No. 20-1499

# In the Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION, PETITIONER

*v.*

UNITED STATES OF AMERICA

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

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under 28 U.S.C. 1254(1) or 50 U.S.C. 1803(b) to issue a writ of certiorari to review the Foreign Intelligence Surveillance Court of Review's decision in this matter.

2. Whether this Court should issue a writ of mandamus or common-law certiorari to review the Foreign Intelligence Surveillance Court of Review's determination that it lacked jurisdiction to entertain petitioner's claim of public access to classified opinions issued by the Foreign Intelligence Surveillance Court.

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## OPINIONS BELOW

The opinion of the Foreign Intelligence Surveillance Court of Review (Pet. App. 1a-3a) is not reported in the Federal Reporter but is available at 2020 WL 6888073. The opinion of the Foreign Intelligence Surveillance Court (Pet. App. 4a-7a) is not reported in the Federal Supplement but is available at 2020 WL 5637419.

## JURISDICTION

The judgment of the Foreign Intelligence Surveillance Court of Review was entered on November 19, 2020. The petition for a writ of certiorari was filed on April 19, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 50 U.S.C. 1803(b). In the alternative, petitioner seeks an extraordinary writ under 28 U.S.C. 1651.

## STATEMENT

### A. Legal Background

1. In 1978, "after years of debate," *Clapper* v. *Amnesty Int'l*, 568 U.S. 398, 402 (2013), Congress enacted the Foreign Intelligence Surveillance Act (FISA), Pub. L. No. 95-511, Tit. I, § 101, 92 Stat. 1783, to establish a "secure framework by which the Executive Branch may conduct legitimate electronic surveillance for foreign intelligence purposes within the context of this Nation's commitment to privacy and individual rights." S. Rep. No. 604, 95th Cong., 1st Sess. 15 (1977). In constructing a secure framework for judicial review, "Congress created two specialized courts," *Clapper*, 568 U.S. at 402, to provide "neutral and responsible oversight of the government's activities in foreign intelligence surveillance," *United States* v. *Cavanagh*, 807 F.2d 787, 790 (9th Cir. 1987)—the Foreign Intelligence Surveillance Court (FISC) and the Foreign Intelligence Surveillance Court of Review (FISA Court of Review). 50 U.S.C. 1803(a)-(b).

Congress determined that "consolidation of judicial authority" in these specialized courts was necessary because of "[t]he need to preserve secrecy for sensitive counterintelligence sources and methods." S. Rep. No. 701, 95th Cong., 2d Sess. 12 (1978) (Senate Intelligence Committee Report). An earlier version of the FISA bill would have empowered select district judges to adjudicate FISA applications, but Congress instead created the FISC "upon the recommendation of the General Counsel of the Administrative Office of the U.S. Courts." *Id.* at 47-48 & n.26. In testimony before the U.S. House of Representatives Permanent Select Committee on Intelligence, the General Counsel explained

that judges on this new court "would be chosen with discretion" and "could be relied upon to maintain the security of intelligence." *Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 95th Cong., 2d Sess. 74 (1978) (statement of Carl H. Imlay).

To further protect the secrecy and integrity of the intelligence collection process, Congress provided that the FISC's files, including its orders, "shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General" and the Nation's top intelligence official, originally the Director of Central Intelligence and now the Director of National Intelligence. 50 U.S.C. 1803(c). The currently applicable Security Procedures were issued by the Chief Justice in 2013. See *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* (Feb. 21, 2013). These Security Procedures provide for the judges and staff of the FISC and the FISA Court of Review to undergo appropriate FBI background checks "under applicable Executive Branch standards for investigations performed in support of determinations of eligibility for access to sensitive compartmented information or other classified national security information." *Id.* ¶¶ 3, 4. And they state that "[m]embers of the court and court personnel shall be briefed on security measures appropriate to the functions of the court by designees of the Attorney General and the Director of National Intelligence." *Id.* ¶ 9. The

Security Procedures further require 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." *Id.* ¶ 7.

2. Congress carefully delineated the jurisdiction of the two specialized FISA courts. As originally enacted, FISA vested the FISC with "jurisdiction to hear applications for and grant orders approving electronic surveillance" for foreign intelligence purposes. 50 U.S.C. 1803(a). Congress vested the FISA Court of Review, in turn, with "jurisdiction to review the denial of any [such] application." 50 U.S.C. 1803(b). And it vested this Court with jurisdiction to review a decision of the FISA Court of Review, "on petition of the United States for a writ of certiorari," if the FISA Court of Review determined that "the application was properly denied." *Ibid.*

Congress has since amended FISA on several occasions, adding additional foreign intelligence collection tools. See *Clapper*, 568 U.S. at 404.[1] As it has done so, Congress has also added additional specific grants of jurisdiction to the FISC, the FISA Court of Review, and this Court. The FISC now has jurisdiction over proceedings instituted by the government related to several

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[1] See, *e.g.*, Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, § 807(a)(3), 108 Stat. 3443 (adding 50 U.S.C. 1821-1829); Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, § 601(2), 112 Stat. 2404 (adding 50 U.S.C. 1841-1846); Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, § 602, 112 Stat. 2410 (adding 50 U.S.C. 1861-1862); Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, Tit. I, § 101(a)(2), 122 Stat. 2437 (adding 50 U.S.C. 1881-1881g).

types of foreign intelligence techniques. See 50 U.S.C. 1822(c) (physical search); 50 U.S.C. 1842(b)(1) (pen register or trap and trace device); 50 U.S.C. 1861(b)(1)(a) (order for the production of tangible things); 50 U.S.C. 1881a(j)(1)(A) (certain targeting of non-U.S. persons located abroad); 50 U.S.C. 1881b(a)(1), 1881c(a)(1) (certain targeting of U.S. persons located abroad).

Consistent with the original mandate, if the FISC denies the relief sought by the government, the FISA Court of Review has jurisdiction to review the FISC's decision. See 50 U.S.C. 1842(d)(3) and 1861(c)(4) (incorporating review procedures of Section 1803); 50 U.S.C. 1822(d), 1881a(j)(4)(A), 1881b(f)(1) and 1881c(e)(1) (creating similar review procedures). And if the FISA Court of Review affirms the FISC's denial of the government's request for relief, this Court has jurisdiction to review the FISA Court of Review's decision on the government's filing of a petition for a writ of certiorari. See 50 U.S.C. 1822(d), 1842(d)(3), 1861(c)(4), 1881a(j)(4)(D), 1881b(f)(2), and 1881c(e)(2).

Apart from matters instituted by the United States, the FISC's only jurisdiction is over certain proceedings brought by recipients of FISA process. See 50 U.S.C. 1861(f)(2), 1881a(i)(4); cf. 50 U.S.C. 1881a(i)(5)(A) (conferring jurisdiction on the FISC over certain petitions for an order to compel compliance). In such a case, either the government or the recipient of FISA process may appeal an adverse FISC decision to the FISA Court of Review. 50 U.S.C. 1861(f)(3), 1881a(i)(6)(A). After the FISA Court of Review rules, either the government or the FISA-process recipient may petition this Court for a writ of certiorari. 50 U.S.C. 1861(f)(3), 1881a(i)(6)(B).

3. In 2015, Congress enacted the USA FREEDOM Act, Pub. L. No. 114-23, 129 Stat. 268. In response to concerns arising from the fact that the FISC's cases are, by their nature and by statutory requirement, secret and predominantly *ex parte*, Congress amended FISA to provide that following the FISC's issuance of a decision, the FISC may certify a question of law to the FISA Court of Review, permitting appellate review in *ex parte* matters where the government prevailed and there is no party having a right to appeal. 50 U.S.C. 1803(j). Similarly, the FISA Court of Review may certify to this Court a question of law "as to which instructions are desired." 28 U.S.C. 1254(2); see 50 U.S.C. 1803(k)(1). The USA FREEDOM Act also added provisions permitting the FISC and the FISA Court of Review, in appropriate circumstances, to appoint an *amicus curiae* in order to provide additional perspective and legal argument to the FISC and the FISA Court of Review in their consideration of a novel or significant interpretation of the law. See 50 U.S.C. 1803(i).

In addition, to promote transparency, the USA FREEDOM Act also amended FISA to provide that, upon issuance of a decision, order, or opinion by the FISC or the FISA Court of Review "that includes a significant construction or interpretation of any provision of law," the Director of National Intelligence, in consultation with the Attorney General, must conduct a declassification review and "make publicly available to the greatest extent practicable each such decision, order, or opinion." 50 U.S.C. 1872(a) (Supp. V 2015). If the Director of National Intelligence, in consultation with the Attorney General, determines that a waiver of that requirement "is necessary to protect the national security of the United States or properly classified intelligence

sources or methods," the government must, instead, "make[] publicly available an unclassified statement * * * summarizing the significant construction or interpretation of any provision of law." 50 U.S.C. 1872(c) (Supp. V 2015).

**B. The Present Controversy**

1. a. Petitioner initiated this dispute by filing a stand-alone motion with the FISC in 2016, unrelated to any pending matter, seeking access to all FISC "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." Pet. App. 8a; see *id.* at 8a-63a. Petitioner argued that the FISC had jurisdiction over the motion under its "inherent powers, including 'supervisory power over its own records and files.'" *Id.* at 18a (citation omitted). Petitioner asserted that the FISC's "significant legal interpretations * * * are subject to the public's First Amendment right of access." *Id.* at 9a. And it argued that "[a]ny limits on the public's right of access" must be "narrowly tailored" to preventing "a substantial probability of harm to a compelling interest"; that there must be no "alternative means to protect that interest"; and that the limits must be "demonstrably effective in avoiding that harm." *Id.* at 12a; see *id.* at 34a-38a.

Petitioner asked the court to "order the government to promptly process and prepare for publication opinions and orders of th[e FISC] containing novel or significant interpretations of law." Pet. App. 12a. And it asked that "the Court itself * * * ensure that any redactions" to those opinions are narrowly tailored to serve a compelling governmental interest, such as protecting intelligence sources and methods. *Id.* at 37a. Petitioner contended that "the standards that justify

classification do not always satisfy the strict constitutional standard," and that "executive-branch decisions cannot substitute for the judicial determination required by the First Amendment." *Id.* at 40a.

b. The FISC dismissed petitioner's motion for lack of jurisdiction, relying on the FISA Court of Review's decision in *In re Opinions and Orders by the FISC Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act,* 957 F.3d 1344, 1350-1351, 1355 (2020) (per curiam) (*In re Opinions Addressing Bulk Collection*). Pet. App. 4a-7a.

*In re Opinions Addressing Bulk Collection* involved a similar records request made to the FISC for a narrower category of FISC opinions. See 957 F.3d at 1347-1348. After the FISC dismissed that motion, the FISA Court of Review dismissed for lack of jurisdiction the movant's petition for review or, in the alternative, petition for a writ of mandamus. The FISA Court of Review held that "it [was] clear from the text of [FISA] that Congress has considered carefully the scope of the court's jurisdiction." *Id.* at 1350; see *ibid.* ("FISA clearly delineates the types of disputes that fall within our appellate jurisdiction."). The FISA Court of Review held that "[t]here can be no question that the Movants' Petition does not fall within any of the categories of jurisdiction enumerated" in FISA, and that "it is equally clear that the Movants are not one of the petitioners authorized by Congress to seek review before our Court." *Id.* at 1351.

The FISA Court of Review also declined in *In re Opinions Addressing Bulk Collection* to exercise any inherent ancillary jurisdiction over the movant's request. 957 F.3d at 1357. The court reasoned that such

an exercise of discretionary authority was not appropriate where "the Movants filed a motion in a *new* 'miscellaneous' case 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." *Ibid.* (emphasis and footnote omitted). And the court further determined that it lacked the power to issue an extraordinary writ under the All Writs Act, 28 U.S.C. 1651(a), because any such writ would not be in aid of the court's jurisdiction. *In re Opinions Addressing Bulk Collection*, 957 F.3d at 1357-1358.

Relying on *In re Opinions Addressing Bulk Collection*, the FISC held in this case that it was similarly "not empowered" to consider "freestanding motions filed by persons who are not authorized by FISA to invoke [the FISC's] jurisdiction." Pet. App. 6a (citing 957 F.3d at 1350-1351). The court likewise declined to exercise ancillary jurisdiction over the matter. *Ibid.* The FISC explained that, in light of its "'significantly limited powers carefully delineated by Congress,'" any inherent discretionary authority "must be exercised with restraint, discretion, and great caution." *Id.* at 5a-6a (quoting *In re Opinions Addressing Bulk Collection*, 957 F.3d at 1356-1357); see *id.* at 6a. And the FISC observed that petitioner "had not been involuntarily haled into court, did not seek to assert rights in an ongoing action, did not establish a factual connection to the classified material, and did not present circumstances warranting the exercise of the [court's] inherent judicial power to enforce its mandates and orders or protect the integrity of its proceedings and processes." *Id.* at 6a.

2. Petitioner filed a petition for review or, in the alternative, for a writ of mandamus with the FISA Court of Review. See Notice of Appeal, No. Misc. 20-02 (FISA

Ct. Rev. Oct. 14, 2020).[2] Petitioner "recognize[d] that [the] Court [of Review] ha[d] previously determined that it does not have jurisdiction to consider an appeal or petition for a writ of mandamus filed by a movant claiming a First Amendment right of public access to the FISC's legal opinions." *Id.* at 1 (citing *In re Opinions Addressing Bulk Collection*, *supra*). But petitioner stated that it was submitting its petition "in order to preserve its ability to seek further review." *Ibid.* After the court ordered petitioner to show cause why the court possessed jurisdiction, petitioner asked the court to "clarify or revisit" its decision in *In re Opinions Addressing Bulk Collection*. Pet. App. 2a (citation omitted).

The FISA Court of Review dismissed the petition. Pet. App. 1a-3a. The court "decline[d] [petitioner's] invitation to revisit [its] recent decision" in *In re Opinions Addressing Bulk Collection*. *Id.* at 3a. And the court concluded that, under that decision, it lacked "jurisdiction to consider [petitioner's] current claims." *Ibid.* "In light of that conclusion," the court further determined that "this case does not present a question of law as to which instructions from the Supreme Court are desired." *Ibid.* (citing 50 U.S.C. 1803(k); 28 U.S.C. 1254(2)).

**ARGUMENT**

Petitioner asks this Court to grant review to consider (1) whether the FISC and the FISA Court of Review erred by dismissing petitioner's motion and appeal for lack of jurisdiction, and (2) whether the First

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[2] The records from this case and from all public, unclassified cases before the FISC and the FISA Court of Review since 2013 are available to the public at https://www.fisc.uscourts.gov/public-filings.

Amendment provides a qualified right of public access to the FISC's significant opinions. The Court should deny that request. The FISA Court of Review correctly determined that it lacked jurisdiction. The court's resolution of that question does not conflict with any decision of this Court or of any court of appeals, and it does not warrant this Court's review. Because the FISA Court of Review correctly determined it lacked jurisdiction, this case presents no opportunity to directly address the jurisdiction of the FISC over petitioner's motion—much less the merits of petitioner's First Amendment claim.

Further review is also unwarranted for a more basic reason. This Court itself lacks jurisdiction to issue a statutory writ of certiorari to review the decision below, and the petition does not satisfy the stringent requirements for the Court's issuance of an extraordinary writ of mandamus or common-law certiorari. The issuance of such a writ would not be in aid of this Court's own jurisdiction. In any event, no exceptional circumstances exist that would justify an exercise of any discretionary powers this Court might have to afford such relief. And even if petitioner's claims had merit, they would not justify the extraordinary relief petitioner seeks here because adequate alternative means of access are available. The Executive Branch is committed to providing the public as much transparency about the FISC's work as is consistent with the Nation's security. And there is also a readily available judicial process under the Freedom of Information Act (FOIA), 5 U.S.C. 552. In fact, a separate FOIA suit has already resulted in the release of much of the material petitioner seeks here. The petition for a writ of certiorari or, in the alternative, mandamus or common-law certiorari, should be denied.

### A. This Court Lacks Jurisdiction To Issue A Statutory Writ Of Certiorari In This Case

Petitioner asks this Court to issue a statutory writ of certiorari under either 28 U.S.C. 1254(1) or 50 U.S.C. 1803(b). Neither statute provides jurisdiction here.

1. Section 1254 provides this Court with jurisdiction to review "[c]ases in the courts of appeals" either "(1) [b]y writ of certiorari granted upon the petition of any party to any civil or criminal case," or "(2) [b]y certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired." 28 U.S.C. 1254. Whether or not petitioner's stand-alone motion to the FISC should be considered a "case," within the meaning of Section 1254, see *Hohn* v. *United States*, 524 U.S. 236, 241 (1998), it is not one that arises from one of the "courts of appeals." Sections 41 and 43 of Title 28 establish thirteen such courts for the eleven numbered circuits, the D.C. Circuit, and the Federal Circuit. See 28 U.S.C. 41 (creating "thirteen judicial circuits of the United States"); 28 U.S.C. 43(a) ("There shall be in each circuit a court of appeals, which shall be a court of record, known as the United States Court of Appeals for the circuit."). This Court's certiorari jurisdiction under Section 1254(1) thus "extends to all 13 courts of appeals for the federal judicial circuits." Stephen M. Shapiro et al., *Supreme Court Practice* 78 (10th ed. 2013) (citing 28 U.S.C. 41). It does not extend to the FISA Court of Review.

Indeed, FISA itself also makes clear that the FISA Court of Review is not a "court[ ] of appeals" within the meaning of Section 1254(1). Section 1803(k), entitled "Review of FISA court of review decisions," provides that "[f]or purposes of section 1254(2) of title 28"—

which provides for review of "[c]ases in the courts of appeals" by certification, 28 U.S.C. 1254(2)—the FISA Court of Review "shall be considered to be a court of appeals." 50 U.S.C. 1803(k)(1). Congress's direction that the FISA Court of Review "be considered" a court of appeals for the special purposes of Section 1254(2) is a powerful indication that the court neither *is* a "court of appeals" within the meaning of Section 1254 generally nor should be *considered* one for purposes of Section 1254(1). Section 1803(k)(1) would be superfluous if the FISA Court of Review were already a "court[] of appeals" for purposes of Section 1254. See *Parker Drilling Mgmt. Servs., Ltd.* v. *Newton*, 139 S. Ct. 1881, 1890 (2019) (discussing the "'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute'") (citation omitted).

2. The other statute upon which petitioner relies in seeking review in this Court, 50 U.S.C. 1803(b), provides this Court with jurisdiction to consider a "petition of the United States for a writ of certiorari" to review a determination by the FISA Court of Review that "any application made under [FISA]" was "properly denied." 50 U.S.C. 1803(b). That provision does not apply here for several independent reasons.

First, a petition for a writ of certiorari filed by the private entity in this case obviously is not a "petition *of the United States* for a writ of certiorari." 50 U.S.C. 1803(b) (emphasis added).

Second, and in any event, petitioner's stand-alone motion to the FISC was not an "application made under [FISA]." 50 U.S.C. 1803(b). FISA provides for a number of "application[s]" to be filed before the FISC, *e.g.*, for an order approving electronic surveillance, 50 U.S.C. 1804(a); authorizing certain physical searches, 50 U.S.C.

1822(b); authorizing a pen register, 50 U.S.C. 1842(a); or ordering the production of business records, 50 U.S.C. 1861(a). A motion for the publication of all significant FISC opinions is not among them. Rather, petitioner insists (Pet. 11-27) that the authority for its request derives from any Article III court's inherent authority to control its own records and the First Amendment itself.

Third, setting aside the fact that no petition was filed by the United States—and even if petitioner's standalone motion could be considered an "application"—the FISA Court of Review made no "determin[ation]" that petitioner's motion was "properly denied." 50 U.S.C. 1803(b). Rather, the FISC "dismissed" petitioner's motion "for lack of jurisdiction," Pet. App. 7a (capitalization and emphasis omitted), and the FISA Court of Review determined that it similarly lacked jurisdiction over petitioner's appeal of that dismissal, *id.* at 3a.

**B. The Petition Does Not Satisfy The Requirements For Extraordinary Relief Under the All Writs Act**

In the alternative, petitioner asks (Pet. 29) this Court to treat its petition as one for a writ of mandamus or common-law certiorari under the All Writs Act, 28 U.S.C. 1651. The All Writs Act authorizes this Court to issue extraordinary writs to a lower court "in aid of" the Court's jurisdiction "and agreeable to the usages and principles of law." 28 U.S.C. 1651(a). "Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a)," however, "is not a matter of right, but of discretion sparingly exercised." Sup. Ct. R. 20.1. An extraordinary writ is available only where: "[i] the writ will be in aid of the Court's appellate jurisdiction, * * * [ii] exceptional circumstances warrant the exercise of the Court's discretionary powers, and * * * [iii] adequate relief cannot be obtained in any other form or

from any other court." *Ibid.* In addition, a writ of mandamus may issue only where a movant shows a "clear and indisputable" right to relief. *Cheney* v. *United States Dist. Ct.*, 542 U.S. 367, 381 (2004) (citation omitted). And a writ of common-law certiorari similarly will not issue "for the mere correction of error." *United States* v. *Dickinson*, 213 U.S. 92, 100 (1909). Petitioner cannot satisfy these rigorous standards.

***1. An extraordinary writ would not be in aid of this Court's appellate jurisdiction***

"[A] court's power to issue any form of relief—extraordinary or otherwise—is contingent on that court's subject-matter jurisdiction over the case or controversy." *United States* v. *Denedo*, 556 U.S. 904, 911 (2009). As the text of the All Writs Act makes clear, neither the Act nor "the extraordinary relief [it] authorizes" is "a source of subject-matter jurisdiction." *Id.* at 913. Rather, such relief may only issue "in aid of" some independent source of appellate jurisdiction, 28 U.S.C. 1651(a)—either in a case in which jurisdiction has been "already acquired by appeal" or in a case "within [the court's] appellate jurisdiction although no appeal has been perfected," *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943); see *Supreme Court Practice* 661. Petitioner does not identify any source of immediate or potential appellate jurisdiction over its stand-alone motion here.

Except for a certification process that is not implicated here, see 50 U.S.C. 1803(k), this Court's appellate jurisdiction over the FISA Court of Review consists entirely of categories of cases relating to FISA applications or process that may be brought by the United States or, in some circumstances, by recipients of FISA process challenging the legality of that process. See pp.

4-5, 12-14, *supra*. Petitioner does not claim to be a recipient of FISA process challenging that process. "Where," as here, "the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions." *Roche*, 319 U.S. at 30.

Contrary to petitioner's contention (Pet. 29), *Nixon* v. *Fitzgerald*, 457 U.S. 731, 743 n.23 (1982), does not suggest that this Court possesses "inherent jurisdiction" to review any lower court dismissal for lack of jurisdiction. *Nixon* concerned this Court's statutory jurisdiction under 28 U.S.C. 1254(1), not inherent jurisdiction. Specifically, the Court addressed the circumstances in which a case should be considered "in the court[] of appeals," 28 U.S.C. 1254, for purposes of Section 1254(1). The Court determined that the case before it had been "'in' the Court of Appeals under § 1254" and therefore was "properly within [this Court's] certiorari jurisdiction," even though the court of appeals had wrongly dismissed the appeal for lack of jurisdiction. *Nixon*, 457 U.S. at 743; see *Hohn*, 524 U.S. at 247 (relying on *Nixon* to hold that the denial of a jurisdictional certificate of appealability did not prevent a case from being "in" the court of appeals for purposes of Section 1254(1)). As explained above, however, Section 1254(1) does not provide the Court with jurisdiction over this petition for different reasons, even if the matter was "in" the FISA Court of Review. See pp. 12-13, *supra*. *Nixon*'s statutory holding thus has no application here.

Petitioners' other attempts to ground its request for extraordinary relief in this Court's appellate jurisdiction are equally unavailing. Petitioner contends (Pet. 30-31) that an extraordinary writ "would be in aid of this

Court's inherent jurisdiction over claims of access to records of the judiciary" or "under the First Amendment itself"—on the theory that, if no other court will hear its claim of access to classified FISC opinions, this Court should do so. But even if this Court possessed such jurisdiction, it would not be "appellate" but original, to which the All Writs Act does not apply. Sup. Ct. R. 20.1; see *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 175 (1803) ("To enable this [C]ourt then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.").

Petitioner also contends (Pet. 30) that a writ would be in aid of this Court's "constitutional appellate jurisdiction." That contention is misplaced. In all cases outside this Court's narrow original jurisdiction, Article III provides that this Court "shall have appellate Jurisdiction * * * *with such Exceptions, and under such Regulations as the Congress shall make*." U.S. Const. Art. III, § 2 (emphasis added); see Edward A. Hartnett, *Not the King's Bench*, 20 Const. Comm. 283, 308-316 (2003) (criticizing the contrary view as inconsistent with the text and history of Article III and this Court's decisions dating back to *Marbury*). Congress has carefully delineated this Court's jurisdiction over decisions of the FISA Court of Review, and the claim petitioner asserts in this case is not within the specific categories Congress has allowed.

***2. No extraordinary circumstances would warrant the exercise of discretionary jurisdiction by this Court***

Petitioner's contention that extraordinary circumstances would warrant the exercise of discretionary jurisdiction by this Court is, in any event, little more than an assertion that the decisions below were incorrect.

See Pet. 31-32. This Court rarely exercises its discretionary jurisdiction—in any form—based merely on an alleged error in the decision below, even an error of constitutional law. See Sup. Ct. R. 10. And the Court has made clear that the extraordinary remedies that petitioner seeks "are reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 260 (1947); see *Will* v. *United States*, 389 U.S. 90, 95 (1967) ("[O]nly exceptional circumstances amounting to a judicial 'usurpation of power' will justify" mandamus relief) (citation omitted). Petitioner's bare assertions of error fall far short of meeting that standard.

Petitioner also asserts (Pet. 8) that "the public has been entirely deprived of access to" the significant FISC opinions issued prior to the USA FREEDOM Act "without any judicial determination that such secrecy is justified." But that assertion is greatly overstated. Although the USA FREEDOM Act's requirements do not apply retroactively, the Attorney General has long been required to provide to Congress any FISC decision, order, or opinion—dating back to July 2003—that "includes significant construction or interpretation of any provision of law or results in a change of application of any provision of [FISA] or a novel application of any provision of [FISA]." 50 U.S.C. 1871(c)(1); see 50 U.S.C. 1871(c)(2). As a result of a suit brought by a different organization under FOIA, the government has previously conducted a review of such decisions, and publicly released scores of them, with classified information redacted. See pp. 21-22, *infra*; see, *e.g.*, Office of the Director of National Intelligence, *Release of FISA Title*

*IV and V Documents* (Sept. 27, 2017)[3]; Office of the Director of National Intelligence, *Additional Release of FISA Section 702 Documents* (June 14, 2017)[4]. The classification decisions concerning the few opinions or orders completely withheld have already been subject to judicial scrutiny under FOIA and were upheld. See pp. 21-22, *infra*.

As petitioner recognizes (see Pet. 5 & 8 n.3), since 2015, Congress also has provided a means in the USA FREEDOM Act for the Director of National Intelligence, in consultation with the Attorney General, to "make publicly available to the greatest extent practicable" each opinion, decision, or order of the FISC or FISA Court of Review "that includes a significant construction or interpretation of any provision of law." 50 U.S.C. 1872(a) (Supp. V 2015). Where the Director of National Intelligence concludes that a waiver of such requirement is necessary to protect the national security of the United States or properly classified intelligence sources or methods, an unclassified statement summarizing the significant construction of law must be made publicly available, including, to the extent consistent with national security, a description of the context in which the matter arose. 50 U.S.C. 1872(c) (Supp. V 2015).

Moreover, the Office of the Director of National Intelligence (ODNI) has recently undertaken a process to review again the few significant FISC opinions or orders that were submitted to Congress under 50 U.S.C. 1871(c)(1) and (2) but were previously withheld in full under FOIA. That review process will consider whether

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[3] https://icontherecord.tumblr.com/post/165800143933/relerel-of-fisa-title-iv-and-v-documents-september.

[4] https://icontherecord.tumblr.com/post/161824569523/additional-release-of-fisa-section-702-documents.

any changed circumstances exist that would permit public release of any information in those opinions, or if not, whether an unclassified summary of any of those opinions can be prepared and made available to the public. *Cf.* 50 U.S.C. 1872(a) and (c). ODNI will aim to complete this process as rapidly as possible. If petitioner disagrees with the Executive's classification decisions for those opinions or orders, or any others previously released, it is free to seek judicial review of those decisions under FOIA in a federal district court, followed by the appropriate court of appeals, and, eventually, this Court in the ordinary course.

***3. Alternative avenues exist for petitioner to obtain adequate relief***

For similar reasons, petitioner also cannot establish that "adequate relief cannot be obtained in any other form or from any other court." Sup. Ct. R. 20.1; see *Cheney*, 542 U.S. at 380 ("[T]he party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires.") (citation omitted). In addition to the Executive Branch processes described above, petitioner may seek relief from the courts other than by an extraordinary writ from this Court.

First, FOIA "requires federal agencies to make Government records available to the public, subject to nine exemptions for categories of material." *Milner* v. *Department of the Navy*, 562 U.S. 562, 564 (2011). FISC opinions qualify as agency records subject to FOIA. See *United States Dep't of Justice* v. *Tax Analysts*, 492 U.S. 136, 143-148 (1989) (judicial decisions obtained by federal agencies in the course of official duties are subject to FOIA); see, *e.g.*, *Electronic Frontier Found.* v. *United States Dep't of Justice*, 376 F. Supp. 3d 1023

(N.D. Cal. 2019). And while FOIA includes an exemption for classified matters, see 5 U.S.C. 552(b)(1), information withheld under that exemption must be "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and "in fact properly classified pursuant to such Executive order," *ibid.* Moreover, even when an exemption applies, FOIA requires "[a]ny reasonable segregable portion of a record [to] be provided to any person requesting such record." 5 U.S.C. 552(b). The Executive Branch's withholding of records under FOIA is subject to judicial review. See 5 U.S.C. 552(a)(4)(B).

Six months before petitioner filed its motion in the FISC, another public interest organization filed a FOIA case in district court similarly seeking "all decisions, orders, or opinions issued by [the] FISC or [the FISA Court of Review] between 1978 and June 1, 2015, that include a significant construction or interpretation of any law." *Electronic Frontier Found.*, 376 F. Supp. 3d at 1026. As noted, that litigation resulted in the release to the plaintiff and the public of 73 FISC decisions, orders, and opinions issued by the FISC between July 2003 and the enactment of the USA FREEDOM Act. See *ibid.*; see also pp. 18-19, *supra*. The government identified only six opinions that could not be released in any form because they were classified in their entirety. See *Electronic Frontier Found.*, 376 F. Supp. 3d at 1026. And the district court found "that the government ha[d] carried its burden to demonstrate that it properly classified th[os]e six opinions" and had given "thorough explanations demonstrating how national security could be compromised if the information is disclosed." *Id.* at 1035.

Second, in addition to district court review under FOIA, in some circumstances, petitioner may also seek access to an opinion in an individual matter properly before the FISC through a motion in that case. See *In re Opinions Addressing Bulk Collection*, 957 F.3d at 1356-1357 (declining to exercise jurisdiction over a "*new* 'miscellaneous case'" unconnected to any "ongoing action"). Petitioner maintains that the necessary secrecy surrounding the FISC's cases makes it "virtually impossible to seek [such] intervention." Pet. 19. But limitations resulting from nondisclosure of sensitive national security information do not create federal court jurisdiction where none exists. See *Clapper*, 568 U.S. at 412 n.4. And, in any event, petitioner's concern is again overstated, as there are ways that members of the public may sometimes learn of FISC proceedings. For example, the FISC can publish opinions and orders, see FISC Rule of Procedure 62(a), and may do so while a proceeding is ongoing or on appeal. See, *e.g.*, *In re Accuracy Concerns Regarding Matters Submitted to the FISC*, 411 F. Supp. 3d 333 (FISA Ct. 2019). Indeed, petitioner itself has filed a request for records in a then-extant FISC matter advancing the same First Amendment right-of-access argument it advances in this case. See *In re Proceedings Required by § 702(i) of FISA Amendments Act of 2008*, Misc. No. 08-01, 2008 WL 9487946 (FISA Ct. Aug. 27, 2008). The FISC rejected the argument on the merits. *Id.* at *3-*4.

#### *4. The FISA Court of Review correctly declined to exercise jurisdiction over petitioner's appeal*

Finally, even if petitioner could satisfy all the jurisdictional and other prerequisites to the issuance of an extraordinary writ by this Court, no writ should issue because the decision below was correct. See *Cheney*,

542 U.S. at 381 (mandamus requires a "clear and indisputable" right to relief) (citation omitted); *Dickinson*, 213 U.S. at 100 (common-law certiorari will not issue "for the mere correction of error"). The FISA Court of Review lacked jurisdiction over petitioner's appeal and properly declined to grant mandamus relief.[5]

a. The FISA Court of Review is a court of limited and specialized jurisdiction. While other federal courts of appeal possess broad "jurisdiction of appeals from all final decisions of the district courts," 28 U.S.C. 1291, which in turn have similarly broad jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. 1331, the FISA Court of Review (and the FISC) possess jurisdiction only over certain enumerated matters. See, *e.g.*, 50 U.S.C. 1803(a)(1) and (d) (granting the FISC "jurisdiction to hear applications for and grant orders approving electronic surveillance" and the FISA Court of Review "jurisdiction to review the denial of any application made under [FISA]"); 50 U.S.C. 1822(c) and (d) (granting the FISC "jurisdiction to hear applications for and grant orders approving" certain physical searches and the FISA Court of Review "jurisdiction to review the denial

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[5] Notably, petitioner addresses the FISA Court of Review's jurisdiction—the sole question decided by the FISA Court of Review—only in a one-sentence footnote, choosing instead to devote almost all of its arguments in the relevant body of the petition to the jurisdiction of the FISC to consider petitioner's stand-alone motion in the first instance and to the merits of petitioner's First Amendment claim. Petitioner states that the FISA Court of Review had jurisdiction over its appeal for "reasons similar to those discussed" in the body of the petition. Pet. 21 n.5. Those reasons (and any differences between them and the arguments advanced in the body of the petition concerning the jurisdiction of the FISC and this Court) are left unexplained.

of any [such] application"); see also pp. 4-5, *supra*. Petitioner's appeal of the FISC's dismissal of its stand-alone motion for the public release of nearly 14 years of FISC opinions does not fit into any of those grants. And petitioner does not contend otherwise. See Pet. 21 n.5 (omitting its discussion of Section 1803(b) from its cross-reference of potential grounds for FISA Court of Review jurisdiction).

Petitioner instead argues that "the FISC has inherent 'supervisory power' over its own records" and that the "power to control a court's records necessarily includes jurisdiction to decide claims for access to those records." Pet. 13-14 (citation omitted). Petitioner then presumably believes that the FISA Court of Review similarly possesses inherent jurisdiction over appeals from the FISC's exercise of (or refusal to exercise) any such inherent jurisdiction. See *id.* at 21 n.5. But whatever an Article III court's inherent *power* to act within the context of a case properly before it, an inferior federal court, including the FISC and the FISA Court of Review, lacks inherent *jurisdiction* over a stand-alone motion unconnected from any case or matter properly before it.

As this Court has explained, "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction." *Kontrick* v. *Ryan*, 540 U.S. 443, 452 (2004). Congress possesses "the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Ankenbrandt* v. *Richards*, 504 U.S. 689, 698 (1992) (quoting *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 245 (1845)). The

category of cases assigned by Congress to a particular court "is not to be expanded by judicial decree." *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Here, the limited subject-matter jurisdiction of the FISC and FISA Court of Review is explicitly specified by statute. Neither the FISC nor the FISA Court of Review (nor any other lower court) has inherent jurisdiction over cases, and that includes the standalone motion petitioner filed in the FISC and the review sought in the FISA Court of Review. See *id.* at 379-380 (reversing a district court order based on "inherent power" because the case was outside the district court's subject-matter jurisdiction) (citation omitted).

Petitioner contends (Pet. 11) that "Article III courts routinely exercise jurisdiction over motions seeking access to their own records and proceedings." Even setting aside those courts' general and far broader jurisdictional grants, the cases on which petitioner relies all involved either a motion by a party to the underlying case or the appearance by a third party in a preexisting case over which the court had already properly exercised jurisdiction. See, *e.g.*, *Flynt* v. *Lombardi*, 782 F.3d 963, 967 (8th Cir. 2015) (per curiam) ("[P]ermissive intervention under Rule 24(b) is an appropriate procedural vehicle for non-parties seeking access to judicial records in civil cases."). None involves a broad, standalone record request concerning dozens of cases adjudicated over a nearly 14-year period. And the same is true of the decisions of the Article I bankruptcy courts on which petitioner relies. See *In re Alterra Healthcare Corp.*, 353 B.R. 66, 69 (Bankr. D. Del. 2006) (newspaper moved to intervene); *In re Bennett Funding Grp., Inc.*, 226 B.R. 331, 332 (Bankr. N.D.N.Y. 1998) (request made by newspaper publisher in ongoing bankruptcy case);

*In re Symington*, 209 B.R. 678, 681 (Bankr. D. Md. 1997) (news media representatives moved to intervene).

b. Petitioner's appeal (Pet. 16) to "ancillary jurisdiction" fares no better. Ancillary jurisdiction is a subspecies of supplemental jurisdiction (the other being pendant jurisdiction), a doctrine that allows a federal court to exercise jurisdiction "over some matters (otherwise beyond their competence) that are incidental to other matters properly before them." *Kokkonen*, 511 U.S. at 378. To exercise such supplemental jurisdiction, a court must have an independent basis for jurisdiction over a predicate case before it can have ancillary jurisdiction over interrelated matters. See 13 Charles Alan Wright et al., *Federal Practice and Procedure* § 3523 (3d ed. 2008); see *Peacock* v. *Thomas*, 516 U.S. 349, 355 (1996) ("The court must have jurisdiction over a case or controversy before it may assert jurisdiction over ancillary claims."). Petitioner's FISC filing was not ancillary to a specific matter before the FISC, and its appeal had no apparent relationship to any case that had ever been before the FISA Court of Review. It was instead a "*new* 'miscellaneous' case"—essentially, a new cause of action—that required its own basis for jurisdiction in both the FISC and the FISA Court of Review. *In re Opinions Addressing Bulk Collection*, 957 F.3d at 1357. Because no such basis existed, the FISC correctly dismissed the matter, and the FISA Court of Review correctly dismissed the petition for review of that dismissal by the FISC.

c. Finally, the FISA Court of Review correctly declined to grant petitioner's alternative request for a writ of mandamus to review the FISC dismissal. See Pet. App. 3a. As the FISA Court of Review previously recognized, such an extraordinary writ would not have

been in aid of its appellate jurisdiction. See *In re Opinions Addressing Bulk Collection*, 957 F.3d at 1357-1358. As FISA provides no basis on which petitioner's motion could ever have properly been before the FISA Court of Review, that court had no jurisdiction or potential jurisdiction to aid. See pp. 22-27, *supra*. Moreover, even if such a writ could be considered to be in aid of the FISA Court of Review's appellate jurisdiction, petitioner has not satisfied the other prerequisites for such extraordinary relief. See pp. 17-22, *supra*.

### C. Even If This Court And The Lower Courts Had Jurisdiction, Petitioner's First Amendment Claim Would Not Warrant This Court's Review

Petitioner separately asks this Court to decide the merits of its substantive First Amendment claim in the first instance. But review of that claim by this Court is also clearly unwarranted. Neither of the courts below addressed that issue in these proceedings, as each found that it lacked jurisdiction to do so. 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.") (citation and internal quotation marks omitted). And because those decisions were correct, the First Amendment question is not presented here.

Moreover, even if the Court had jurisdiction to resolve the First Amendment claim, it would not be appropriate to do so in the first instance. As this Court has frequently emphasized, this Court is generally "a court of final review and not first view." *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) (citation omitted). In *Nixon* v. *Fitzgerald*, on which petitioner relies (Pet. 21

n.6), this Court found that "concerns of judicial economy" warranted reaching the merits of the former President's claim of immunity without remanding to the court of appeals, where the claim was foreclosed by binding circuit precedent. 457 U.S. at 743 n.23. By contrast, the FISA Court of Review has not addressed petitioner's First Amendment claim in this or any other matter.

In any event, petitioner's claim lacks merit. In *Globe Newspaper Co.* v. *Superior Ct.*, 457 U.S. 596 (1982), and *Press-Enterprise Co.* v. *Superior Ct.*, 478 U.S. 1 (1986), this Court recognized a First Amendment right of access to criminal trials and certain other related criminal proceedings. See *Press-Enterprise Co.*, 478 U.S. at 7-8. The Court acknowledged that such a right "is not explicitly mentioned in terms in the First Amendment." *Globe Newspaper Co.*, 457 at 604. But it reasoned that the amendment was "broad enough to encompass" such a right "to ensure that th[e] constitutionally protected 'discussion of governmental affairs' is an informed one." *Id.* at 604-605; see *Press-Enterprise Co.*, 478 U.S. at 7 ("The right to an open public trial is a shared right of the accused and the public.").

The Court recognized, however, that not all "governmental processes operate best under public scrutiny." *Press-Enterprise Co.*, 478 U.S. at 8. "A classic example is that 'the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.'" *Id.* at 9 (citation omitted). To determine whether a qualified First Amendment right of public access applies to a particular type of criminal proceeding, the Court has looked to "considerations of experience and logic." *Ibid.* Even assuming that such a right extends beyond criminal proceedings, see *Globe Newspaper Co.*, 457 U.S. at

611 (O'Connor, J., concurring in the judgment) (interpreting the Court's decision not to carry "any implications outside the context of criminal trials"), neither consideration supports extending the First Amendment right of access to the unique and sensitive national security proceedings before the FISC.

The experience test asks "whether the place and process have historically been open to the press and general public." *Press-Enterprise Co.*, 478 U.S. at 8. There is no serious argument that either the place (the FISC) or the process (proceedings on applications made by the Executive Branch for the issuance of court orders approving foreign intelligence authorities) has been subject to a tradition or history of public access. Indeed, Congress created the FISC for the purpose of protecting the secrecy that has always applied to foreign intelligence collection, and it directed the FISC to utilize appropriate secrecy measures. See 50 U.S.C. 1803(c). "[T]he FISC is not a court whose place or process has historically been open to the public." *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 493 (FISA Ct. 2007).

Petitioner argues (Pet. 22) that there is "a long history of federal courts publishing their opinions in cases relating to the legality of national security surveillance." But that describes neither a "place" nor a "process." *Press-Enterprise Co.*, 478 U.S. at 8. The experience test examines the "*type* or *kind* of hearing," *El Vocero* v. *Puerto Rico*, 508 U.S. 147, 150 (1993) (per curiam)—for example, district court proceedings ancillary to grand jury operations, *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 502-503 (D.C. Cir.), cert.

denied, 525 U.S. 820 (1998)[6]—not the subject matter of those proceedings broadly defined. None of petitioner's authorities establishes "a tradition of accessibility to [proceedings] of the type conducted" before the FISC. *Press Enterprise Co.*, 478 U.S. at 10.

There is similarly no substantial argument that logic requires public access to the FISC's proceedings as a matter of constitutional law. As the FISC has explained, its "entire docket relates to the collection of foreign intelligence by the federal government." *In re Motion for Release*, 526 F. Supp. 2d at 487. Its operations are governed "by FISA, by Court rule, and by statutorily mandated security procedures issued by the Chief Justice of the United States," which together "represent a comprehensive scheme for the safeguarding and handling of FISC proceedings and records." *Id.* at 488. Although the Executive Branch is dedicated to providing petitioner and the public as much transparency surrounding the FISC's work as is consistent with its obligation to protect the national security, the "detrimental consequences of broad public access to FISC proceedings or records would greatly outweigh any" benefits. *Id.* at 494. The potential harms from inadvertent disclosures "are real and significant, and, quite frankly, beyond debate." *Ibid.*

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[6] See also *In re Application of New York Times Co. To Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 410-411 (2d Cir. 2009) (no right of access to sealed wiretap applications); *United States* v. *El-Sayegh*, 131 F.3d 158, 160-161 (D.C. Cir. 1997) (no First Amendment right of access to unconsummated plea agreements); *Times Mirror Co.* v. *United States*, 873 F.2d 1210, 1213-1214 (9th Cir. 1989) (no history of public access to search warrant proceedings and materials).

Petitioner's suggestion (Pet. 10) that redactions of classified information would be permissible only if subject to strict scrutiny by a court is also fundamentally incompatible with the Executive Branch's constitutional responsibility to protect the national security. See *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988). As the Court has explained, the Executive Branch's "authority to classify and control access to information bearing on national security * * * flows primarily from th[e] constitutional investment of power in the President." *Ibid.*; see Pet. App. 6a ("[T]he 'crux' of [petitioner's] claim to disclosure '[lay] within the Executive's clear authority to determine what material should remain classified.'") (third set of brackets in original; citation omitted). Contrary to petitioner's contention (Pet. 20), Congress may permissibly allow such classification decisions to remain primarily within the authority of the Executive Branch. See *CIA* v. *Sims*, 471 U.S. 159, 179 (1985) (recognizing that the classification decisions of the responsible Executive Branch official "who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference").

Because neither historical experience nor logic requires public access to proceedings before the FISC concerning collection of foreign intelligence, the "qualified First Amendment right of access" recognized in other contexts does not apply. *Press-Enterprise Co.*, 478 U.S. at 9.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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