or as such communications are stored," or "an officer, employee, or agent" of the aforementioned entities. *Id*. § 1881 (b)(4).

[35] *See id*. § 1881a(g)–(h) (explaining the requirements for a "certification"); § 1881a(d)–(f) (defining the various "procedures" for acquisitions under this subsection).

[36] *See id*. § 1881b(f)(1); *id*. § 1881c(e)(1).

[37] *See id*. § 1803(j) (providing in relevant part that the FISC "shall certify for [our] review . . . any question of law that may affect resolution of the matter in controversy that the court

Furthermore, the FISA identifies the relevant parties that are authorized to file a petition for review in our Court. It makes clear, for example, that the Government may file a petition for review of a decision or order by the FISC with respect to each of the four enumerated categories mentioned above.[38] In addition to the Government, the FISA also authorizes "any person receiving" a production or nondisclosure "order" (*i.e.*, the first enumerated category),[39] as well as an "electronic communication service provider" receiving a "directive" (*i.e.*, the second enumerated category),[40] to file a petition for review.

There can be no question that the Movants' Petition does not fall within any of the categories of jurisdiction enumerated above. By the same token, it is equally clear that the Movants are not one of the petitioners authorized by Congress to seek review before our Court. Instead, the Movants simply assert a constitutional violation with respect to the withholding of information that the Executive has deemed classified and that is contained in FISC opinions in closed cases-cases in which the Movants were not a party. Although Congress has empowered most other federal courts to consider claims arising

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determines warrants such review because of a need for uniformity or because consideration by [us] would serve the interests of justice").

[38] *See* ante, note 32.

[39] *Id.* § 1861(f)(3). A "person" is defined as "any individual, including any officer or employee of the Federal Government, or any group, entity, association, corporation, or foreign power." *Id.* § 1801(m).

[40] *Id.* § 1881a(i)(6)(A).

under the federal Constitution,[41] such as the Movants' First Amendment claim, Congress did not do so here, and, we are not awareof any statutory basis that can support our jurisdiction over the Movants' putative appeal.

B.

The Movants contend that the statute that establishes our Court, 50 U.S.C. § 1803(b), gives us jurisdiction over their Petition. That statute provides, in relevant part, that "[t]he Chief Justice [of the United States] shall publicly designate three judges, one of whom shall be publicly designated as the presiding judge, . . . who together shall comprise a court of review which *shall have jurisdiction to review the denial of any application made under this chapter*."[42] The Movants assert that their Motion is an "application" that "arose under 'this chapter' because the FISC was created by, and issues opinions pursuant to authority it receives from, the [FISA]."[43] The Movants misread the provision.

1.

The phrase "application made under this chapter" in § 1803(b) generally refers to an application made by the Government *ex parte* and *in camera* for foreign intelligence surveillance. We reach this conclusion for at least four reasons.

First, because we are a court of *review*, the term "application" in § 1803(b) must be construed in light of how the same term is used in the provision that

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[41] *See* 28 U.S.C. § 1331.

[42] 50 U.S.C. § 1803(b) (emphasis added).

[43] Movants' Br. at 3.

establishes the court that denies the applications that we are authorized to review. Section 1803(a)(1) provides for the creation of the FISC and states in relevant part that the FISC "shall have jurisdiction to hear applications for and grant orders approving electronic surveillance."[44] Section 1803(a)(1) also makes clear that if the FISC "denies an *application for an order authorizing electronic surveillance* under this chapter," the FISC "shall provide immediately for the record a written statement of each reason for [its] decision and, on motion of the United States, the record shall be transmitted, under seal, to the court of review established in subsection (b)."[45]

Because § 1803(b) refers to the "review [of] the denial of any application under this chapter"[46] and the FISC is authorized to deny the application in the first instance, it follows that our court has jurisdiction to review the denial of those applications that the FISC has the authority to deny under § 1803(a)[47]—namely, an application for "surveillance."[48] After all, the

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[44] 50 U.S.C. § 1803(a)(1).

[45] *Id*. (emphasis added).

[46] *Id*. § 1803(b).

[47] As the Movants concede, the FISC did not rely on any FISA provision to establish its own jurisdiction over the Motion. To the contrary, the FISC noted that the "Movants' First Amendment right of access claim falls outside the jurisdictional provisions" of the FISA, including § 1803(a)(1). *In re Bulk Collection,* 2020 WL 897659, at *3 (relying instead on the doctrine of ancillary jurisdiction).

[48] By "surveillance," we do not refer exclusively to "electronic surveillance," but also to the various investigative techniques authorized under the FISA, including "physical searches." In other words, we use the term "surveillance "in the same manner as it is used to identify chapter 36 of Title 50 of the United States

"chapter" to which § 1803(b) refers is chapter 36 of Title 50 of the United States Code, which is entitled "Foreign Intelligence Surveillance."

Second, as the text of § 1803(b) makes clear, our Court can only review the "denial," not the grant, of an "application."[49] That limited authorization reinforces our conclusion that the term "application" refers to applications for surveillance, and not to any request for relief relating to the FISC. Indeed, Congress's reason for authorizing review*only* in cases where an "application" is denied by the FISC is clear from the text and structure of the statute: applications are made *ex parte* and *in camera* by the Government. As a result, only the Government would have the statutory right to appeal its denial. If the application were granted, the Government would have nothing to appeal.

Third, the use of the term "application" in another subparagraph of § 1803, which authorizes the appointment of an "amicus curiae," further demonstrates that the term "application" refers to an application for surveillance under the FISA. Section 1803(i)(2)(A) requires the designation of "an individual . . . to serve as amicus curiae to assist . . . in the consideration of any *application* for an order or review that, in the opinion of the [FISC or this Court], presents a novel or significant interpretation of the law, unless the [FISC or this Court] issues a finding that such appointment is not appropriate."[50] In other words, the FISA requires the appointment of an

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Code.

[49] 50 U.S.C. § 1803(b).

[50] 50 U.S.C. § 1803(i)(2)(A) (emphasis added).

amicus or a finding that the appointment is not appropriate only where there is: (1) an "application for an order" or an "application for ... review," (2) that "presents a novel or significant interpretation of the law."[51]

Section 1803(i)(2)(A) is premised on the principle that, since the litigation involving an "application" for electronic surveillance is *ex parte*, the FISC and this Court could benefit from having someone who can provide an independent comment on the Government's asserted interest in intelligence collection. Accordingly, that principle—namely, that having an amicus could be beneficial in light of the *ex parte* character of an application for electronic surveillance-further reinforces our conclusion that the term "application" in § 1803 refers to an application for surveillance, and not just any request for relief relating to the FISC.[52] If the FISC or this Court needs assistance from an amicus in resolving an issue of law that does not involve an "application" for surveillance, that designation could be made pursuant to § 1803(i)(2)(B)'s authorization to appoint an amicus "in any instance [that the FISC or this Court] deems

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[51] *Id.* Such "application for an order or review" could include, for example, the Government's efforts to secure an order approving the targeting of United States persons abroad to acquire foreign intelligence information, *see id.* §§ 1881b, 188lc, or to obtain the review and approval of "certification" and "procedures" for "acquisitions" of non-United States persons abroad, *id.* § 1881a.

[52] For this same reason, the Movants' argument that we are required under § 1803(i)(2)(A) to designate an individual or organization to serve as *amicus curiae* in this case, *see* Movants' Br. at 2 n.1, lacks merit. Because the Movants' Petition is not an "application" subject to our review, the mandatory-appointment requirement of § 1803(i)(2)(A) is not triggered here.

appropriate or, uponmotion," regardless of whether it involves an "application" or not.[53]

Fourth, the term "application" is used in other sections in chapter 36 also to refer to *ex parte* and *in camera* applications made by the Government for surveillance. For instance, § 1804 describes the Government's applications for an order by the FISC approving electronic surveillance.[54] And § 1823 describes the Government's applications for an order by the FISC approving physical searches.[55]

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[53] 50 U.S.C. § 1803(i)(2)(B). Our earlier designation of Professor Laura Donahue as *amicus curiae* in the case that certified the question of the Movants' Article III standing—a fact relied on by the Movants in their brief, *see* Movants' Br. at 2 n.1 (citing Order at 2, *In re Certification,* FISCR No. 18-01 (Foreign Intel. Surv. Ct. of Rev. Jan. 9, 2018))—is consistent with our interpretation of the text. That designation was made pursuant to § 1803(i), which includes the discretionary appointment provision in § 1803(i)(2)(B).

We acknowledge that the FISC invoked§ 1803(i)(2)(A) to appoint Professor Donahue to assist in its disposition of the Movants' Motion, *see* Order at 2, *In re Bulk Collection*, No. Misc. 13–08 (Foreign Intel. Surv. Ct. May 1, 2018). That single citation of § 1803(i)(2)(A), however, does not undermine our foregoing analysis of the text and structure of the FISA. To be sure, the citation was likely inadvertent in light of the fact that the FISC did not conclude that the Movants' Motion was an "application" for purposes of § 1803 and, instead, relied on the doctrine of ancillary jurisdiction to adjudicate the merits of the Movants' claim. And, to be sure, the *same* appointment could have been made by the FISC pursuant to § 1803(i)(2)(B), so there was nothing improper about the FISC's designation of Professor Donahue in that instance.

[54] *See* 50 U.S.C. § 1804 (entitled "Applications for Court Orders" relating to electronic surveillance).

[55] *See id*. § 1823 (entitled "Application for Court Order" relating to physical searches).

2.

By contrast, the Movants' reading of § 1803(b) produces at least three untenable consequences. *First*, under the Movants' reading, the Court of Review would be empowered to review rulings *on the merits* that the FISC would not be empowered to make. The Movants argue that although the statute that establishes the FISC, § 1803(a)(1), authorizes that court to adjudicate *only* applications for electronic surveillance, the statute that establishes this Court, § 1803(b), authorizes our review of *any* request for relief that relates to the FISC or the FISA.[56] In other words, the Movants suggest that while the FISA authorizes the FISC to undertake the limited task of considering applications for surveillance, the FISA authorizes our Court to undertake the comparatively broader task of reviewing the denial of *any* request for relief relating to the FISC or the FISA—including a request that the FISC would lack the statutory authority to deny, whatever the request may be. This creates an anomalous situation: our reviewing authority under the FISA would exceed the FISC's adjudicatory authority under the same statute, turning our court into something more than just a specialized court of review.

Second, under the Movants' reading, other provisions in § 1803 would be rendered meaningless. For example, the FISA requires an *amicus* designated

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[56] *See* Movants' Br. at 3 (noting that the statute specifying the FISC's jurisdiction refers to "applications for electronic surveillance," whereas the statute specifying the Court of Review's jurisdiction refers to "any application" made under the FISA, which includes a request for "access to FISC opinions" given that the "FISC was created by, and issues opinions pursuant to authority it receives from, the [FISA]").

by the FISC or our Court to have access to "any legal precedent, application, certification, petition, motion, or such other materials that the court determines are relevant to the duties of the amicus curiae."[57] If the Movants' Motion to the FISC or the Petition to our Court were considered an "application" for purposes of § 1803, as the Movants contend, then Congress would not have identified the term " application" as a separate category from other terms like "petition" or "motion." Only by interpreting the term "application" as we do, could terms like "petition" and "motion" preserve their ordinary meaning.

Third, under the Movants' reading, some, if not all, of the specific jurisdictional bases provided in the FISA also would be rendered meaningless or superfluous. In fact, it would make little sense for Congress to carefully delineate specific types of decisions that could be appealed by carefully delineated parties—as it did in sections 1861, 1881a, 1881b, and 1881c[58]—if any other person could appeal the denial of any request that relates to the FISC or the FISA.

C.

The Movants also argue that "Article III appellate courts [have] fashioned multiple procedural mechanisms for non-parties to assert their constitutional access right in the first instance and to later obtain appellate review."[59] One of those

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[57] 50 U.S.C. § 1803(i)(6)(A)(i).

[58] *See* ante, note 32.

[59] Movants' Br. at 5 (identifying "direct intervention," "collateral order doctrine," and the "writ of mandamus" as examples of procedural mechanisms used to consider claims for

mechanisms is the "collateral order doctrine, which has supplied authority to entertain appeals in other public access cases in the federal appellate courts."[60] In those cases, the doctrine was invoked to review an interlocutory order disposing of an important collateral issue prior to the final resolution of the case—*e.g.*, access to records in an ongoing criminal case.[61]

That doctrine has no application here. Among other things, there is no question that the non-specialized federal courts of appeals have jurisdiction over appeals of final and interlocutory decisions by district courts,[62] which are, in turn, empowered to consider claims arising under the First Amendment to the Constitution.[63] That is not true of specialized courts like the FISC or our Court.[64] The collateral order doctrine, or any other judicially-created procedural mechanism, cannot be used to

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access to records in criminal cases) (collecting cases).

[60] *Id*. at 4 (collecting cases).

[61] *See, e.g.*, *In re N.Y. Times Co.*, 828 F.2d 110, 113 (2d Cir. 1987) (explaining that the collateral order doctrine applied "since deferral of a ruling on appellants' claims until a final judgment in the underlying criminal prosecution is entered would effectively deny appellants much of the relief they seek, namely, prompt public disclosure of the motion papers").

[62] *See* 28 U.S.C. § 1291 ("Final Decisions"), *id.* § 1292 ("Interlocutory Orders").

[63] *See id*. § 1331 ("Federal-Question Jurisdiction").

[64] Our Court is not a "court of appeals" for purposes of 28 U.S.C. § 1291, which is the subject of the collateral order doctrine. *Cf.* 50 U.S.C. 1803(k)(1) (providing that the Court of Review is a "court of appeals" for purposes of 28 U.S.C. § 1254, which authorizes review of a case by the Supreme Court by writ of certiorari or certification).

manufacture subject matter jurisdiction where none exists.

II.

To salvage their Petition, the Movants invoke the common-law doctrine of ancillary jurisdiction as an alternative jurisdictional basis for our review of the dismissal of their Motion. Under that discretionary doctrine, "a federal court may exercise ancillary jurisdiction '(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.'"[65] This "ancillary" common-law authority, while not necessarily confirmed or conferred by Congress,[66] is said to be inherent in the courts' judicial power derived from Article III of the Constitution.[67] But because this authority lacks an explicit statutory basis and is therefore "shielded from direct democratic controls," the Supreme Court repeatedly has warned the inferior courts that this authority "must be

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[65] *Peacock v. Thomas*, 516 U.S. 349, 354 (1996) *(quoting Kokkonen*, 511 U.S. at 379–80).

[66] To be sure, "Congress codified much of the common-law doctrine of ancillary jurisdiction as part of' supplemental jurisdiction' in 28 U.S.C. § 1367." *Peacock*, 516 U.S. at 354 n.5.

[67] *See United States v. Hudson*, 11 U.S. 32, 34 (1812) ("Certain implied powers must necessarily result to our Courts of justice from the nature of their institution."); *accord Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 764 (1980) ("The inherent powers of federal courts are those which 'are necessary to the exercise of all others." (quoting *Hudson*, 11 U.S. at 34)); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 58 (1991) (Scalia, J., dissenting).

exercised with restraint and discretion,"[68] and with "great caution."[69]

In the circumstances presented here, we decline to rely on any "ancillary" authority to consider the Movants' Petition. As a Court of Review of significantly limited powers carefully delineated by Congress, we are especially reluctant—"cautio[us]" in the admonition of the Supreme Court[70]—to consider issues beyond our jurisdictional competence on the basis of a doctrine "that can hardly be criticized for being overly rigid or precise."[71] The Movants' Petition simply does not present a circumstance that warrants the exercise of our discretionary, ancillary authority. The Movants have not been haled into court against their will, nor do they seek to assert rights in an ongoing action.[72] Nor is this an instance in which the application of our inherent judicial power is appropriate, let alone "necessary," to enforce one of our own mandates or orders,[73] or to protect the

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[68] *Roadway Exp.*, 447 U.S. at 764.

[69] *Ex parte Burr*, 22 U.S. 529, 531 (1824).

[70] *Id.*

[71] *Kokkonen*, 511 U.S. at 379.

[72] *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365,376 (1978) ("[A]ncillary jurisdiction typically involves claims by a defending party haled into court against his will or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court."); *accord Peacock*, 516 U.S. at 355.

[73] *Hudson*, 11 U.S. at 34 ("To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others . . . ."); *cf. Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 795–801 (1987) (recognizing the courts' inherent authority to appoint private

integrity of our own proceedings and processes.[74] Accordingly, we do not consider here, let alone decide, questions that the Movants fear would not be reviewable if their Motion were dismissed-sanctions imposed by the FISC against "government officials for misconduct," or findings "of contempt" by the Government or by electronic communication service providers,[75] both of which are much more consistent with the inherent authority recognized by the doctrine of ancillary jurisdiction.

Rather, here, the Movants filed a motion in a *new* "miscellaneous" case[76] seeking the disclosure of non-public material which has been deemed classified *by the Executive Branch* and to which the Movants have not established a factual connection.[77] Because the

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counsel to investigate and initiate contempt proceedings for violation of an order); *Young*, 481 U.S. at 819–20 (Scalia, J., concurring in judgment) (noting that a court's inherent powers include only those "*necessary* to permit the courts to function" (emphasis added)).

[74] *Cf. Chambers*, 501 U.S. at 44–45 (explaining that among the various powers of a federal court is the power "to vacate its own judgment upon proof that a fraud has been perpetrated upon the court," to "bar from the courtroom a criminal defendant who disrupts a trial," and "to fashion an appropriate sanction for conduct which abuses the judicial process" (collecting cases)).

[75] Movants' Br. at 4.

[76] *In re Bulk Collection*, No. Misc. 13-08.

[77] To clarify, we do not consider or decide here whether the Movants have a cause of action in a federal district court against an executive agency for the disclosure of the relevant non-public material that the Executive Branch has determined to be classified. We note that the Government has acknowledged that the Freedom of Information Act, 5 U.S.C. § 552, may provide for judicial review of a claim seeking access to such material. *See* Government's Br. at 10.

crux of the Movants' claim to disclosure here lies within the Executive's clear authority to determine what material should remain classified, we recall the Supreme Court's admonition that "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion."[78]

In the absence of a clear grant of reviewing authority in the FISA or a need to protect the integrity of our own judicial processes, respect for the separation of powers dictates that we dismiss the Petition for lack of jurisdiction, as we "have no business deciding" the merits of the Movants' constitutional claim.[79]

III.

Perhaps recognizing that the FISA does not authorize their Petition for Review in this instance, the Movants also characterize their Petition as one seeking, in the alternative, the extraordinary writ of mandamus. This alternative effort to establish jurisdiction fares no better.

The common-law writ of mandamus directed at a lower court is codified in the All Writs Act[80]and in our Rules of Procedure.[81] The writ is "a 'drastic and extraordinary' remedy 'reserved for really

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[78] *Chambers*, 501 U.S. at 44 (citing *Roadway Exp.*, 447 U.S. at 764).

[79] *Cuno*, 547 U.S. at 341.

[80] "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate *in aid of their respective jurisdictions* and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (emphasis added).

[81] "All writs that may be issued by United States courts of appeals shall be available to the FISCR." FISCR. Proc. 8.

extraordinary causes.'"[82] And "only exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion will justify the invocation of this extraordinary remedy"[83]for the purpose of confining a lower court "to a lawful exercise of its prescribed jurisdiction."[84]

In the nature of things, the writ is available only to assist an existing basis for jurisdiction. Indeed, "the action must . . . involve subject matter to which our appellate jurisdiction could in some manner, at sometime, attach," and to which "the issuance of the writ might assist."[85] The Movants recognize this point by conceding that the "All Writs Act does not provide 'an independent grant of appellate jurisdiction,'" and that "courts may only consider mandamus petitions if 'an independent statute . . . grants [the court] jurisdiction.'"[86] But as noted, the Movants have not identified an independent basis for subject matter jurisdiction over their Petition.[87] And our Rules of

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[82] *Cheney v. U.S. Dist. Court for* D.C., 542 U.S. 367, 380 (2004) (quoting *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947)).

[83] *Id*. (internal quotation marks and citations omitted).

[84] *Id.* (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)).

[85] *United States v. Christian*, 660 F.2d 892,894 (3d Cir. 1981) (quoting *United States v. RMI Co.*, 599 F.2d 1183, 1186 (3d Cir. 1979)); *accord Ortiz v. United States*, 138 S. Ct. 2165, 2173 (2018) (*citing Marbury v. Madison*, 5 U.S. 137, 175 (1803)); *In re Al Baluchi*, 952 F.3d 363, 367–68 (D.C. Cir. 2020).

[86] Movants' Br. at 8 (quoting *In re al-Nashiri*, 791 F.3d 71, 75–76 (D.C. Cir. 2015) (internal citations and quotation marks omitted)).

[87] The Movants cite two other provisions of the FISA to assert that we have subject matter jurisdiction to consider their mandamus petition: (1) § 1803(g)(1), which authorizes the court

Procedure, which are said to authorize the issuance of the writ by impliedly referring to the All Writs Act,[88] certainly do not provide that jurisdictional basis.

In sum, we lack jurisdiction to grant the extraordinary relief that the Movants request.

CONCLUSION

As Judge Collyer aptly observed in an earlier proceeding, our faithful adherence to Congress's limited mandate requires that we decline the Movants' invitation to "expand [our own] jurisdiction" in a way that is contrary to so many "statutory provisions that limit [our] jurisdiction to a specialized area of national concern,"[89]—that is, the

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to establish rules and procedures and to "take such actions. . . as are reasonably necessary to administer [its] responsibilities under this chapter [36]"; and (2) § 1803(j), which establishes a certification procedure for certain questions of law and which the FISC invoked to ask this Court to answer the question relating to the Movants' Article III standing. *See* Movants' Br. at 9.

Neither section provides an independent basis for subject matter jurisdiction in this instance. Section 1803(g)(l), by its own terms, does not create subject matter jurisdiction over any kind of case, let alone over an action involving a party that has not received any FISA process. And § 1803(j) only authorizes the FISC to certify certain questions of law to our Court; it does not create an independent basis of reviewing authority over cases that fall outside of our own subject matter jurisdiction. Even if it did, the Movants have not relied upon the certification procedure in this case. To be sure, when we accepted the FISC's certification relating to the Movants' Article III standing, we only agreed to answer the question certified to us and specifically refused to consider if there was subject matter jurisdiction over the Motion. *See In re Certification*, 2018 WL 2709456, at *7.

[88] *See* ante, note 81.

[89] *In re Opinions & Orders*, 2017 WL 5983865, at *21 (Collyer,

"governmental electronic surveillance of communications for foreign intelligence purposes."[90]

Because the Movants' Petition falls outside of the class of cases that Congress carefully identified as being subject to our reviewing authority, the March 10, 2020 Petition is **DISMISSED** for lack of jurisdiction.

P.J., dissenting).

[90] *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013).

APPENDIX E

UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

IN RE OPINIONS & ORDERS OF THIS COURT ADDRESSING BULK COLLECTION OF DATA UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

Docket No. Misc. 13-08

[Filed February 11, 2020]

OPINION

Before the Court is the Motion of the American Civil Liberties Union, the American Civil Liberties Union of the Nation' s Capital, and the Media Freedom and Information Access Clinic for the Release of Court Records.[1] The Movants ask the Court to "unseal its opinions addressing the legal basis for the 'bulk collection' of data" under the Foreign Intelligence Surveillance Act of 1978, codified as

[1] Hereinafter, this motion will be referred to as the "Motion for the Release of Court Records" and cited as "Mot. for Release of Ct. Records." The American Civil Liberties Union ("ACLU"), the American Civil Liberties Union of the Nation's Capital ("ACLU-NC"), and the Media Freedom and Information Access Clinic ("MFIAC") will be referred to collectively as "the Movants." Documents submitted by the parties and orders and opinions of the Court in this matter are available on the Court's public website at http://www.fisc.uscourts.gov/public-filings.

amended at 50 U.S.C. §§ 1801–1885c ("FISA") on the asserted ground that "these opinions are subject to the public's First Amendment right of access, and no proper basis exists to keep the legal discussion in these opinions secret." Mot. for Release of Ct. Records at 1. In fact, however, the four opinions responsive to the Movants' claim have never been subject to a sealing order issued by the Foreign Intelligence Surveillance Court (FISC). Moreover, the Executive Branch has declassified those opinions in substantial part and each of them has been made public by the Executive Branch or the FISC. Consequently, what the Movants now seek is access to the redacted, non-public material withinthose opinions, which remains classified by the Executive Branch.

I. Procedural Background.

The Movants filed the pending motion on November 7, 2013, in the wake of widely-publicized disclosures about the bulk collection of data by the United States government under FISA. Mot. for Release of Ct. Records at 1–4. The four opinions that address the legal basis for bulk collection under FISA were made public in 2013 and 2014 after classification reviews conducted by the Executive Branch and subject to redaction of text containing information that the Executive Branch found to be classified. The United States' Opposition to the Motion of the ACLU for the Release of Court Records at 1–2 ("Gov't Opp'n Br."). Before the filing of the Motion for the Release of Court Records, the FISC had published two of those opinions pursuantto FISC Rule of Procedure 62(a):

- Memorandum, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things From*

[Redacted], No. BR 13-158 (Oct. 11, 2013) (McLaughlin, J.), *available at* http://www.fisc.uscourts.gov/sites/default/files/BR%2013-158%20Memorandum-1.pdf; and

- Amended Memorandum Opinion, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible ThingsFrom [Redacted]*, No. BR 13-109 (Aug. 29, 2013) (Eagan, J.), *available at* https://www.fisc.uscourts.gov/sites/default/files/BR%2013-109%20Order-1.pdf.

Id.

The other two opinions were released by the Executive Branch:

- Opinion and Order, [Redacted], No. PR/TT [Redacted] (Kollar-Kotelly, J.), *available at* https://www.odni.gov/files/documents/1118/CLEANEDPRTT%201.pdf; and
- Memorandum Opinion, [Redacted], No. PR/TT [Redacted] (Bates, J.), https://www.dni.gov/files/documents/1118/CLEANEDPRTT%202.pdf.

Id.[2]

[2] Those opinions concerned the production of tangible things under 50 U.S.C. § 1861 or the installation and use of pen register/trap-and-trace (PR/TT) devices under § 1842. Congress has since amended §§ 1861 and 1842 to require use of "specific selection terms," thereby eliminating bulk collection under those provisions. *See* USA FREEDOM Act of 2015, Pub. L. 114–232 § l0l(a), 129 Stat. 269–70 (codified at § 186l(b)(2)(C)); § l0l(b), 129 Stat. 270 (codified at § 1861(c)(2)(F)(iii)); § 103, 129 Stat. 272 (codified at § 186l(b)(2)(A) & (c)(2)(A), (3)); § 107, 129 Stat. 273–75 (codified at § 186l(k)(4)); § 201, 129 Stat. 277 (codified at §§

On January 25, 2017, the undersigned judge dismissed the pending motion on the ground that the Movants lacked standing under Article III of the Constitution to bring a claim based on a First Amendment right of public access. *In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under FISA*, 2017 WL 427591 (FISA Ct. Jan. 25, 2017). The FISC, sitting en banc, reconsidered that dismissal sua sponte and issued an opinion on November 9, 2017, which held by a 6-5 vote that Article Ill's standing requirement was satisfied. *In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under FISA*, 2017 WL 5983865 (FISA Ct. Nov. 9, 2017) (en banc). The en banc FISC vacated the January 25, 2017 opinion and remanded the matter to the undersigned judge for further consideration. *Id* at 9.

On January 5, 2018, however, the FISC certified the question of Movants' Article III standing to the Foreign Intelligence Surveillance Court of Review (FISCR) pursuant to 50 U.S.C. § 1803(j) "because review by the FISCR would serve the interests of justice, a dispositive issue about standing was involved, and the split among the FISC Judges was very close and involved a difference of opinion about the law to apply, among other considerations." *In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under FISA*, 2018 WL 396244 at *1 (FISA Ct. Jan. 5, 2018). The FISCR accepted the certification on January 9, 2018, and appointed Professor Laura K. Donohue to serve as amicus curiae. *In re Certification of Questions of Law to the FISCR*, 2018 WL 2709456 at *1, 3 (FISA Ct. Rev. Jan.

1841(4), 1842(c)(3)).

9, 2018) (per curiam). On March 16, 2018, the FISCR held that the Movants meet the requirements for standing under Article Ill. *Id*. at *4–7. The FISCR did not decide whether the FISC had subject matter jurisdiction or reachthe merits of Movants' claim. *Id.* at *3–4.

Upon remand, the undersigned judge entered an order scheduling briefing on whether the Court has subject matter jurisdiction over the Movants' claim and appointing Professor Donohue to contribute to that briefing as amicus curiae. Appointment of Amicus Curiae and Briefing Order, No. Misc. 13-08 (May 1, 2018). The Court is grateful to Professor Donohue for her able assistance.

The Court has fully considered the submissions of the parties and amicus. For the reasons stated below, the Court finds that (1) it has subject matter jurisdiction over the Motion for the Release of Court Records; and (2) the First Amendment does not confer a qualified rightof public access to the material sought by the Movants, nor is there reason for the Court to exercise any discretion it may have to grant the relief requested. The Motion for the Release of Court Records accordingly will be denied and the motion will be dismissed.

II. THE COURT HAS SUBJECT MATTER JURISDICTION OVER THE MOVANTS' CLAIM.

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to bepresumed that a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377

(1994) (citations omitted). The FISC is a federal court with specialized jurisdiction concerning applications and certifications filed by the government andrelated to the collection of foreign intelligence. 50 U.S.C. §§ 1803(a)(1), 1822 (c), 1842(b)(1) and (d)(1), 1861(b)(1)(A) and (c)(1), 1881a(i), 1881b(a), 1881c(a), and 1881d(a).

Although Movants' First Amendment right of access claim falls outside the jurisdictionalprovisions noted above, Movants assert that the FISC has subject matter jurisdiction over the claim pursuant to the FISC's inherent authority over its own records and as ancillary to its jurisdiction over the applications and proceedings which resulted in the opinions to which Movants seek access. *See* Movants' Opening Brief in Response to the Court's Order of May 1, 2018 at 4–12 ("Movants' Br."). Amicus asserts that adjudication of the Movants' claim is within the "essential inherent power" conferred by Article III of the Constitution. *See* Brief of Amicus Curiae at 18–24 ("Amicus Br."). The government argues that the FISC has no jurisdiction to adjudicate Movants' claim because it falls outside its statutory grant of subject matter jurisdiction and is not covered by the doctrine of ancillary jurisdiction. *See* United States' Response Brief Regarding Subject Matter Jurisdiction at 7–11 ("Gov't Resp. Br."). For the reasons discussed below, the Court finds that it has ancillary jurisdiction over Movants' claim.

The Supreme Court has recognized the authority of federal courts to exercise ancillary jurisdiction over claims outside their statutory grant for two purposes: "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; and (2) to enable a court to function successfully, that is, to manage its proceedings,

vindicate its authority, and effectuate its decrees." *Kokkonen*, 511 U.S. at 379–80 (reversing the district court's enforcement of a settlement agreement, which arose from a lawsuit previously before the court, as "quite remote from what courts require in order to perform their function") (citations omitted).

In *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), the Supreme Court summarized the roots of the authority that came to be described in *Kokkonen*'s second prong:

> It has long been understood that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution," powers "which cannotbe dispensed with in a Court, because they are necessary to the exercise of all others." *United States v. Hudson*, 7 Cranch 32, 34, 3 L. Ed. 259 (1812); see also *Roadway Express, Inc. v. Piper*, *447* U.S. 752, 764, 100 S. Ct. 2455, 2463, 65 L.Ed.2d 488 (1980) (citing *Hudson).* For this reason, "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *Anderson v. Dunn*, 6 Wheat. 204, 227, 5 L. Ed. 242 (1821); see also *Ex parte Robinson*, 19 Wall. 505,510, 22 L. Ed. 205 (1874). These powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.*, 370 U.S.

626, 630-631, 82 S. Ct. 1386, 1388–1389, 8 L.Ed.2d 734 (1962).

Chambers, 501 U.S. at 43.

As an Article III court, *see In re Certification of Questions of Law to FISCR*, 2018 WL 2709456 at *4, citing *In re Sealed Case,* 310 F.3d 717, 731, 732 n.19 (FISA Ct. Rev. 2002) (per curiam), the FISC possesses the same inherent authority recognized in *Chambers* and *Kokkonen*.[3] Whether the FISC has ancillary jurisdiction to adjudicate the Movants' claim therefore depends on whether the exercise of such jurisdiction is necessary to its successful functioning.

The supervisory power courts hold over their own records is well-established. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978) ("Every court has supervisory power over its own records and files"); *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 141 (2d Cir. 2004) ("The court's supervisory power does not disappear because jurisdiction over the relevant controversy has been lost. The records and files are not in limbo. So long as they remain under the aegis of the court, they are superintended by the judges who have dominion over the court.").

In managing their proceedings and records, federal courts must observe constitutional rights. *See,*

[3] This principle is reflected in certain provisions of the FISC's statutory mandate. *See* 50 U.S.C. § 1803(g)(I) ("The [FISC and FISC Court of Review] may establish such rules and procedures, and take such actions, as are reasonably necessary to administer their responsibilities under this [Act]."); §l803(h) ("Nothing in this [Act] shall be construed to reduce or contravene the inherent authority of [the FISC] to determine or enforce compliance with an order or rule of such court or with a procedure approved by such court.").

e.g., Doe v. Pub. Citizen, 749 F.3d 246, 253 (4th Cir. 2014) (finding district court's sealing order violated the public's right of access under the First Amendment and remanding with instructions to unseal the record); *In re Providence Journal Co.*, 293 F.3d 1, 11–13 (1st Cir. 2002) (exercising advisory mandamus to resolve novel issues of great public importance and finding district court's practice of refusing to place legal memoranda on file in clerk's office violated First Amendment); *Brown & Williamson Tobacco Corp. v. F.T.*C., 710 F.2d 1165, 1177, 1180–81 (6th Cir. 1983) (stating "the First Amendment and the common law do limit judicial discretion" and vacating district court's order sealing record of Federal Trade Commission proceeding for failing to state findings or conclusions justifying nondisclosure to public).

The manner in which the FISC manages its proceedings is also constrained by statute. FISA requires the FISC to adhere to specified security procedures:

> The record of proceedings under this [Act], including applications made and orders granted, shall be maintained under security measures established by the Chief Justice [of the United States] in consultation with the Attorney General and the Director of National Intelligence.

50 U.S.C. § 1803(c). The security measures established by the Chief Justice in accord with Section 1803(c) provide:

> Court Proceedings. The court shall ensure that all court records (including

> notes, draft opinions, and related materials) that contain classified national security information are maintained according to applicable Executive Branch security standards for storing and handling classified national security information. Records of the court shall not be removed from its premises except in accordance with the Act, applicable court rule, and these procedures.

Security Procedures Established Pursuant to Public Law No. 95–511, 92. Stat. 1783, as Amended, By the Chief Justice of the United States for the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review, ¶7 (2013) ("FISC Security Procedures").

To meet this responsibility, the FISC adopted rules of procedure which regulate how it handles and maintains national security information. *See, e.g.*, FISA Ct. R. Proc. 3 ("In all matters, the Court and its staff shall comply with the security measures established pursuant to 50 U.S.C. §§ 1803(c), 1822(e), 1861(f)(4), and 188la(k)(l), as well as Executive Order 13526, 'Classified National Security Information' (or its successor)"); FISA Ct. R. Proc. 62(b) ("Except when an order, opinion, or other decision is published or provided to a party upon issuance, the Clerk may not release it, or other related record, without a Court order. Such records must be released in conformance with the security measures referenced in Rule 3."). Rule 62(b) limits public access to FISC opinions by prohibiting release by the Clerk of Court to anyone other than the government at time of issuance unless specifically authorized by Court order. These

restrictions endure unless release is ordered by the Court, regardless of the status of the underlying matter.

The Supreme Court has recognized a First Amendment right of public access to some judicial proceedings. *See, e.g., Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1 (1986) (*"Press-Enterprise II"); Globe Newspaper Co. v. Super. Ct. for Norfolk Cnty.*, 457 U.S. 596 (1982). When a claimant asserts that right of access with respect to the proceedings or documents of a federal court established under Article III, it is necessary for that court to be able to adjudicate the claim, lest its own actions violate the First Amendment.[4] In this case, the FISC's statutory obligation to maintain its records securely underscores the need for it to be able to adjudicate Movants' claim. In seeking access to certain FISC opinions, Movants posit a FirstAmendment right that may conflict with the above-described security procedures, which arerequired by statute and effected through the FISCs rules. The FISCR has found

[4] Moreover, adjudicating such claims may involve factual issues which are best assessed by the court whose proceedings or records are at issue. *See, e.g., Globe Newspaper*, 457 U.S. at 606–08 (First Amendment challenge to closure of a criminal trial during testimony of a minor victim of a sexual offense required trial court to assess factors such as victim's "psychological maturity and understanding" and "the interests of parents and relatives"); *United States* v. *Wecht*, 537 F.3d 222, 239–42 (3d Cir. 2008) (First Amendment challenge to withholding names of jurors from the public in a criminal trial required district court to evaluate whether risks to jurors were "serious and specific"); *Oregonian Pub. Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1467 (9th Cir. 1990) (First Amendment challenge to sealing of plea agreement required district court to evaluate "evidentiary support" forcontention that exposure of defendant's cooperation with law enforcement would threaten his and his family's safety).

Movants' claim to be judicially cognizable. *In re Certification of Questions of Law to FISCR*, 2018 WL 2709456 at *7. If Movants' claim has merit, the First Amendment may require modification to the manner in which the FISC maintains its opinions.[5] It is necessary, therefore, for the FISC to adjudicate Movants' claim in order to ensure that its proceedings comport with a correct understanding of both the First Amendment and statutorily required security procedures. The FISC's ability to "function successfully" and "manage its proceedings," *Kokkonen*, 511 U.S. at 379–80, would be significantly compromised if it lacked authority to adjudicate First Amendment claims such as the one asserted by Movants.

The fact that Congress has conferred on the FISC subject matter jurisdiction over a narrow range of matters, in comparison with the jurisdiction of federal district courts, does not detract from the grounds for finding ancillary jurisdiction. The "doctrine of ancillary jurisdiction . . . recognizes federal courts' jurisdiction over some matters (*otherwise beyond their competence*) that are incidental to other matters properly before them." *Kokkonen*, 511 U.S. at 378 (emphasis added). Other specialized courts of law have recognized their authority to decide Constitution-based claims related to their own proceedings, despite not having original jurisdiction over claims "arising

[5] It must be noted that this Court's authority to decide the instant matter does not depend on the merits. *See Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case.").

under the Constitution," as conferred upon federal district courts by 28 U.S.C. § 1331. *See In re Symington*, 209 B.R. 678, 691–92 (1997) ("This Court unquestionably has subject matter jurisdiction over [news companies' motion to intervene and strike protective order keeping debtor records private] . . . . As long as a protective order remains in effect, the court that entered the order retains the power to modify it . . .") (citations omitted).[6] *See also Dacoron v. Brown*, 4 Vet. App 115, 119 (1993) ("[N]othing in the above analysis [recognizing district court jurisdiction over Constitutional claims] implies that this Court does not have power to review claims pertaining to the constitutionality of statutory and regulatory provisions. Such authority is inherent in the Court's status as a court of law, and is expressly provided in 38 U.S.C. § 726l(a)(1) . . .") (citations omitted).

The government suggests that the FISC lacks jurisdiction over Movants' claim because the opinions to which Movants seek access were not issued in proceedings currentlybefore the FISC. *See* Gov't Resp. Br. at 9–11 (contrasting Movants' claim seeking "documents from other cases" with claims relating to unlawful disclosure of information "inongoing . . . actions pending in district court" and "efforts to

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[6] *Cf. In re Alterra Healthcare Corp.*, 353 B.R. 66, 70 (2006) (finding newspaper's First Amendment, federal common law, and statutory claims for access to several settlement agreements, which had been filed under seal pursuant to orders of the bankruptcy court, to be "a core proceeding over which the Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1334(b) & 157(b)(2)(A)"); *In re Bennett Funding Group, Inc.*, 226 B.R. 331, 332-33 (1998) (adjudicating newspaper's First Amendment and federal common law right of access to retainer agreement filed in camera pursuant to core jurisdiction under 28 U.S.C. §§ 1334(b) and 157(a), (b)(l) and (2)(A))).

intervene in an extant case"). While the government is correct insofar as the associated intelligence-gathering authorizations granted by the FISC have expired, the FISC has a continuing obligation to maintain the records of those proceedings in accord with Section 1803(c) and Rule 62(b). Moreover, that obligation remains in place for those portions of the requested opinions that are still classified and not available to the public, notwithstanding the release of other portions based on Executive Branch declassification decisions.

In light of the above analysis and consistent with this Court's prior decisions,[7] the Court will exercise ancillary jurisdiction pursuant to *Kokkonen*'s second prong and proceed to the merits.

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[7] *See In re Mot. for Release of Court Records*, 526 F. Supp. 2d 484, 487 (FISA Ct. 2007) ("*In re Motion for Release of Court Records 2007*") (recognizing authority over court records and concluding, "it would be quite odd if the FISC did not have jurisdiction in the first instance to adjudicate a claim of right to the court's very own records and files"); *In re Orders of Court Interpreting Section 215 of Patriot Act*, 2013 WL 5460064 (Sept. 13, 2013) (exercising subject matter jurisdiction over third party claim for access to FISC records); and *In re Mot. for Consent to Disclosure of Court Records or, in the Alternative, Determination of the Effect of Court's Rules on Statutory Access Rights*, 2013 WL 5460051 at *2 (June 12, 2013) (finding jurisdiction to adjudicate a dispute over whether a FISC rule prohibited the government from disclosing its copies of a FISC opinion pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552).

III. THE FIRST AMENDMENT DOES NOT PROVIDE A QUALIFIED RIGHT OF PUBLIC ACCESS TO THE OPINIONS AT ISSUE.

Movants and Amicus urge the Court to apply the "experience-and-logic" test articulated in *Press-Enterprise II* and find a First Amendment right of public access to FISC opinions. Mot. for Release of Ct. Records at 12; Reply Brief of Amicus Curiae ("Amicus Reply Br.") at 45–47.[8]

> Under the First Amendment, . . . the Supreme Court has applied what is referred to as the experience-and-logic test to determine whether there is a constitutional right of access to particular court records or proceedings. That test entails asking whether the record or proceeding in question has "historically been open to the press and general public," and "whether public access plays a significant positive role in the functioning of the particular process in question."

In re Certification of Questions of Law to FISCR, 2018 WL 2709456 at *3 (quoting *Press- Enterprise II*, 478 U.S. at 8). If these questions are answered affirmatively, then the First Amendment confers a qualified right of public access, *Press-Enterprise II*, 478 U.S. at 8, which entails a "presumption of openness [which] may be overcome only by an overriding interest based on findings that closure is

[8] Amicus also argues that the common law provides a public right of access, *see* Amicus Reply Br. at 34–45; however, Movants have asserted only a First Amendment claim.

essential to preserve higher values and is narrowly tailored to serve that interest," *Press-Enter. Co.* v. *Super. Ct.*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*"). Although the Supreme Court has never applied the experience-and-logic test "outside the context of criminal judicial proceedings or the transcripts of such proceedings," *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 935 (D.C. Cir. 2003), the FISCR's opinion in *In re Certification of Questions of Law to FISCR* indicates that it is applicable here.

A. The proper framing of the experience-and-logic test

How broadly or narrowly to apply the experience-and-logic test has sometimes been a vexing question,[9] but the reasoning of the Supreme Court in *Press-Enterprise II* provides guidance. The Supreme Court observed that, "[a]lthough many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly." *Press-Enterprise II,* 478 U.S. at 8–9. This distinction makes it evident that the experience-and-logic inquiry described in *Press-Enterprise II* should be directed with sufficient precision to appreciate the history and nature of the particular type of proceeding or document in question. *See Times Mirror Co.* v. *United States*, 873 F.2d 1210, 1213 (9th Cir. 1989) ("the Supreme Court has

[9] *See, e.g.*, *Dhiab v. Trump*, 852 F.3d 1087, 1104 (D.C. Cir. 2017) *(Press-Enterprise II* did not explain"whether we look to broad or narrow categories" and "the likely categories" in *Dhiab* "may range among civil actions generally, habeas actions, habeas actions relating to conditions of confinement, and finally habeas actionsrelated to Guantanamo") (Williams, J., concurring in part and concurring in the judgment).

implicitly recognized that the public has no [First Amendment] right of access to a particular proceeding without first establishing that the benefits of opening the proceedings outweigh the costs to the public").

FISC judges have applied the experience-and-logic test with sufficient particularity to take into account the distinctive characteristics of FISC proceedings. *See In re Motion for Release of Court Records 2007*, 526 F. Supp. 2d 484, 492 (FISA Ct. 2007) (applying "experience and logic" test to electronic surveillance proceedings under 50 U.S.C. §§ 1804-1805); *In re Proceedings Required by § 702(i)*, 2008 WL 9487946 at *3–4 (FISA Ct. Aug. 27, 2008) (applying test to records relating to FISC review of government's certification and procedures for acquisition of foreign intelligence information under Section 702 of FISA, codified at 50 U.S.C. § 188la).[10] The FISCR has also

[10] In this regard, these FISC decisions align with those of numerous other courts, which have applied the experience-and-logic test to the particular type of judicial proceeding or document to which a First Amendment right of access has been asserted. *See, e.g.*, *Press-Enterprise II*, 478 U.S. at 10 (applied to preliminary hearings of the type conducted in California criminal proceedings); *In re Morning Song Bird Food Litig.*, 831 F.3d 765, 777 (6th Cir. 2016) (applied to objections to presentence reports); *In re Application of the United States for an Order Pursuant to 18 U.S.C. §2703(d)*, 707 F.3d 283, 291–92 (4th Cir. 2013) ("*In re §2703(d) Application*") (applied to §2703(d) orders and proceedings); *In re Hearst Newspapers, LLC*, 641 F.3d 168, 177–80 (applied to sentencing proceedings); *In re Application of the New York Times Co. to Unseal Wiretap & Search Warrant Materials*) ("*In re Application of New York Times*"), 577 F .3d 401, 409–10 (2d Cir. 2009) (applied to Title III wiretap applications); *Wecht*, 537 F.3d at 235–39 (applied to names of jurors and prospective jurors in criminal trials); *United States v. Corbitt*, 879 F.2d 224, 228–36 (7th Cir. 1989) (applied to presentence reports); *Times Mirror Co.*, 873 F.2d at 1213–18 (applied to pre-

endorsed this approach. *See In re Certification of Questions of Law to FISCR,* 2018 WL 2709456 at* 1 ("The work of the FISC is different from that of other courts in important ways that bear on the First Amendment analysis.").

One of the most distinctive characteristics of the FISC's review and disposition of FISA applications is that, under the framework established by Congress, such work is not open to the public. In addition to the requirement that the FISC comply with security measures adopted by the Chief Justice *(see supra* pp. 7–8), orders directing third parties to produce tangible things in support of foreign intelligence investigations must be entered ex parte and not disclose the nature of the investigation for which they are issued. *See* 50 U.S.C. § 1861(c)(1), (2)(E). Recipients of such orders are subject to nondisclosure requirements. 50 U.S.C. § 186l(d)(1). Petitions challenging such orders "shall be filed under seal" and, when adjudicating such petitions, the FISC "shall, upon request of the Government, review ex parte and in camera any government submission, or portions thereof, which may include classified information." 50 U.S.C. § 1861(f)(5); *see also* 50 U.S.C. § 1881a(l)(2) (equivalent provision for FISC proceedings on petitions to challenge or enforce directives under Section 702 of FISA). FISC proceedings on applications to approve installation and use of PR/TT devices and other forms of intelligence collection also must be closed to the public and any resulting orders that are served on third parties are protected from further disclosure.[11]

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indictment search warrant proceedings and materials).

[11] PR/TT orders must be entered ex parte and provide that persons directed to assist in installing or operating a PR/TT device shall do so "in such a manner as will protect its secrecy"

Finally, even the congressionally-mandated process for release of FISC opinions that involve "a significant construction or interpretation" of law, *see* 50 U.S.C. § 1872(a), does not presume openness. Rather, it involves an Executive Branch declassification review that results in public release of each such opinion "to the greatest extent practicable," "*consistent with*" the results of that review, which may involve redaction of sensitive information or release of a summary in place of the opinion itself. § 1872(a), (b), (c) (emphasis added). *See also In re Certification of Questions of Law to FISCR*, 2018 WL 2709456 at *1 (the "legal analysis" in FISC opinions "often contain[s] highly sensitive information, the release of which could be damaging to national security").

The foregoing considerations instruct that the FISC should apply the experience-and-logic test solely in the context of this Court's opinions relating to foreign intelligence collection. Movants prefer a broader perspective and argue that the Court should apply the experience-and-logic test to judicial opinions generally, or at least to such opinions that interpret the "meaning and constitutionality of public statutes." Mot. for Release of Ct. Records at 13–17.[12] But using

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and "shall maintain, under security procedures approved by the Attorney General and the Director of National Intelligence, any records concerning the pen register or trap and trace device or the aid furnished." 50 U.S.C. § 1842(d)(1), (2)(B). Similar provisions apply to FISC orders approving electronic surveillance, *see* 50 U.S.C. § 1805(a), (c)(2)(B)–(C), physical search, *see* 50 U.S.C. § 1824(a), (c)(2)(B)–(C), and certain acquisitions targeting U.S. persons who are outside the United States, *see* 50 U.S.C. §§ 1881b(c)(1), (5)(B)–(C) and 188lc(c)(1).

[12] Amicus similarly argues that the inquiry should encompass how judicial opinions "are treated based on the common law right of access" and the history of public access to documents in other

such a broad platform to evaluate experience and logic would lose focus on the distinctive characteristics of FISC opinions and proceedings described above.

Movants' reasoning behind their proposal is not persuasive. First, Movants assert that theexperience inquiry "'does not look to the particular practice of any one jurisdiction, but instead to the experience in that *type* or *kind* of hearing throughout the United States.'" *Id.* at 13 (quoting *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 150 (1993) (per curiam) (emphasis in original); *accord* Amicus Reply Br. at 50. But the FISC is not one forum among others similarly situated: it has singular and national jurisdiction over all FISA applications. *See* 50 U.S.C. §§ 1803(a)(1), 1822(c), 1842(b), 186l(b)(1), 188Ia(j)(1)(A), 188lb(a)(1), 188lc(a)(1). The FISC is the only forum that conducts the relevant types of proceedings and issues the relevant types of opinions.

Relatedly, Amicus argues that "'[t]radition is not meant . . . to be construed narrowly'" and the Court should look "'to analogous proceedings and documents of the same type or kind.'" Amicus Reply Br. at 50–51 (quoting *In re Boston Herald, Inc.*, 321 F.3d 174, 184 (1st Cir. 2003)). But in the decision relied upon, the First Circuit also observed that "analogies" to other procedural contexts must be "solid ones" that "serve as reasonable proxies for the 'favorable judgment of experience' concerning access to the actual documents in question." *In re Boston Herald*, 321 F.3d at 184 (quoting *Press-Enterprise II*, 478 U.S. at 8). Accordingly, the First Circuit dismissed as "too broad"

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courts—either other specialized Article III courts, *e.g.*, the U.S. Court for International Trade, or Article Ill courts generally. *See* Amicus Reply Br. at 47–52.

a proposed analogy between access to criminal trials and access to documents submitted ex parte in support of a defendant's request for assistance with legal expenses. 321 F.3d at 184. Similarly, the Fourth Circuit in *In re § 2703(d) Application* rejected the argument that a claimed right of public access to an order under Section 2703(d) of Title 18 of the U.S. Code could be founded on the "long history of access to judicial opinions and orders," because that interpretation of the First Amendment was "too broad, and directly contrary" to precedent "that this right extends only to *particular* judicial records and documents." 707 F.3d at 291 n.8 (emphasis in original; internal quotation marks omitted). This Court concludes that public access to opinions issued in civil and criminal proceedings in other courts does not bear on the experience inquiry here due to the distinctive nature of the underlying FISC proceedings.

Movants reason that the experience-and-logic test should be more generously analyzed when "access to a *new* forum" is at issue "[b]ecause there will never be a tradition of public access in new forums," Mot. for Release of Ct. Records at 14 (emphasis in original); however, they do not explain why the FISC, which has continuously entertained applications for approval of foreign intelligence collection since 1979, should be regarded as so new that it cannot have established its own "history" regarding public access.[13] In any case,

[13] *Cf. In re Application of New York Times*, 577 F.3d at 410 (reviewing in 2009 how Title III wiretap applications have been handled since Title III's enactment in 1968 and concluding that such applications "have not historically been open to the press and general public," notwithstanding claimant's contention that such applications "are merely judicial records that, like search warrants or docket sheets, have been historically open to public access"); *In re Application of Leopold to Unseal Certain Electronic*

due to the FISC's purported youth, Movants urge reliance on a broader category of "judicial opinions interpreting the meaning and constitutionality of public statutes" to gauge experience and logic. *See id.*, *citing New York Civil Liberties Union v. New York City Transit Auth.*, 684 F.3d 286, 299 (2d Cir. 2012) ("*NYCLU*").[14] But even if the FISC were "new," its singular caseload and statutory obligations require the experience-and-logic to be applied in a more focused and, necessarily, limited fashion. *See In re*

Surveillance Applications and Orders, 300 F. Supp. 3d 61, 87–88 (D.D.C. 2018) (describing as "doubtful" whether, over 31 years after enactment of § 2703(d), orders issued thereunder "are of such recent vintage" that the court should broaden the experience inquiry to encompass whether search warrant materials have historically been open to the public), *reconsideration denied*, 327 F. Supp. 3d 1 (D.D.C. 2018), *appeal filed* (D.C. Cir. Sept. 19, 2018).

[14] Movants also cite *In re Copley Press, Inc.*, 518 F.3d 1022 (9th Cir. 2008). Mot. for Release of Ct. Records at 14. That decision did not involve an expansive application of the experience-and-logic test in view of a "new forum." Instead, it followed Ninth Circuit precedent that satisfaction of the logic prong can be sufficient to establish a qualified right of public access, even if the experience prong is not satisfied. 518 F.3d at 1026–27 (relying on *Phoenix Newspapers, Inc. v. U.S. Dist. Court*, 156 F.3d 940, 948 (9th Cir. 1998) and *Seattle Times Co. v. U.S. Dist. Court*, 845 F.2d 1513, 1516–17 (9th Cir. 1988)). Although the Tenth Circuit agreed, *see United States v. Gonzales*, 150 F.3d 1246, 1258 (10th Cir. 1998), the weight of circuit authority requires satisfaction of both prongs, *see Sullo & Bobbitt, PLLC v. Milner*, 765 F.3d 388, 393–94 (5th Cir. 2014); *In re Application for § 2703(d) Order*, 707 F.3d at 291; *In re Search of Fair Finance*, 692 F.3d 424, 429–31 (6th Cir. 2012); *In re Application of New York Times*, 577 F.3d at 409–10; *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 213 (3d Cir. 2002); *United States v. El-Sayegh*, 131 F.3d 158, 161 (D.C. Cir. 1997). The Court need not address this dichotomy because it finds that neither experience nor logic is satisfied in this case. *See infra* pp. 19–30.

Boston Herald, 321 F.3d at 184 (even if the type of proceeding at issue is of "relatively recent vintage," other types of proceedings can be relevant only if they "serve as reasonable proxies for the favorable judgment of experience concerning access to the actual documents in question") (internal quotation marks omitted).

The Second Circuit's decision in *NYCLU* does not indicate otherwise. *NYCLU* involved a claimed First Amendment right of public access to hearings before the Transit Adjudication Bureau (TAB) concerning alleged violations of public transit rules of conduct. The TAB was an administrative body created to lessen the burden of adjudicating such violations in criminal court. 684 F.3d at 289–93. In applying the experience-and-logic test, the Second Circuit considered the historical openness of such transit-rule adjudications in criminal court, as well as the practices of the TAB. *Id* at 300. It did so in part because the TAB was new but more importantly because the TAB and the criminal court were functionally equivalent, that is, "[t]he *process* that goes on at TAB hearings is *a determination of whether a respondent has violated a Transit Authority Rule.* And *that* process was presumptively open . . . when such proceedings were heard only" in the criminal court. *Id.* at 301–02 (emphasis in original).

Finally, Movants warn that a narrow experience inquiry "would permit Congress to circumvent the constitutional right of access altogether—even as to, say, criminal trials—simply by providing that such trials henceforth be heard in a newly created forum." Mot. for Release of Ct. Records at 14. Their concern is both hypothetical and probably unconstitutional. In addition, it presupposes a prior right of public access

which never existed. Before Congress established the FISC, there were no judicial proceedings on applications for approval of foreign intelligence collection and Executive Branch documents and deliberations regarding foreign intelligence collection were hardly open to the public.

Accordingly, the Court will apply the experience-and-logic test to FISC opinions concerning requests for approval of foreign intelligence collection; more specifically, opinions issued by the FISC in: (1) ex parte proceedings on government applications for approval of particular forms of intelligence gathering, *see, e.g.*, 50 U.S.C. §§ 1804–1805 (electronic surveillance), or involving reviews of certifications and procedures respecting acquisition of foreign intelligence information pursuant to § 1881a(j); (2) ex parte proceedings on government requests to modify orders previously issued in such proceedings; and (3) adversarial proceedingsbetween the government and a person directed to provide information or otherwise assist in foreign intelligence collection, *see, e.g.*, §1881a(i)(4)–(5) (proceedings on petitions to challenge or enforce directives issued under § 1881a(i)(1)). The following discussion refers to these types of proceedings as "foreign intelligence proceedings."

B. Application of the experience-and-logic test

For the reasons explained below, the Court concludes that the asserted right of public access fails under both the experience inquiry and the logic inquiry.

1. Experience

The experience inquiry concerns "whether the record or proceeding in question has 'historically been

open to the press and general public.'" *In re Certification of Questions of Law to FISCR*, 2018 WL 2709456 at *3 (quoting *Press-Enterprise II*, 478 U.S. at 8) (citation omitted).

For the first 30 years of the FISC's existence, there plainly was no history of openness respecting FISC opinions. Prior to 2007, just two FISC opinions had been publicly released.[15] The opinion in *In re Motion for Release of Court Records 2007*, 526 F. Supp. 2d 484, which was the third FISC opinion to be publicly released, concerned an adversarial proceeding initiated by a non-governmental party claiming a First Amendment right of access to FISC records, much like the current proceeding. In that matter, the Court found no tradition of public access, even for "cases presenting legal issues of broad significance," and described the FISC as "not a court whose place or process [had] historically been open to the public." *Id.* at 493.

In contrast, Movants and Amicus point to the considerably larger number of FISC opinions and orders that have been made public since *In re Motion for Release of Court Records 2007*. *See* Movants' Br. at 17; Amicus Reply Br. at 49–50. According to the catalog of publicly-available FISC and FISCR opinions compiled by Amicus, *see* Amicus Appendix at Tab A, *In re Certification of Questions of Law to FISCR*, 2018

[15] *See In re Motion for Release of Court Records 2007*, 526 F. Supp. 2d at 488 n.13 (referencing prior releases of *In re All Matters Submitted to FISC*, 218 F. Supp. 2d 611 (FISA Ct. 2002), *rev'd sub nom. In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002), and *In re Application of the United States for an Order Authorizing the Physical Search of Nonresidential Premises and Personal Property* (FISA Ct. June 11, 1981), *reprinted in* S. Rep. 97-280 at 16–19 (1981)).

WL 2709456 (No. 18-01) ("Amicus Appendix"), 54 FISC opinions have been released since the issuance of that opinion, certainly a notable increase. Nevertheless, the relatively recent public accessibility of a greater number of FISC opinions falls far short of establishing that opinions issued by the FISC in foreign intelligence proceedings have "'historically been open to the press and general public.'" *See In re Certification of Questions of Law to FISCR*, 2018 WL 2709456 at *3 (quoting *Press-Enterprise II*, 478 U.S. at 8).

First, six of the 54 opinions cited by Amicus are inapposite because they were issued in unclassified adversarial proceedings arising from third parties' claims for relief, not in foreign intelligence proceedings.[16] The release of those six opinions is no more relevant to the experience inquiry in this case than, for example, the public accessibility of federal district court opinions issued in civil litigation.

The large majority of the remaining 48 opinions was made available by the Executive Branch beginning in 2013, after then-President Barack

[16] Two of those opinions, *In* re *Opinions & Orders of Court Addressing Bulk Collection of Data under FISA*, 2017 WL 5983865 (FISA Ct. Nov. 9, 2017), and *In re Opinions & Orders of Court Addressing Bulk Collection of Data under FISA*, 2017 WL 427591 (FISA Ct. Jan. 25, 2017), were issued in this very case. The other four are: *In re Proceedings Required by Section 702(i) of FISA Amendments Act of 2008,* 2008 WL 9487946 (FISA Ct. Aug. 27, 2008); *In re Motion for Consent to Disclosure of Court Records or, in the Alternative, a Determination of the Effect of the Court's Rules on Statutory Access Rights*, 2013 WL 5460051 (FISA Ct. June 12, 2013); *In re Orders of this Court Interpreting Section 215 of the Patriot Act*, 2013 WL 5460064 (FISA Ct. Sept. 13, 2013); and *in re Orders of this Court Interpreting Section 215 of the Patriot Act*, 2014 WL 5442058 (FISA Ct. Aug.7, 2014).

Obama directed the Director of National Intelligence (DNI) to "declassify and make public as much information as possible about certain sensitive programs while being mindful of the need to protect sensitive classified intelligence and national security." *See* Press Release, Shawn Turner, Director of Public Affairs, Office of the DNI, *DNI Declassifies Intelligence Community Documents Regarding Collection under Section 702 of the Foreign Intelligence Surveillance Act (FISA)* (August 21, 2013), https://www.odni.gov/index.php/newsroom/press-releases/press-releases-2013/item/915-dni-declassifies-intelligence-community-documents-regarding-collection-under-section-702-of-the-foreign-intelligence-surveillance-act-fisa. During 2013 and 2014, the Executive Branch released eleven FISC opinions that had been issued in foreign intelligence proceedings.[17] In comparison, during the same period,

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[17] *Id*. (providing links to three FISC opinions); Press Release, James R. Clapper, Director of National Intelligence, *DNI Clapper Declassifies Intelligence Community Documents Regarding Collection under Section 501 of the Foreign Intelligence Surveillance Act (FISA)* (Sept.10, 2013), https://www.dni.gov/index.php/newsroom/press-releases/press-releases-2013/item/927-dni-clapper-declassifiesintelligence-community-documents-regarding-collection-under-section-501-of-the-foreign-intelligence-surveillanceact-fisa (providing links to two FISC opinions); Press Release, James R. Clapper, Director of National Intelligence, *DNI Clapper Declassifies Additional Intelligence Community Documents Regarding Collection under Section 501 of FISA* (Nov.18, 2013), https://www.dni.gov/index.php/ newsroom/press-releases/press-releases-2013/item/964-dni-clapper-declassifies-additional-intelligence-community-documents-regarding-collection-under-section-501-of-the-foreignintelligence-surveillance-act (providing links to Opinion and Order, [Redacted], No. PR/TT [Redacted] (Kollar-Kotelly, J.) and Memorandum Opinion, [Redacted], No. PR/IT [Redacted] (Bates, J), two of the four

the FISC itself released seven opinions issued in foreign intelligence proceedings, five of them in redacted form after declassification review by the Executive Branch.[18]

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opinions at issue in this matter); *Statement by the ODNI and U.S. Department of Justice on the Declassification of Documents Related to the Protect America Act Litigation* (Sept. 11, 2014), https://www.dni.gov/index.php/newsroom/press-releases/ press-releases-2014/item/1109-statement-by-the-odni-and%C2%AD%20the-u-s-doj-on-the-declassification-of-documents-related-to-the-protect-america-act-litigation (providing links to two FISC opinions); and *DOJ Releases Additional Documents Concerning Collection Activities Authorized By President George W Bush Shortly After The Attacks Of September 11, 2001* (Dec. 12, 2014), https://www.dni.gov/index.php/newsroom/press-releases/press-releases-2014/item/1152-the-doj-releases-additional-documents-conceming-collection-activities-authorized-by-president-george-w-bush-shortly-after-the-attacks-of-september-11-2001 (providing link to one 2007 FISC Opinion).

An eleventh opinion, Order and Memorandum Opinion, *In re [Redacted]*, No. [Redacted], (FISA Ct. Aug. 2, 2007) was released by the Department of Justice in December 2014 to a FOIA requester. *See* Amicus Appendix, Entry 50.

[18] *In re Application of FBI*, 2013 WL 9838183 (FISA Ct. Feb. 19, 2013); *In re Application of FBI for Order Requiring Prod. of Tangible Things*, 2013 WL 5741573 (FISA Ct. Aug. 29, 2013); Memorandum Opinion, *In re Application of FB for Order Requiring Prod. of Tangible Things,* No. BR 13-158 (FISA Ct. Oct. 11, 2013) (McLaughlin, J.); Opinion and Order, *In re Application of FBI for Order Requiring Production of Tangible Things,* No. BR 14-01 (FISA Ct. March 7, 2014) (Walton, J.), *available at* https://fisc.uscourts.gov/sites/ default/files/BR%2014-01%20Opinion-1.pdf; Opinion and Order, *In re Application of FBI for Order Requiring Production of Tangible Things,* No. BR 14-01 (FISA Ct. March 12, 2014) (Walton, J.), *available at* https://fisc.uscourts.gov/sites/default/files/BR%2014-01%20 Opinion-2.pdf; *In re Application of FBI*, 2014 WL 5463097 (FISA Ct. March 20. 2014); *In re Application of FBI*, 2014 WL 5463290

In June 2015, Congress amended FISA to mandate an Executive Branch declassification review of significant FISC opinions. USA FREEDOM Act § 402(a)(2), 129 Stat. 281 (codified at 50 U.S.C. § 1872(a)); *see also supra* p. 14 and *infra* pp. 28–29. Since that provision came into effect on June 2, 2015, 28 opinions issued by the FISC in foreign intelligence proceedings have been released, *see* Amicus Appendix, Entries 2, 5–12, 19, 20, 22, 25, 30, 33–37, 40–42, 44, and 56–60, only three of them by the FISC. *See id.*, Entries 6, 8, and 10. Since the compilation of the Amicus Appendix, Professor Donohue, in collaboration with the Georgetown University Edward Bennett Williams Law Library, has made publicly available a collection of resources on foreign intelligence law, including publicly released FISC opinions.[19] Those materials include an additional nine FISC opinions from foreign intelligence proceedings that have been released by the Executive Branch in redacted form, consistent with its classification determinations, since the submission of the Amicus Appendix.[20] Combined with those described in the

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(FISA Ct. June 19, 2014).

The FISCR released an eighth FISC opinion, Memorandum Opinion, *In re Directives [Redacted] Pursuant to Section 105B of FISA*, No. 105B(g): 07-0l (FISA Ct. Apr. 25, 2008), in redacted form following declassificationreview by the Executive Branch as part of its record in *In re Directives [Redacted] Pursuant to Section 105B of FISA*, 551 F.3d 1005 (FISA Ct. Rev. 2008).

[19]*See* https://repository.library.georgetown.edu/handle/10822/1052698.

[20] Memorandum Opinion and Order, [Redacted], (FISA Ct. Sept. 4, 2019), *available at* https://repository.library.georgetown.edu/bitstream/handle/10822/1056862/gid_c_00259.pdf?sequence=1&isAllowed=y; Memorandum Opinion and Order, [Redacted], (FISA Ct. Oct. 18, 2018), *available at*

Amicus Appendix (including two opinions released prior to 2007, *see supra* p. 19), that makes for 58 opinions FISC opinions issued in foreign intelligence proceedings that have been publicly released.

The circumstances of the vast majority of those releases are actually a testament to the FISC's history of closure with regard to such opinions. For the entire history of the FISC, Amicus has cited only twelve opinions issued in foreign intelligence proceedings published by the FISC itself. *See* Amicus Appendix,

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https://repository.library.georgetown.edu/bitstream/handle/10822/1056860/gid_c_00258.pdf?sequence=1&isallowed=y; Supplemental Opinion and Accompanying Primary Order, [Redacted], (FISA Ct. Dec. 18, 2008), *available at* https://repository.library.georgetown.edu/bitstream/handle/10822/1052763/gid_c_00034.pdf?sequence=3&isAllowed=y; Order Authorizing Electronic Surveillance and Accompanying Opinion, [Redacted], (FISA Ct. [date redacted]), (Davis, J.), *available at* https://repository.library.georgetown.edu/bitstream/handle/10822/1052779/gid_c_00153.pdf?sequence=3&isAllowed=y; Memorandum Opinion, [Redacted], (FISA Ct. [date redacted], (Feldman, J.), *available at* https://repository.library.georgetown.edu/bitstream/handle/10822/1052784/gid_c_00139.pdf?sequence=3&isAllowed=y; Opinion, [Redacted], (FISA Ct. [date redacted]), (Kollar-Kotelly, J.), *available at* https://repository.library.georgetown.edu/bitstream/handle/10822/1052986/gid_c_00159.pdf?sequence=3&isAllowed=y; Opinion and Order, [Redacted], (FISA Ct. [date redacted], (Gorton, J.), *available at* https://repository.library.georgetown.edu/bitstream/handle/10822/1052989/gid_c_00155.pdf?sequence=2&isAllowed=y; Opinion and Order, [Redacted], (FISA Ct. [date redacted] (Hogan, J.), *available at* https://repository.library.georgetown.edu/bitstream/handle/10822/1053863/gid_c_00254.pdf?sequence=1&isAllowed=y; Opinion and Order, [Redacted], (FISA Ct. [date redacted] (Hogan, J.), *available at* https://repository.library.georgetown.edu/bitstream/handle/10822/1052785/gid_c_00138.pdf?sequence=3&isAllowed=y.

Entries 6, 8, 10, 14, 15, 16, 17, 18, 23, 26, 28, and 54.[21] Each of those opinions was made public in a form consistent with an Executive Branch declassification review, unless the opinion did not contain any classified information in the first instance.[22] The release of those few opinions in redacted form does not show a history of openness, supporting a First Amendment right of access.[23]

Finally, it weighs heavily against the asserted history of openness that of the 59 FISC opinions discussed above, only two were released between the Court's inception in 1979 and August 2013. *See supra* pp. 19–21. History is the past considered as a whole, not just the most recent developments. *Cf. North Jersey Media Group*, 308 F.3d at 211 ("the tradition

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[21] Two of the twelve opinions are responsive to Movants' claim. *See Amicus Appendix, Entries 23 and 26,* referencing Memorandum Opinion, *In re Application of FBI for Order Requiring Prod. of Tangible Things*, No. BR 13-158 (FISA Ct. Oct. 11, 2013) and *In re Application of FBI for Order Requiring Prod. of Tangible Things*, 2013 WL 5741573, respectively.

[22] On December 17, 2019, the FISC published an order which included a discussion of the government's duty of candor in proceedings under Title I of FISA. *See* Order, *In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*, No. Misc. 19-02 (FISA Ct. Dec. 17, 2019). That order did not require a declassification review because it did not contain classified information in the first instance.

[23] Amicus also identified 113 FISC orders that have been released to the public. *See* Amicus Appendix at Tab B. That number is unpersuasive in the context of the thousands of orders issued by the FISC during its history that have not been publicly released. *See, e.g.*, Report of Director of Admin. Office of U.S. Courts on Activities of Foreign Intelligence Surveillance Courts for 2015, 2016, 2017 and 2018, https://www.uscourts.gov/statistics-reports/analysis-reports/directors-report-foreign-intelligence-surveillance-courts.

of open deportation hearings is too recent and inconsistent to support a First Amendment right of access").

Notably, FISC opinions that contained classified information have been released only after a review and redaction by the Executive Branch. Movants seek access to redacted classified information in opinions they have already received. Since such classified information has never been released by the FISC, in that regard there is *no* relevant experience.

2. Logic

The logic inquiry concerns "'whether public access plays a significant positive role in the functioning of the particular process in question.'" *In re Certification of Questions of Law to FISCR*, 2018 WL 2709456 at *3 (quoting *Press-Enterprise II*, 478 U.S. at 8; citation omitted). In making that determination, a court balances the benefits of public openness against any harms, *see, e.g.*, *In re Search of Fair Finance*, 692 F.3d at 431–42; *In re Boston Herald, Inc.*, 321 F.3d at 186–88; *United States v. Gonzales*, 150 F.3d at 1259–60, including, when applicable, harm to national security, *see North Jersey Media Group*, 308 F.3d at 217.

Movants contend that access to FISC opinions will be beneficial in two particular ways: (1) public knowledge of the law is necessary for democratic governance, especially with regard to Executive Branch conduct that implicates constitutional rights, *see* Mot. for Release of Ct. Records at 16; and (2) access to FISC opinions specifically will promote public confidence in the FISC and the FISA process, enable "more refined decisionmaking in future cases," contribute to the decisionmaking of other courts, and

"improve democratic oversight," *see id*. at 17–20. These are benefits that might plausibly accrue from public access to FISC opinions, just as they generally accrue from public access to other types of judicial opinions. But as with the experience inquiry, the proper focus of the logic inquiry must be on "'the functioning of the particular process in question.'" *In re Certification of Questions of Law to FISCR*, 2018 WL 2709456 at *3 (quoting *Press-Enterprise II*, 478 U.S. at 8; citation omitted); *see supra* pp. 12–18. "'[T]he value of access must be measured in specifics,'" *In re Search of Fair Finance*, 692 F.3d at 433 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J., concurring in the judgment),[24] and specific harms to the proceeding at issue outweigh generic assertions about the benefits of openness:

> ["]Every judicial proceeding, indeed every governmental process, arguably benefits from public scrutiny to some degree, in that openness leads to a better-informed citizenry and tends to deter government officials from abusing the powers of government." Yet, "because the integrity and independence" of proceedings such as the grand jury, jury deliberations, and the internal communications of the court "are

[24] The quoted passage from Justice Brennan's opinion continues: "Analysis is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is whether access to a particular government process is important in terms of that very process." *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring in judgment).

> threatened by public disclosures, claims of 'improved self-governance' and 'the promotion of fairness' cannot be used as an incantation to open these proceedings to the public."

United States v. Gonzales, 150 F.3d at 1260 (quoting *Times Mirror Co.*, 873 F.2d at 1213; internal citations omitted); *accord In re Search of Fair Finance*, 692 F.3d at 432–33 (finding that the general benefits of "assur[ing] that established procedures are being followed," promoting "the appearance of fairness," and providing "a check on . . . magistrate judges" were "outweighed by the very particular harms" to the "criminal investigatory process" that would result from publication of search warrant documents). *But see In re Search Warrant for Secretarial Area*, 855 F.2d 569, 572–74 (8th Cir. 1988) (First Amendment confers qualified right of public access to search warrant documents).

In *In re Motion for Release of Court Records 2007*, which involved an asserted First Amendment right of access to FISC electronic surveillance orders and related pleadings, the Court found that "the detrimental consequences of broad public access to FISC proceedings orrecords would greatly outweigh" any benefits. 526 F. Supp. 2d at 494. Those detrimental consequences included the identification of "methods of surveillance," which "would permit adversaries" to "conceal their activities;" disclosures of "confidential sources of information," which "would chill current and potential sources from providing information" and "might put some in personal jeopardy;" and disclosures of intelligence gathering that could harm nationalsecurity in other ways, "such as damaging relations with foreign governments." *Id*.

As here, the ACLU in *In re Motion for Release of Court Records 2007* sought access to "only those portions of the requested materials that the Court finds are not properly classified." *Id.* at 495. In that case, the Court found that the logic test would not be satisfied even if it were applied to "only those parts of the requested materials that the Court, after independent review, . . . determined need not be withheld." *Id.*[25] The Court noted that its review "might err by releasinginformation that in fact should remain classified," and thereby damage the national security. 526 F. Supp. 2d at 495. Moreover, "the FISA process would be adversely affected if submitting sensitive information to the FISC could subject the Executive Branch's classification to a heightened form of judicial review"[26] because the "greater risk of

[25] The Court also expressed doubt "that the logic test should be so narrowly applied." *Id.* at 495 & n.29 (internal quotation marks omitted). Indeed, it is doubtful that a decision to release discrete information within a document could shed any light on whether general public access to other documents of the same type would benefit the particular process at issue. *See Globe Newspaper Co.*, 868 F.2d at 509–10 ("the fact that in certain cases access to the [requested] records may not be detrimental to the functioning" of the process in question, "and perhaps may even be beneficial to it, ... is not sufficient reason to create a presumption in favor of openness") (emphasis omitted).

[26] The ACLU had argued that the FISC should review Executive Branch classification decisions in a "probing manner" that is less deferential than the review of record releases under FOIA. 526 F. Supp. 2d at 491 & n.18. The ACLU and other Movants advocate for the same rigorous review by the FISC in this case. *See* Mot. for Release of Ct. Records at 25 ("Independent judicial review of any proposed redactions . . . is necessary because the standards that justify classification do not always satisfy the strict constitutional standard and . . . executive-branch decisions cannot substitute for the judicial determination required by the First Amendment.").

declassification and disclosure over Executive Branch objections would chill the government's interaction with the Court." 526 F. Supp. 2d at 496. The Court anticipated three deleterious consequences of that chilling effect: (1) it "could damage national security interests if, for example, the government opted to forgo surveillance or search of legitimate targets in order to retain control of sensitive information thata FISA application would contain;" (2) it might create "an incentive for government officials to avoid judicial review" by conducting surveillance without FISC approval "where the need for such approval is unclear;" and (3) it could threaten "the free flow of information to the FISC that is needed for an ex parte proceeding to result in sound decisionmaking and effective oversight." *Id*.

The same anticipated harms preclude finding that the logic test is satisfied in this case. First, the fact that Movants seek access only to FISC opinions and not applications or other related documents does not abate the harms or distinguish *In re Motion for Release of Court Records 2007*. Given the extent to which sensitive information about subjects such as ongoing counterintelligence and counterterrorism investigations and means of technical collection appears in opinions issued by the FISC in foreign intelligence proceedings, the Court finds that the above-described harms can be anticipated from public access to such opinions.

Moreover, Movants have not demonstrated any error in the assessment of harms in *In re Motion for Release of Court Records 2007*. They have merely asserted without explanation that "the Court erred in concluding that public access would 'result in a diminished flow of information, to the detriment of the

process in question.'" Mot. for Release of Ct. Records at 21(quoting *In re Motion for Release of Court Records 2007*, 526 F. Supp. 2d at 496). But courts have found that public access to various types of proceedings and documents could impede the receipt of relevant information, including search warrant documents,[27] presentence reports and objections thereto,[28] and transcripts and materials respecting criminal defendants' requests for assistance with legal expenses.[29] In addition, it is not unreasonable to be concerned that a FISC judge "might err by releasing information that in fact should remain classified," thereby damaging national security. 526 F. Supp. 2d at 495. The FISCR has similarly recognized that the FISC "is not well equipped to make the sometimes difficult determinations as to whether portions of its orders may be released without posing a risk to national security or compromising ongoing

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[27] *See, e.g.*, *In re Search of Fair Finance*, 692 F.3d at 432 ("[P]ublic access to search warrant documents" would cause the government "to be more selective in the information it disclosed in order to preserve the integrity of its investigations. This limitation on the flow of information to the magistrate judges could impede their ability to accurately determine probable cause.").

[28] *See, e.g.*, *In re Morning Song Bird Food Litig.*, 831 F.3d at 776 (disclosure "would tend to restrict the sentencing court's access to relevant knowledge by discouraging the transmission of information by defendants andcooperating third parties").

[29] *In re Boston Herald*, 321 F.3d at 188 ("specter of disclosure . . . might lead defendants (or other sources called upon by the court) to withhold information"); *In re Gonzales*, 150 F.3d at 1259 (without "assurance that the information revealed . . . will not be disclosed, a defendant and his or her counsel would be discouraged" from full disclosure of information to the court).

investigations." *In re Certification of Questions of Law to FISCR*, 2018 WL 2709456 at *1. The logic inquiry requires a balancing of the benefits of openness against any concomitant harms, *see supra* p. 24, and the risk of harming national security through disclosure of sensitiveinformation must be weighed in striking that balance.

Finally, Movants assert that Congress' decision in 2015 to establish an Executive Branch process to declassify and release significant FISC opinions, *see* USA FREEDOM Act of 2015 § 402(a)(2) (codified at 50 U.S.C. § 1872(a)), reinforces their arguments regarding the logic inquiry. Movants' Br. at 18. The Court disagrees. The key figure in the statutory process is the DNI who, unlike FISC judges, is particularly well situated to decide what information must be withheld to protect national security and what information is safe to release.[30] The DNI, in consultation with the Attorney General, must "conduct a declassification review" of FISC opinions that include "a significant construction or interpretation of any provision of law." 50 U.S.C. § 1872(a). Congress did not prescribe standards to apply in such review. Instead, it left Executive Branch classification standards in place and required that the opinions be made public "to the greatest extent practicable," "*consistent with*" the review's results. *Id.* (emphasis added). Important to the issues presented here, the statute specifically permits the DNI, in

[30] *Cf. Central Intelligence Agency v. Sims*, 471 U.S. 159, 180 (1985) ("[I]t is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency' sintelligence-gathering process.").

consultation with the Attorney General, to waive the publication requirement if doing so "is necessary to protect the national security of the United States or properly classified intelligence sources or methods," provided that an unclassified summary of the FISC's legal interpretation is prepared and published. 50 U.S.C. § 1872(c).

Movants advocate for a wholly different process in which the Court would independently apply criteria for withholding information that are more limited than those in the Executive Branch classification standards. *See* Mot. for Release of Ct. Records at 25. The Court's declination of that function is entirely congruent with 50 U.S.C. § 1872. To be sure, Section 1872 reflects a legislative judgment that public access to significant FISC opinions is desirable, but only when the DNI is satisfied that sensitive national security information is sufficiently protected. In fact, the provisions of Section 1872 contradict Movants' argument that the benefits of open access to such opinions outweigh the harms *as a general matter*. *See Globe Newspaper Co.*, 868 F.2d at 509 ("The First Amendment right of access attaches only to those governmental processes that as a *general* matter benefit from openness.") (emphasis in original).

This Court concludes that "public access" to FISC opinions in foreign intelligence proceedings does not and would not play a "significant positive role in the functioning" of the FISC, *In re Certification of Questions of Law to FISCR*, 2018 WL 2709456 at *3, particularlywith regard to classified information that the Executive Branch would protect. Logic dictates otherwise.

IV. THE COURT WILL NOT ORDER FURTHER REVIEW AS A MATTER OF DISCRETION.

FISC Rule 62(a) states:

> The Judge who authored an order, opinion, or other decision may *sua sponte* or onmotion by a party request that it be published. Upon such request, the Presiding Judge, after consulting with other Judges of the Court, may direct that an order, opinion or other decision be published. Before publication, the Court may, as appropriate, direct the Executive Branch to review the order, opinion, or other decision and redact it as necessary to ensure that properly classified information is appropriately protected pursuant to Executive Order 13526 (or its successor).

FISA Ct. R. Proc. 62(a) (emphasis in original). Movants assert that, "even if the Court holds thatthe First Amendment right of access does not attach . . ., it should nonetheless exercise its discretion—as it has in the past and in the public interest—to order the government to conduct adeclassification review of its opinions pursuant to Rule 62." Mot. for Release of Ct. Records at 27. In support of that assertion, Movants cite an earlier instance in which the Court, as "an exercise of discretion," directed the government to submit proposed redactions of any opinion atissue so that its author, "with the benefit of [such proposal], may decide whether to propose publication pursuant to Rule 62(a)." *Id*. (quoting *In re Orders of Court Interpreting Section 215 of Patriot Act*, 2013 WL 54600644 at *8).

The cited case, however, presented materially different circumstances. Here, the Executive Branch has completed a declassification review of the opinions at issue. Consistent with that review, the opinions have been made available to the public in redacted form[31] and there is no particular reason to expect that further review will yield different results. Under the circumstances presented, the Court declines to direct a second declassification review.

V. CONCLUSION.

For the foregoing reasons, the Court will dismiss the pending Motion for the Release of Court Records. A separate order accompanies this Opinion.

February 11, 2020

/s/ Rosemary M. Collyer
Judge, U.S. Foreign Intelligence Surveillance Court

[31] Indeed, the FISC has previously engaged in the Rule 62(a) publication process for two of the four opinions at issue. *See supra* p. 2.