No. 20-1499

In the Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION,
Petitioner,

v.

UNITED STATES,
Respondent.

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

BRIEF OF *AMICI CURIAE* THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AND AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

The Brennan Center for Justice at NYU School of Law ("Brennan Center") is a nonprofit, non-partisan think tank and public interest law institute that seeks to improve systems of democracy and justice.[2] The Center's Liberty and National Security ("LNS") Program uses innovative policy recommendations, litigation, and public advocacy to advance effective national security and law enforcement policies that respect the rule of law and constitutional values. The LNS Program's interest in this case stems from its extensive research and advocacy on the subjects of foreign intelligence surveillance and secret law.

Americans for Prosperity Foundation (AFPF) is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas include the separation of powers, government transparency, and constitutionally limited government. As part of this mission, AFPF appears as *amicus curiae* before

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[1] Counsel of record for all parties received notice of *amici curiae*'s intent to file this brief at least 10 days prior to the due date, and all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The Brennan Center for Justice is affiliated with New York University School of Law, but no part of this brief purports to represent the school's institutional views.

state and federal courts. AFPF has a particular interest in this case because of its consistent body of work promoting government transparency and protecting the privacy interests of American citizens and businesses.

SUMMARY OF ARGUMENT

"All actions affecting the rights of other human beings are wrong," Immanuel Kant wrote, "if their maxim is not compatible with their being made public." Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, in KANT: POLITICAL WRITINGS 126 (Hans Reiss ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1795). For centuries, Kant's argument for the public availability of the law has served as a cornerstone of democratic governance. Openness and transparency are embedded in U.S. governmental institutions, in which secret law has no place.

Judicial opinions are no exception to this principle, even in cases implicating national security or other sensitive matters. *See Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (Guantánamo military commissions); *United States v. U.S. Dist. Ct.*, 407 U.S. 297 (1972) (domestic security surveillance); *see also In re Leopold to Unseal Certain Elec. Surveillance Applications & Orders*, 964 F.3d 1121, 1127 (D.C. Cir. 2020) (Garland, J.) (granting access to surveillance applications as longstanding access to judicial records "reflects the antipathy of a democratic country to the notion of 'secret law'"). But for too long, significant opinions of the Foreign Intelligence Surveillance

Court ("FISC"), an Article III court, have been shrouded in secrecy.

Secret law of all types causes several concrete harms that are antithetical to democratic norms. Secret law prevents the public from understanding and shaping the law and thus inhibits democratic accountability; disables checks on governmental abuses of the law; and weakens the quality of the law itself.

An episode from the FISC's own history demonstrates these harms. For several years following 9/11, the FISC authorized bulk collection of Americans' telephone records (the "bulk collection program") by the National Security Agency ("NSA"). However, the fact of this authorization—as well as the legal reasoning underpinning it—long remained secret to much of Congress as well as the public. Only through former government contractor Edward Snowden's disclosures did the FISC-approved bulk collection program come to light. And only after those disclosures did the FISC issue an opinion publicly articulating its legal justification for the program.

This forced transparency permitted other courts to review and reject the FISC's reasoning and to establish that the NSA's program violated the law. It also allowed governmental oversight bodies to assess the program's value. And it generated significant public outcry and pressure on Congress, which eventually led to the enactment of the 2015 USA FREEDOM Act—a sweeping reform law that terminated the bulk collection program; narrowed other collection authorities; directed the appointment of *amici curiae* for some FISC proceedings; and

required the executive branch to review FISC opinions for declassification in certain, albeit limited, circumstances.

But this success story for governmental oversight was not assured. Instead, it hinged on a fluke event—Snowden's disclosures—rather than internal democratic safeguards and transparency mechanisms within or outside the FISC. Nor did the 2015 USA FREEDOM Act reforms achieve full transparency for significant FISC opinions. Declassification of FISC opinions remains within executive discretion and, as recent history has shown, has occurred slowly, with many significant opinions—like those sought by Petitioner in this case—still shielded from public view.

It is paramount for democratic accountability and the rule of law that the story of the bulk collection program not be repeated. Accordingly, there must be a forum for the public to assert its right to access to the court's significant legal opinions, while still preserving the FISC's ability—shared by all Article III courts—to redact information where truly necessary.

For the reasons that follow, this Court should grant *certiorari*.

ARGUMENT

I. SECRET LAW, INCLUDING FISC OPINIONS, HARMS DEMOCRATIC ACCOUNTABILITY AND SUBVERTS THE RULE OF LAW.

A. The FISC's non-public opinions are secret law.

Secret law refers to any type of law that has been withheld from the public. "Law," in turn, encompasses any rule or interpretation that sets binding standards for future conduct. *See generally* ELIZABETH GOITEIN, THE NEW ERA OF SECRET LAW, BRENNAN CTR. FOR JUSTICE 8-11 (2016), https://www.brennancenter.org/sites/default/files/2019-08/Report_The_New_Era_of_Secret_Law_0.pdf; Dakota S. Rudesill, *Coming to Terms with Secret Law*, 7 HARV. NAT'L SEC. J. 241, 249 (2015). In the U.S. system of government, "law" refers not only to congressional legislation, administrative regulations, and executive orders, but also judicial decisions and interpretations that bind the parties and may also acquire precedential status. *See* Mortimer N. S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 AM. J. COMP. L. 67, 72 (2006).

Non-public opinions of the FISC, which themselves result from *ex parte, in camera* proceedings, constitute secret law. Unlike most Article III court opinions—even those involving national security or classified information, *see infra* Part III.B—they are not automatically disclosed to the public. Yet they bind the government in its actions, including actions that very much affect the public's

rights. And they serve as precedent both for the FISC itself as well as the government. For example, the FISC has cited its own opinions, even when those decisions remain classified.[3] As does the executive.[4]

B. Secret law is anathema to democratic principles and causes concrete harms.

Our democratic system rests on foundational commitments to legal transparency. *See, e.g.*, U.S. Const. art. I, § 5, cl. 3 (generally requiring publication of congressional proceedings); U.S. Const. art. I, § 9, cl. 7 (requiring publication of receipts and expenditures of public money); 3 Stat. 376 (1817) (requiring all Supreme Court decisions to be reported within six months of issuance); 44 U.S.C. § 1505(a) (requiring disclosure of almost all presidential proclamations and executive orders); 5 U.S.C. § 552(a) (requiring disclosure of agency rules and final opinions made in the adjudication of cases); *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 772 n.20 (1989) (one objective of FOIA is the "elimination of 'secret law'") (citation omitted). That is because secret law, in addition to being philosophically "repugnant," causes grave and

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[3] *See, e.g.*, *In re Directives [REDACTED] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004 (FISCR 2008); Mem. Op. and Primary Order, *In re Application of FBI for an Order Requiring Production of Tangible Things from [REDACTED]*, No. BR 13-158, at *3-4 (FISC Oct. 11, 2013), https://www.clearinghouse.net/chDocs/public/NS-DC-0018-0001.pdf; Mem. Op., *[REDACTED]*, 2011 WL 10945618, at *6 (FISC Oct. 3, 2011).

[4] *See, e.g.*, Defendants' Opp. to Mot. for Prelim. Inj., 2013 WL 5744828, at *16, *ACLU v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013) (favorably citing the FISC's interpretation of "relevance").

concrete harms to democratic accountability and the rule of law. *Torres v. INS*, 144 F.3d 472, 474 (7th Cir. 1998) (Posner, C.J.).

The ways in which secret law undermines the functioning of our democracy are manifold. *First*, our republican form of government, in which people exercise self-government through their elected representatives, depends on public knowledge of the laws as passed by Congress and interpreted by the courts and executive branch. *See* Letter from James Madison to W.T. Barry, Aug. 4, 1822, in THE WRITINGS OF JAMES MADISON (Gaillard Hunt ed.), https://bit.ly/3wzNR8y ("[A] people who mean to be their own Governors, must arm themselves with the power which knowledge gives."); *see also Secret Law and the Threat to Democratic and Accountable Government: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Sen. Feingold) ("It is a basic tenet of democracy that the people have a right to know the law."). If members of the public do not know the law, they cannot debate it or seek to change it by petitioning their representatives or voting them out of office. Michael A. Sall, *Classified Opinions: Habeas at Guantánamo and the Creation of Secret Law*, 101 GEO. L.J. 1147, 1166 (2013) ("It is considerably more difficult for the public to convince Congress to change a law to which neither the public nor Congress has open access."); Rudesill, *supra*, at 323 ("Transparency and notice regarding the law allow the people to exercise law/policy choice[.]"). The importance of public access to the law to ensure democratic accountability does not evanesce when national security matters are involved, even if the

government must narrowly redact sensitive factual information. Goitein, *supra*, at 25.

Second, public access to the law is vital to ensure fidelity to the rule of law. Absent public access, there can be no legal challenges to laws or legal interpretations that violate constitutional or statutory rights; nor can there be legal challenges in cases where the government exceeds limitations contained in those secret laws or interpretations. Indeed, secret law makes such violations and overreach more likely, as the government has more leeway to act with impunity. *See* Claire Grant, *Secret Laws*, 25 RATIO JURIS 301, 314 (2012) ("Ignorance of law . . . aggravates the risk of oppression by means of law."). It is for this reason in part that the "public's right of access to judicial records is a fundamental element of the rule of law." *In re Leopold*, 964 F.3d at 1123.

Third, secret law is more likely to be bad law. Because secret law is often developed in an echo chamber and is insulated from broader scrutiny, it is susceptible to poorly-reasoned legal interpretations that enable government abuses.[5] Its secret nature

[5] For instance, consider another example of secret law. After 9/11, the Office of Legal Counsel ("OLC") prepared several secret legal memoranda that bound the executive branch and gave "legal blessing" for the government to torture and abuse suspected members of the Al Qaeda and the Taliban. Rudesill, *supra*, at 294; *see also* Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST (June 8, 2004), https://wapo.st/3yjx2As. Although these memoranda were not judicial opinions, they had an analogous binding and precedential effect on the executive branch. Because these memoranda were kept among a small group, others could not challenge errors in their legal reasoning, nor could other

also forestalls normal error-correcting mechanisms, such as multiple layers of appeal and testing by other courts. Thus, rather than being remedied, weak legal reasoning becomes perversely self-replicating. Goitein, *supra*, at 20-22.

These risks inhere in the structure and operation of the FISC. Other courts' decisions may go through three or more layers of review; involve public precedent; and solicit the perspectives of not only the litigants but also often numerous *amici*. By contrast, for much of the FISC's history, and during the time period of the opinions sought by the Petitioner, the court only heard from a single party: the government. If the government prevailed before the FISC, as it usually did, the case was over. If it did not, the government could appeal to the three-judge Foreign

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governmental branches exercise checks and balances. *See* David E. Pozen, *Deep Secrecy*, 62 STAN L. REV. 257, 336 (2010) (observing that "informational pathways . . . could have subjected deep secrets to additional forms of scrutiny and revision"); Rudesill, *supra*, at 295 ("Secrecy allowed weak legal work to go unchallenged during drafting and after finalization.").

When the new head of OLC was appointed in 2003, he found the memoranda to be "tendentious, overly broad and legally flawed." *See* Jeffrey Rosen, *Conscience of a Conservative*, N.Y. TIMES MAG. (Sept. 9, 2007), https://nyti.ms/34g1Tjy; *see also* Peter M. Shane, *Executive Branch Self-Policing in Times of Crisis: The Challenges for Conscientious Legal Analysis*, 5 J. NAT'L SEC. L. & POL'Y 507, 510-20 (2012) (describing the "breakdown" of government lawyering in OLC's legal analyses). Although the new head planned to withdraw and replace the memoranda, these plans were sidelined by other priorities. It was not until after the foundational memorandum was leaked to the media, creating a massive public backlash, that the opinion was withdrawn. *See* Rosen, *supra*.

Intelligence Surveillance Court of Review (FISCR), which was a rare occurrence. Goitein, *supra*, at 22. And even today, after the 2015 reforms, *see infra* Part II, limitations remain with respect to the efficacy of the FISC's *amicus* program. *See* Faiza Patel & Raya Koreh, *Improve FISA on Civil Liberties by Strengthening Amici*, Just Security (Feb. 26, 2020), https://www.justsecurity.org/68825/improve-fisa-on-civil-liberties-by-strengthening-amici.

II. THE FISC'S FLAWED AUTHORIZATION OF THE NSA'S BULK COLLECTION PROGRAM EXEMPLIFIES THE HARMS OF SECRET LAW.

To understand the harms of secret law in general and secret FISC rulings in particular, we need only examine the FISC's authorization of the NSA's bulk collection of domestic telephone call records under Section 215 of the USA PATRIOT Act. 50 U.S.C. § 1861 (as amended by the USA PATRIOT ACT, Pub. L. No. 107-56, 115 Stat. 272 (2001)). Beginning in 2006, the FISC authorized and exercised jurisdiction over the program. Because it did so in secret, however, it took Snowden's disclosures in 2013 to reveal that the FISC had interpreted the law in a way that was legally flawed and that violated the public's expectations and wishes. As a direct result of this unexpected transparency, other courts were able to reject the FISC's legal reasoning, and the public was able to analyze and debate the bulk collection program. This ultimately led to the program's termination—and the enactment of wide-reaching surveillance reform—in 2015. USA FREEDOM Act, 129 Stat. 268.

A. Until Edward Snowden's disclosures, Section 215 was publicly understood to involve individualized, case-by-case approval of "business records" collection, but in fact was secretly interpreted by the FISC to justify broad, programmatic surveillance.

Established by FISA in 1978, the FISC possessed a narrow mandate—"to hear applications for and grant orders approving electronic surveillance" of suspected foreign agents. 50 U.S.C. § 1803(a)(1). This approval occurred on an individualized, case-by-case basis. But it is now known that in the years following 9/11, the FISC secretly adopted a "programmatic role" in authorizing and supervising government surveillance—including the NSA's bulk collection program under Section 215. Meenakshi Krishnan, *The Foreign Intelligence Surveillance Court and the Petition Clause: Rethinking the First Amendment Right of Access*, 130 YALE L.J. F. 723, 731 (2021).

Section 215 of the USA PATRIOT Act amended the so-called "business records" provision of FISA. Notwithstanding its name, this provision, as amended, permits the government to apply for an order from the FISC to compel the production of "any tangible thing." 50 U.S.C. § 1861(a)(1). The FISC must grant the order if the government can show "there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation . . . to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities." *Id.* § 1861 (b)(2)(B).

The authority provided by Section 215 is a sweeping one, and the legal standard of "relevance" is not particularly demanding. Nonetheless, the requirement that the FISC determine that a particular "thing" is "relevant" to "an authorized investigation" appeared, on its face, to provide the safeguard of judicial approval on a case-by-case basis. ELIZABETH GOITEIN & FAIZA PATEL, BRENNAN CTR. FOR JUSTICE, WHAT WENT WRONG WITH THE FISA COURT, 21 (2015) https://www.brennancenter.org/our-work/research-reports/what-went-wrong-fisa-court. With this prevailing understanding of Section 215 in place, Congress reauthorized the authority several times.[6]

In June 2013, however, Snowden's disclosures revealed that the FISC, beginning in 2006, had authorized NSA bulk collection under Section 215.[7] *In re Application of FBI for an Order Requiring the Production Of Tangible Things from [REDACTED]*, Order No. BR 0605 1, 2 (FISC May 24, 2006), https://www.dni.gov/files/documents/section/pub_May%2024%202006%20Order%20from%20FISC.pdf.

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[6] Pub. L. No. 109-177, 120 Stat. 192 (2006); Act of Feb. 27, 2010, Pub. L. No. 111-141, 124 Stat. 37 (2010) (codified as amended at 50 U.S.C. §§ 1805, 1861-1862); PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-14, 125 Stat. 216 (2011) (codified as amended at 50 U.S.C. §§ 1805, 1861-1862).

[7] *See* Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN (June 6, 2013), https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order; Dan Roberts & Spencer Ackerman, *Senator Feinstein: NSA Phone Call Data Collection in Place 'Since 2006'*, GUARDIAN (June 6, 2013), https://www.theguardian.com/world/2013/jun/06/court-order-verizon-call-data-dianne-feinstein.

Under the FISC orders, the NSA could collect Americans' telephone records indiscriminately and in bulk. These records specified when calls were made or received, how long the calls lasted, and the phone numbers of those placing and receiving the calls—information that could be assembled to create a highly revealing mosaic of a person's affiliations and activities. *See ACLU v. Clapper*, 785 F.3d 787, 824 (2d Cir. 2015) (the scope of metadata collected "permit[s] something akin to [] 24-hour surveillance"); *see also* Goitein & Patel, *supra*, at 21.

Seven years after the FISC first exercised jurisdiction over the bulk collection program, and only after Snowden's revelations, the court issued its first judicial opinion explaining its legal reasoning behind its prior approval orders. *See In re Application of FBI for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 13-109, 2013 WL 5741573 (FISC Aug. 29, 2013). The FISC acknowledged that most Americans do not have any links to international terrorism. It nonetheless concluded that *all* Americans' phone records could be considered relevant to authorized international terrorism investigations because relevant records were likely buried within them. *Id.* at *6-7; *see* Goitein & Patel, *supra*, at 22 ("[The FISC] concluded, in short, that because collecting irrelevant data was necessary to identify relevant data, the irrelevant data could thereby be deemed relevant.").

This reading of Section 215 was, to say the least, counterintuitive. Few members of the public would have conceived of their own phone records as relevant to any counterterrorism investigation. As a result of

this discrepancy between the common understanding of the public law and the FISC's secret interpretation, the public was not merely in the dark about what the government was and was not allowed to do; it was affirmatively misled. *See* Goitein, *supra*, at 58.

B. The public, judicial, and legislative response to the FISC's authorization of the bulk collection program reveals how open law promotes the rule of law and democratic accountability.

After the NSA's bulk collection program and its legal underpinnings came to light, so too did the program's legal deficiencies, negligible intelligence yield, and unpopularity. Disclosure served the rule of law by allowing other courts to reject the FISC's flawed legal reasoning. It served democratic accountability by enabling a public debate over the NSA's activities, leading to the passage of legislation that ended bulk collection and revamped the operations of the FISC.

1. Courts and government oversight officials categorically rejected the FISC's legal authorization of the bulk collection program.

After the FISC publicly set forth the legal underpinnings of its approval of the bulk collection program, other courts and government oversight officials probed—and ultimately discarded—the court's analysis, finding that bulk collection violated the law.

Several courts found the FISC's legal reasoning deeply flawed and repudiated it. The Second Circuit, for example, determined that the FISC-approved government interpretation of an "expansive concept of 'relevance'" permitting mass collection of telephone metadata was "unprecedented and unwarranted." *Clapper*, 785 F.3d at 812; *see also Klayman v. Obama*, 957 F. Supp. 2d 1, 42 (D.D.C. 2013) (finding it significantly likely that the bulk collection program violated the Fourth Amendment given its "'indiscriminate' and 'arbitrary invasion'" of privacy), *rev'd on standing grounds*, 800 F.3d 559 (D.C. Cir. 2015). More recently, the Ninth Circuit similarly found that the bulk collection program exceeded the government's statutory authority and may have also violated the Fourth Amendment. *United States v. Moalin*, 973 F.3d 977, 984 (9th Cir. 2020).

Courts also rebuffed the argument that the legislature had ratified the FISC's interpretation of Section 215, noting the secret nature of FISC opinions during the periods when Section 215 was reauthorized. *Clapper*, 785 F.3d at 820-21 ("Congress cannot reasonably be said to have ratified a program of which many members of Congress—and all members of the public—were not aware . . . There was certainly no opportunity for broad discussion in the Congress or among the public of whether the [FISC's] interpretation of § 215 was correct.").

The Privacy and Civil Liberties Oversight Board ("PCLOB"), a presidentially appointed five-member board that assesses the civil liberties implications of counterterrorism policies, also undertook a review of the program. It concluded that the NSA's bulk

collection of phone records significantly risked privacy, individual liberties, and expressive and associational rights, and that Section 215 did not provide an "adequate legal basis" for approval of the program. Privacy and Civil Liberties Oversight Bd., Report on the Telephone Records Program Conducted Under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court 10-12 (2014), https://fas.org/irp/offdocs/pclob-215.pdf [hereinafter "PCLOB Report"].

2. The public, once aware of the bulk collection program and able to assess its costs and benefits, called for its termination, leading to the passage of the USA FREEDOM Act.

The disclosure of the NSA's bulk collection program, and the independent reviews of the program that followed, allowed members of the public to develop an informed opinion about whether the law had sufficiently protected their rights and their security. This led to calls for Congress to amend the law, which in turn yielded the most significant reform of surveillance authorities in nearly forty years.

In response to Snowden's disclosures, independent government entities undertook an analysis of the program's costs and benefits, which revealed that the program was ineffective as well as unlawful. In its review of the bulk collection program, the PCLOB observed that the bulk collection program did not make a "concrete difference" in *any* terrorism investigation, and what little value it had merely duplicated FBI efforts. PCLOB Report, *supra* at 11.

President Obama's separately-commissioned review group similarly found that the program yielded no unique benefit. President's Review Grp. on Intelligence and Communications Technologies, Liberty and Security in a Changing World 104 (2013), https://obamawhitehouse.archives.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf ("The information [gathered from bulk collection] was not essential to preventing attacks and could readily have been obtained in a timely manner using conventional section 215 orders.").

Civil society swiftly mobilized and clamored for an end to the NSA's bulk collection program. *See, e.g.*, Rebecca Bowe, *NSA Surveillance: Protesters Stage Restore the Fourth Rallies Across US*, GUARDIAN (July 5, 2013), https://www.theguardian.com/world/2013/jul/04/restore-the-fourth-protesters-nsa-surveillance; Zeke J. Miller, *Privacy and Digital Groups Call on Congress to End NSA Surveillance Programs*, TIME (June 11, 2013), https://swampland.time.com/2013/06/11/privacy-and-digital-groups-call-on-congress-to-end-nsa-surveillance-programs. The editorial boards of major news outlets around the country called for the program's termination. *See, e.g.,* Editorial, *Bad Times for Big Brother*, N.Y. TIMES (Dec. 21, 2013), https://nyti.ms/3yuqajQ; Editorial, *Mr. President, Put These Curbs on the NSA*, L.A. TIMES (Dec. 20, 2013), https://lat.ms/3uhuyQ6. Opinion polls showed that, for the first time since 9/11, more Americans were worried that the government had gone too far in sacrificing liberties for counterterrorism goals than that the government's counterterrorism policies did

not go far enough. *See* Glenn Greenwald, *Major Opinion Shifts, in the US and Congress, on NSA Surveillance and Privacy*, GUARDIAN (July 29, 2013), https://www.theguardian.com/commentisfree/2013/jul/29/poll-nsa-surveillance-privacy-pew.

The widespread calls for reform eventually culminated in the passage of the 2015 USA FREEDOM Act, which is generally acknowledged to be the most significant reform of surveillance authorities since FISA was enacted in 1978. *See, e.g.*, Peter Swire, *The USA FREEDOM Act, the President's Review Group and the Biggest Intelligence Reform in 40 Years*, IAPP (June 8, 2015), https://iapp.org/news/a/the-usa-freedom-act-the-presidents-review-group-and-the-biggest-intelligence-reform-in-40-years/. Notably, civil liberties advocates had long sought legislative reform of Section 215 based on concerns about its potential breadth. *See, e.g.*, Kevin Bankston, *Tell Your Representative to Reject the PATRIOT Act Sneak Attack Before Tomorrow's Vote*, ELEC. FRONTIER FOUND. (Feb. 7, 2011), https://www.eff.org/deeplinks/2011/02/tell-your-representative-reject-patriot-act-sneak-0; Letter from the ACLU to the U.S. House of Representatives (Feb. 7, 2011), https://www.aclu.org/letter/aclu-letter-house-regarding-reauthorization-patriot-act-february-2011. Without information about how Section 215 had actually been interpreted and applied, however, these efforts had foundered. *See, e.g.*, Letter from Senators Ron Wyden and Mark Udall to Attorney General Eric Holder (Mar. 15, 2012) https://fas.org/sgp/news/2012/10/pclob-let.pdf

(referencing civil society's unsuccessful efforts to obtain information about Section 215).

The USA FREEDOM Act disavowed the FISC's interpretation of Section 215 and ended the NSA's bulk collection of phone records. *See* 161 Cong. Rec. S3642-01, S3651 (statement of Sen. Merkley) ("There should be no secret spying on Americans and no secret law in a democracy."); Press Release, Office of Sen. Mike Lee, USA Freedom Act and the Balance of Security and Privacy (R. Utah) (Dec. 18, 2015) ("Under the USA Freedom Act, the NSA is no longer allowed to vacuum up all that metadata, a practice that violates the Fourth Amendment rights of all Americans, according to a federal court's recent ruling."). It also prohibited any other type of bulk collection under Section 215 by requiring any collection to be tied to the use of a "specific selection term." *See* 50 U.S.C. § 1861(b)(2)(A).

In addition to ending bulk collection under Section 215, *Moalin*, 973 F.3d at 989 (quoting Pub. L. No. 114-23, 129 Stat. 268, codified at 50 U.S.C. § 1861*)*, the Act also rethought foreign intelligence law more broadly. It banned bulk collection under other intelligence-gathering authorities, like the pen register and trap-and-trace provisions found elsewhere in FISA, and National Security Letters (NSLs).[8] Additionally, it required the government to make public certain statistical information about its use of surveillance authorities, so that the public

[8] *See* Caroline Lynch & Lara Flint, *The USA FREEDOM Act Turns Two*, Lawfare (June 2, 2017), https://www.lawfareblog.com/usa-freedom-act-turns-two.

would be in a better position to assess the authorities' scope and impact. *See* 50 U.S.C. § 1873(b).

The Act also identified and responded to the structural flaws of the FISC that had enabled approval of the bulk collection program. For example, the Act directed the FISC to appoint several individuals as *amici curiae* who would be available to present arguments to the court, and it created a presumption that the court should appoint *amici* in certain circumstances.[9] In addition, the Act required that the Director of National Intelligence ("DNI"), in consultation with the Attorney General, conduct declassification reviews of "each decision, order, or opinion" issued by the FISC "that includes a significant construction or interpretation of any provision of law . . .and consistent with that review, make publicly available to the greatest extent practicable each such decision, order, or opinion." 50 U.S.C. § 1872(a)-(b).

III. INTERVENTION BY THIS COURT IS NECESSARY, AND THE REMEDY SOUGHT IS APPROPRIATE.

In the case of the NSA bulk collection program, public access to FISC opinions served to vindicate the rule of law and the will of the electorate—but only after several years during which the FISC's secrecy shielded the government's program from more

[9] The FISC must appoint an amicus in any case that in the Court's view "presents a novel or significant interpretation of law," unless the court issues a finding that the appointment is not appropriate. The statute does not articulate the grounds for doing so. 50 U.S.C. § 1803(i)(2)(A).

rigorous legal scrutiny and political blowback. Intervention by this Court is necessary to ensure that other secret rulings of the FISC do not similarly delay or prevent democratic accountability. Moreover, the remedy sought by Petitioner—a recognition of the FISC's authority to disclose its own opinions, redacting them where necessary—is supported by the practice of other Article III courts that handle matters bearing on national security.

A. This Court's intervention is required to prevent a repeat of the NSA bulk collection story.

The USA FREEDOM Act's declassification review requirement, while a crucial step forward, does not mandate disclosure of the specific FISC opinions sought by Petitioner, nor does it ensure sufficient transparency for future FISC opinions. For several reasons, ensuring adequate public access to FISC opinions will require this Court to exercise jurisdiction over Petitioner's claims.

First, the executive branch views the USA FREEDOM Act's declassification requirement as applying only to decisions issued after the law's enactment. *See, e.g.*, Gov't Mem. at 2, *Elec. Frontier Found. v. DOJ*, No. 14-cv-00760 (D.D.C. Feb. 5, 2016), ECF No. 28. On that basis alone, the opinions sought by Petitioner are still kept from public view.

Second, the law's declassification review requirement is subject to a national security waiver. The DNI, in consultation with the Attorney General, may waive the requirement upon a unilateral determination that a waiver is "necessary to protect

the national security of the United States or properly classified intelligence sources or methods," so long as the government issues a publicly available unclassified statement on the matter. 50 U.S.C. § 1872(c).

Third, under the USA FREEDOM Act, the executive branch, not the FISC, conducts the declassification review, and it is not bound by the First Amendment standard for public access claims to judicial records. *See id.* § 1872. Among other ramifications, the executive branch's control of the FISC opinion declassification process allows it to release opinions slowly and opportunistically.

For example, on October 18, 2018, the FISC issued an opinion concluding that the government had failed to comply with both statutory and constitutional requirements in implementing Section 702 of FISA.[10] The government withheld this opinion for nearly a year while it pursued an appeal to the FISCR, presumably hoping that a FISCR ruling in the government's favor would help mitigate any public backlash. *See* Elizabeth Goitein, *The FISC's 702 Opinions, Part I: A History of Non-Compliance Repeats Itself*, Just Security (Oct. 15, 2019), https://www.justsecurity.org/66595/the-fisa-courts-702-opinions-part-i-a-history-of-non-compliance-repeats-itself; Elizabeth Goitein, *The FISC's Section 702 Opinions, Part II: Improper Queries and Echoes of "Bulk Collection"*, Just Security (Oct. 16, 2019),

[10] Section 702 of the FISA authorizes the NSA to collect communications of non-U.S. persons overseas for foreign intelligence purposes. 50 U.S.C. § 1881a.

https://www.justsecurity.org/66605/the-fisa-courts-section-702-opinions-part-ii-improper-queries-and-echoes-of-bulk-collection. Only after the FISCR issued its opinion rejecting the government's appeal—and after the government agreed to change its practices to the FISC's satisfaction—did the government authorize the release of the opinions in October 2019.

There is ample reason to worry that this pattern will repeat itself. Other FISC opinions that have been made public since the Snowden disclosures and the enactment of the USA FREEDOM Act have regularly revealed major legal violations and government noncompliance.[11] It is critical that the public have

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[11] *See, e.g.*, *[REDACTED]*, No. [REDACTED] (FISC Nov. 6, 2015), https://www.intelligence.gov/assets/documents/702%20Documents/oversight/20151106-702Mem_Opinion_Order_for_Public_Release.pdf (describing FBI violations of protections for attorney-client communications, a "failure of access controls" by the FBI, and the NSA's failure to get rid of certain improperly collected data); *[REDACTED]*, No. [REDACTED] (FISC Apr. 27, 2017), https://www.dni.gov/files/documents/icotr/51117/2016_Cert_FISC_Memo_Opin_Order_Apr_2017.pdf (noting NSA's systematic violations of 2012 rules governing communications obtained through Section 702 "upstream" collection); *[REDACTED]*, No. [REDACTED] (FISC Dec. 6, 2019), https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2019_702_Cert_FISC_Opinion_06Dec19_OCR.pdf (revealing several violations by the FBI, NSA, and CIA); *[REDACTED]*, No. [REDACTED] (FISC Nov. 18, 2020), https://www.intel.gov/assets/documents/702%20Documents/declassified/20/2020_FISC%20Cert%20Opinion_10.19.2020.pdf (describing several instances of noncompliance by the FBI but nonetheless approving Section 702 surveillance).

access to such opinions in a timely and consistent manner, without the possibility of withholding or delay by the government.

B. Like other Article III courts, the FISC may determine when to redact or seal truly sensitive government information.

The Supreme Court has recognized a qualified First Amendment right of access, but, by definition, it is not absolute. And in cases within and outside the access context, Article III courts maintain discretion to redact opinions, close hearings, or place documents under seal, for example in cases involving trade secrets, the identities of minors, personal identifiers, and various other categories of information.[12] But these sealings are all determined by the court and must be narrowly tailored to the specific information for which secrecy is needed, while the rest of the judicial record remains publicly available.

This authority has long been recognized even in cases involving national security matters. *See N.Y. Times v. United States*, 403 U.S. 713 (1971); *U.S. Dist. Ct.*, 407 U.S. at 299; *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006) (Easterbrook, J.) ("Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification. The Supreme Court issues public opinions in all cases, even those said to involve state secrets."), *abrogated*

[12] *See generally* ROBERT TIMOTHY REAGAN, SEALING COURT RECORDS AND PROCEEDINGS, FED. JUDICIAL CENTER 7-10 (2010), https://www.fjc.gov/sites/default/files/2012/Sealing_Guide.pdf.

on other grounds, *RTP LLC v. ORIX Real Estate Capital*, 827 F.3d 689, 691-92 (7th Cir. 2016). For example, in cases brought by Guantánamo detainees seeking *habeas* relief that involve classified information, courts have issued unredacted portions of an opinion, as well as a brief explanation as to why certain portions were redacted. *See, e.g.*, *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008). Moreover, when the government asserts the state secrets privilege in civil litigation, it is the court—not the government—that ultimately decides whether the privilege applies. *See El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2007); *Jewel v. N.S.A.*, 965 F. Supp. 2d 1090, 1096 (N.D. Cal. 2013).

Just like any other Article III court, FISC possesses this same decision-making-power. If anything, the FISC's status as a specialized intelligence court uniquely equips it to determine which portions of its own opinions should remain secret and which can be released.

In short, Article III courts' inherent and well-proven authority to redact, seal, or summarize sensitive or classified information where necessary and narrowly tailored makes clear that there is no need to transfer this authority from the FISC to the executive branch. *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). *See also* Krishnan, *supra*, at 730 (court's fact-based harms inquiry, and any resultant sealing, follows a First Amendment right-of-access determination).

CONCLUSION

The NSA's bulk collection program shows us the harms of allowing the executive branch to be the gatekeeper of FISC opinions. Secret law leaves democratic accountability and the rule of law to the mercy of black swan events, like Snowden's disclosures. The proper functioning of our democratic state, however, relies on public law and public discourse, which together permit the courts and the public to debate, shape, challenge, and where necessary, overturn law.

For these reasons, it is important to grant *certiorari* in this case. Only this Court can settle the questions now before it: *first*, whether the FISC has the authority to release its own opinions, while still reviewing and redacting information where truly necessary just like any other Article III court; and *second*, whether the First Amendment provides a qualified right of public access to those opinions. In *amici*'s view, the FISC has both the ability and responsibility to disclose its opinions.

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