No. 20-1499

IN THE
Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Foreign Intelligence Surveillance Court of Review

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate-disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

At bottom, the government contends that *no court* has jurisdiction to decide whether citizens have a First Amendment right of access to the Foreign Intelligence Surveillance Court's opinions. But this Court has jurisdiction over the petition, and the courts below erred in concluding that they lacked jurisdiction to resolve Petitioner's First Amendment claim. By denying any judicial forum for redress of constitutional rights, the government's position would raise a serious constitutional question. The government argues that it might release the judicial opinions at issue either voluntarily or pursuant to FOIA, but those possibilities have never been a substitute for the First Amendment right of access to a court's opinions. Only this Court can ensure that Petitioner's constitutional claim has its day in court.

I. THIS COURT HAS JURISDICTION OVER THE PETITION.

A. Statutory jurisdiction.

The Court has jurisdiction to issue a statutory writ of certiorari under 28 U.S.C. § 1254(1). The government's argument that section 1254(1) applies only to the thirteen circuit courts of appeals is unsupported. None of the provisions cited by the government limits the reach of section 1254(1) to only those courts, or otherwise precludes the existence of other courts of appeals like the FISCR. The government points to 50 U.S.C. § 1803(k), but this provision merely clarifies that the certification procedure, not mentioned elsewhere in the statute, applies to the FISCR. That clarification is not "superfluous," as the

government argues. *See* Opp. 13. It is "simply intended to remove any doubt." *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 226 (2008).

The government's argument that this Court lacks jurisdiction under 50 U.S.C. § 1803(b) is also wrong. Opp. 13. The phrase "on petition of the United States" does not appear in the clause defining the Court's jurisdiction; that clause expressly authorizes the Court to review a "decision" by the FISCR. This text controls, and it reaches the FISCR "decision" that Petitioner appeals from here. The government's contention that the Court only has jurisdiction to review FISCR decisions concerning certain types of applications does not square with the statute's text. The FISCR has jurisdiction over "*any* application," *id.* (emphasis added)—a term with "expansive" sweep, *see* Pet. 28 (quoting *Ali*, 552 U.S. at 219)—and Petitioner's motion for access to opinions issued pursuant to FISA is one such application. Even if Congress may have contemplated in 1978 that the government would generally be petitioning for review of surveillance decisions, the jurisdictional grant in the final clause of section 1803(b) is not limited to petitions by the government, and the text governs. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020).

The Court can resolve any doubt about its statutory jurisdiction by analogizing to the collateral-order doctrine. The Court has adopted a "practical rather than a technical construction" of 28 U.S.C. § 1291 in interpreting the circuit courts' appellate jurisdiction—thus permitting appeals of decisions "which finally determine claims of right separable from, and collateral to, rights asserted in the original action" and which are "too important to be denied review and

too independent of the cause itself to require that appellate consideration be deferred." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). These principles also apply to the collateral motion at issue here.

B. Ancillary jurisdiction.

The Court also has ancillary jurisdiction because the sealed opinions to which Petitioner seeks access were issued in proceedings over which the FISC, FISCR, and this Court clearly have jurisdiction. This Court has jurisdiction to review the surveillance decisions at issue, and it therefore has ancillary jurisdiction to address the intertwined question of whether the opinions should be sealed. Indeed, the Court has ancillary jurisdiction to rule on motions for access to its *own* records. *See Price v. Dunn*, 139 S. Ct. 2764 (2019) (mem.). To exercise that power effectively and manage its proceedings, *see Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379–80 (1994), it also has jurisdiction to review the lower courts' rulings on access to their opinions, which would necessarily be a part of this Court's record.

C. Mandamus and common-law certiorari.

If the jurisdiction above is lacking, the Court has jurisdiction to issue a writ of mandamus or common-law certiorari. Pet. 29–32.

1. Issuance of an extraordinary writ would be in aid of this Court's jurisdiction.

The government claims a writ of mandamus would not be in aid of the Court's jurisdiction. Opp. 15. But as previously explained, it would be in aid of this

Court's jurisdiction: (1) to review a lower court's refusal to exercise its own jurisdiction, (2) to oversee inferior Article III courts, (3) to review claims of access to judicial records, and (4) to review the denial of a claimed right of access to judicial records. Pet. 29–31. The government's arguments to the contrary are unpersuasive.

First, the government argues that this Court may not review the FISC's and FISCR's decisions by mandamus because this Court lacks statutory jurisdiction over the petition. Opp. 15–16. This is backwards. The "gap-filling" function of the writ of common-law certiorari is "to permit the Supreme Court to review cases of which it could not otherwise accept jurisdiction." Prof. Vladeck Amicus Br. 2–3, 9 (quoting Richard Wolfson, *Extraordinary Writs in the Supreme Court Since* Ex Parte Peru, 51 Colum. L. Rev. 977, 984 (1961)); *see In re 620 Church St. Bldg. Corp.*, 299 U.S. 24, 26 (1936).

Second, the government argues that this Court lacks inherent jurisdiction to review a lower court's dismissal for lack of jurisdiction, Opp. 16, but *Nixon* expressly holds otherwise. In *Nixon*, the Court recognized that, unless it possessed authority to review a lower court's dismissal for want of jurisdiction, the lower court's decision "would be insulated entirely from review by this Court." *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982). Indeed, "jurisdictional review is at the core of certiorari's common-law role," Prof. Vladeck Amicus Br. 2, and this Court has issued a common-law writ to review a jurisdictional dismissal after finding that statutory certiorari was unavailable. *See House v. Mayo*, 324 U.S. 42 (1945), *overruled on other grounds by Hohn v. United States*, 524 U.S. 236 (1998).

Third, the government argues that the Court's inherent jurisdiction over claims of access to judicial records would be original, not appellate, and that the All Writs Act does not apply. Opp. 16–17. But Petitioner seeks this Court's review of the FISC's decision refusing to exercise supervisory authority over its own records—an exercise of this Court's appellate, not original, jurisdiction. *Marbury v. Madison*, 5 U.S. 137, 175 (1803) ("It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted.").

Finally, the government argues that FISA stripped this Court of jurisdiction. Opp. 17. But no provision of FISA withdraws jurisdiction, and this Court generally does not recognize withdrawals of jurisdiction by implication. *E.g.*, *Felker v. Turpin*, 518 U.S. 651, 661 (1996) (declining to find withdrawal of jurisdiction "by implication"); *Ex parte Yerger*, 75 U.S. 85, 103 (1869) (same).

In any event, "it is doubtful whether Congress could deprive the Supreme Court of appellate jurisdiction over constitutional cases." Prof. Vladeck Amicus Br. 15–16; *see Hamdan v. Rumsfeld*, 548 U.S. 557, 575 (2006) (rejecting a statutory interpretation that "raises grave questions about Congress's authority to impinge upon this Court's appellate jurisdiction"); *Webster v. Doe*, 486 U.S. 592, 603 (1988); *id.* at 611–12 (Scalia, J., dissenting) (suggesting that the Supreme Court's appellate jurisdiction over constitutional claims cannot be eliminated).

2. Exceptional circumstances warrant the issuance of an extraordinary writ.

Issuance of an extraordinary writ is justified here because otherwise there would be no forum in which Petitioner could assert its constitutional claim. Pet. 31–32; Prof. Vladeck Amicus Br. 14–20. The government suggests other avenues through which Petitioner might gain access to FISC opinions. Opp. 18–20. But none of these alternatives provides for judicial consideration of Petitioner's First Amendment claim.

The government's own declassification review process is no substitute for judicial review of a constitutional claim. Though the government invokes the declassification review process in the USA FREEDOM Act, Opp. 19, it also states that the process would not apply to the opinions at issue here, Opp. 18. While the government says it is re-reviewing previously withheld opinions anyway, voluntary review by the executive branch is not a substitute for judicial review. *See* Pet. 26 n.7.

Nor does the Freedom of Information Act ("FOIA") provide an adequate substitute. FOIA suits are not a vehicle for asserting a *constitutional* right of access at all. And in FOIA cases, unlike First Amendment access cases, courts defer to agencies' withholding decisions so long as those decisions "appear[] 'logical' or 'plausible.'" *Compare Wolf v. CIA*, 473 F.3d 370, 375 (2007); *Elec. Frontier Found. v. DOJ*, 376 F. Supp. 3d 1023, 1033, 1035 (N.D. Cal. 2019), *with Press–Enterprise Co. v. Superior Ct.*, 464 U.S. 501, 509–13 (1984) (in First Amendment access case, government bears burden to show substantial probability of harm to a compelling interest, narrow tailoring, and absence of any alternative means).

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

Finally, "adequate relief cannot be obtained in any other form or from any other court." S. Ct. Rule 20.1; *see* Pet. 11–21, 32. This factor is intended to prevent litigants from circumventing appellate review. *See* Prof. Vladeck Amicus Br. 20–21; *cf. Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380–81 (2004) (This condition is "designed to ensure that the writ will not be used as a substitute for the regular appeals process." (citations omitted)). That concern is not present because Petitioner has already sought FISCR review.

Even if the Court interprets this factor more broadly, Petitioner cannot otherwise obtain the relief it seeks here. While the government asserts that "in some circumstances" Petitioner may file an access motion in connection with an individual matter before the FISC, Opp. 22, that route is illusory in the vast majority of the FISC's proceedings because their very existence is secret. Moreover, in the government's view, that route is wholly unavailable with respect to the opinions at issue here, because the underlying proceedings are not "ongoing." Opp. 22.

In short, this Court has several bases to exercise jurisdiction. And to conclude that the Court lacks jurisdiction would raise serious constitutional questions, by precluding any review of a constitutional claim.

II. THE FISC AND FISCR WERE WRONG TO HOLD THAT THEY LACK POWER TO CONSIDER MOTIONS FOR ACCESS TO THEIR OWN OPINIONS.

A. The FISC's ruling was incorrect.

The government concedes that the FISC *could* exercise jurisdiction over a motion for access "in an individual matter" before it, Opp. 22, but insists that the FISC lacks jurisdiction because Petitioner filed a "miscellaneous" motion related to multiple proceedings. Opp. 26. But if the FISC has jurisdiction to consider motions for access to its opinions, there is no reason it can exercise that authority in only a single proceeding, and not, as here, in multiple proceedings. Pet. 11–21.

It does not matter that the underlying proceedings may have ended, Opp. 22, because the FISC's authority over its records is ongoing. Article III courts regularly entertain motions to unseal records after a proceeding has ended. *See, e.g.*, *Doe v. Public Citizen*, 749 F.3d 246, 252–53 (4th Cir. 2014). When a third party seeks access to court records, it "do[es] not ask the district court to exercise jurisdiction over an additional claim on the merits, but rather to exercise a power that it already has, namely the power to modify a previously entered confidentiality order." *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1047 (D.C. Cir. 1998). "It is well established that a federal court may consider collateral issues after an action is no longer pending." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395–96 (1990) (describing exercises of ancillary jurisdiction).

The government proposes an unprecedented distinction between a court's inherent power to control its opinions and its jurisdiction to address motions for

access to those opinions. Opp. 24. The FISC itself has repeatedly held that there is no such distinction. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 486–87 (FISC 2007*); In re Motion for Consent to Disclosure of Court Records*, No. Misc. 13-01 (FISC June 12, 2013), https://perma.cc/F27S-J7KN. Indeed, in an analogous context, "courts and commentators seem unanimous in finding such an inherent power to modify discovery-related protective orders, even after judgment, when circumstances justify." *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 782 (1st Cir. 1988) (affirming district court's exercise of jurisdiction over third party's motion); *Hagestad v. Tragesser*, 49 F.3d 1430, 1433–34 (9th Cir. 1995) (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978)).

The government argues that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction," Opp. 24, but Congress created jurisdiction over motions for access to FISC records when it established the FISC as an Article III court, expressly recognized the FISC's "inherent authority" in FISA, 50 U.S.C. § 1803(h), and 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 itself has relied on this grant to authorize motions for publication of its opinions. *See* FISC R. P. 62(a) (permitting a party to move for publication of FISC opinion).

Finally, the government all but ignores Petitioner's contention—and the FISC's prior conclusion—that the FISC has ancillary jurisdiction over motions for access to its records. *See Kokkonen*, 511 U.S. at 379–80; Pet. App. 93a–102a. The government

objects that Petitioner's motion was "not ancillary" because it was docketed as a miscellaneous matter. Opp. 26. But Petitioner's motion is in fact ancillary to each of the cases in which the FISC issued substantive opinions. *See In re Application of Leopold to Unseal Certain Elec. Surveillance Applications & Ords.*, 964 F.3d 1121 (D.C. Cir. 2020) (reversing denial of motion to unseal surveillance orders in hundreds of closed investigations not specifically identified by the motion). The fact that Petitioner filed a single motion referencing a group of opinions, rather than separate motions in each proceeding, makes no difference.

B. The FISCR's ruling was incorrect.

The government suggests that the FISCR lacks the ability to review the FISC's rulings on motions for access to its records. Opp. 23 n.5. Even if the government were correct, that would not deprive *this* Court of appellate jurisdiction over the FISC's ruling. *See* Part I.B–C, *supra.* In any event, the government's claim is incorrect.

First, the FISCR has appellate jurisdiction over Petitioner's "application" under section 1803(b) for the reasons above. *See* Part I.A, *supra*.

Second, like the FISC, the FISCR has both inherent and ancillary jurisdiction to decide claims for access to its *own* records. *See* Part II.A, *supra.* And as a supervisory court, the FISCR also has ancillary jurisdiction to review the FISC's ruling regarding the FISC's records. Federal courts may exercise ancillary jurisdiction when the exercise of jurisdiction "enable[s] a court to function successfully." *Kokkonen*, 511 U.S. at 379–80. To enforce compliance with its statutes and rules concerning information security, *see, e.g.*, 50 U.S.C. § 1803(c), (g)(1), the FISCR must be

able to control its own docket and papers, *and* supervise the FISC's exercise of the same power—both to ensure consistency and because, in practice, the record in any given FISC proceeding will invariably overlap with the record in any appeal to the FISCR.

Third, the FISCR also had authority to review the FISC's decision via writ of mandamus. Congress has authorized the FISCR to "take such actions . . . as are reasonably necessary to administer [its] responsibilities under this chapter," 50 U.S.C. § 1803(g)(1), including managing access to classified information, *see id.* § 1803(c). The FISCR therefore has power to review FISC rulings on motions for access to classified FISC records. And as a supervisory Article III court, the FISCR has authority to ensure that the FISC properly adjudicates cases within its remit. *See Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943).

III. THERE IS A FIRST AMENDMENT RIGHT OF ACCESS TO SIGNIFICANT FISC OPINIONS.

On the merits of Petitioner's First Amendment claim, the government contends that Petitioner does not point to a "place" or "process" that shows an "experience" of access to these opinions. Opp. 29. But the proper focus of the access doctrine's "experience" prong is the type of court proceeding or record to which a party seeks access, not the past practice of the specific forum. The latter focus would be circular. *See El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 150 (1993) (First Amendment right of access looks to "the experience in that *type* or *kind* of hearing throughout the United States"); *In re Bos. Herald, Inc.*, 321 F.3d 174, 184 (1st Cir. 2003) (experience test includes examination of "analogous proceedings and documents"); *see also* Pet. 23–27 (explaining the logic

of ensuring public access to judicial opinions, including far-reaching surveillance rulings by the FISC).

The government also argues that this Court should not reach the merits "in the first instance" because there is no FISCR precedent on the First Amendment question. Opp. 27. But in *Nixon*, this Court explained that, while the existence of controlling appellate precedent might *bolster* the appropriateness of this Court's review, the Court could engage in that review so long as a petition presented "a pure issue of law." 457 U.S. at 743 n.23. The petition here presents a pure issue of law, and judicial economy would not be served by a lengthy remand after five years of litigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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