No. 20-1499

In the Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION, *Petitioner*

v.

UNITED STATES

On Petition for a Writ of Certiorari
to the United States Foreign Intelligence
Surveillance Court of Review

BRIEF OF PROJECT FOR PRIVACY & SURVEILLANCE ACCOUNTABILITY AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTIONS PRESENTED

The questions presented are:

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

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

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INTRODUCTION AND INTEREST OF *AMICUS*[1]

The Foreign Intelligence Surveillance Court (FISC) and the Foreign Intelligence Surveillance Court of Review (FISCR) operate in secret. With few exceptions, they decide issues of significant national importance outside of the adversarial system animating the rest of the federal judiciary. Worse still, even their decisions are classified and rarely see daylight.[2] They are thus unique among federal courts—only the government appears before them, and only the government is privy to their opinions.

This case raises a significant question: How can the American people learn of, debate, and cast informed votes relating to the Executive Branch's surveillance activities performed in their names—and, for that matter, authorized by FISC and FISCR—if the government refuses to disclose that information? The petition (at 11-27) amply explains how the decision below, in which FISCR declined even to consider a right-of-access motion—is wrong about FISC's and FISCR's jurisdiction as Article III courts and raises significant First Amendment questions.

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[1] All parties were given notice more than 10 days before—and consented to—the filing of this brief. No counsel for a party authored it in whole or in part, nor did any person or entity, other than *Amicus* and its counsel, make a monetary contribution to fund its preparation or submission. *Amicus* is not publicly traded and has no parent corporations, and no publicly traded corporation owns 10% or more of *Amicus*.

[2] In the 40 years of FISC's existence, for example, only 59 opinions and 113 orders have been released to the public despite FISC issuing thousands of orders and an untold number of opinions. Pet. App. 119a, 119a n.23.

This case is of particular concern to *Amicus* Project for Privacy & Surveillance Accountability (PPSA), a nonprofit, nonpartisan organization that focuses on a range of privacy and surveillance issues, because the proper resolution of the question presented goes to the heart of its mission: holding the government accountable for its surveillance activities. Time and again, government actors have demonstrated that, when they can act secretly, they will behave poorly. And the harms stemming from such behavior are magnified when the entire proceeding approving those actions—already a pale and non-adversarial semblance of a genuine Article III judicial proceeding—is classified.

As *Amicus* explains more fully below, the result is a string of demonstrable abuses ranging from the widespread warrantless surveillance of American citizens—a presumptive infringement of the Fourth Amendment—to material misstatements in applications seeking such surveillance. Because of the *ex parte* nature of FISC and FISCR proceedings, these abuses either go unchecked altogether or come to light only long after the harm has occurred—and potentially could have been addressed—or in suspiciously partisan circumstances undermining the trustworthiness and effectiveness of such disclosure. Indeed, because the decision below (at Pet. App. 123a-124a) allows the Executive Branch alone to be the sole arbiter of when FISC and FISCR decisions can be released, the public learns about abuses only if the government itself decides for its own often-suspect reasons to disclose them or—in rare cases—if a government whistleblower risks criminal sanctions to

expose government wrongdoing that the government itself was trying to conceal.

The American people should not have to wait for a leaker or for the government to magnanimously (or self-servingly) illuminate its activities. Instead, FISC and FISCR, like all Article III courts, should be able, and sometimes required, to publicize their decisions—subject, of course, to proper redaction to avoid undermining genuine national-security efforts. This Court should grant the petition to ensure that the American people have the information they need to hold the Executive Branch accountable when it violates their Fourth Amendment rights through warrantless surveillance.

ADDITIONAL REASONS TO GRANT THE PETITION

The petition (at 11-27) amply explains why the decision below merits review of both the jurisdictional point and the broader First Amendment point. *Amicus* writes separately to highlight the many times the federal government has abused the FISA process and to explain how the decision below, which insulates the government from scrutiny, will allow those abuses to continue absent this Court's review.

I. The Federal Government Has a Long History of Abusing Individual Rights in *Ex Parte* FISC Proceedings.

By all accounts, the process of ensuring national security is an "extraordinarily difficult job—one in which actions are second-guessed, success is

unreported, and failure can be catastrophic."[3] Because of the risks involved, FISC both "conducts its usually *ex parte* proceedings in secret" and rarely issues its decisions publicly. *ACLU* v. *Clapper*, 785 F.3d 787, 793 (2d Cir. 2015). But while the necessities of national security may require special accommodation, they are not a blanket pass for the government to do whatever it likes without ultimate democratic and constitutional oversight.

Because of the lack of an adverse party in FISC proceedings, the government has a "heightened duty of candor,"[4] that is "fundamental to [FISC's] effective operation."[5] As FISC itself has recognized, however, the government has repeatedly failed to live up to this heightened duty and has instead demonstrated an "institutional lack" of candor, raising "very serious Fourth Amendment" questions.[6] These abuses have come in many forms, two of which are particularly

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[3] The White House, *Remarks by the President on Review of Signals Intelligence* (Jan. 17, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence.

[4] Opinion at 8, *In Re Application Of The Federal Bureau Of Investigation For An Order Requiring The Production Of Tangible Things*, No. BR 14-01 (FISC Mar. 21, 2014), https://www.eff.org/document/unclassified-fisc-order-march-21-2014.

[5] Opinion at 59, [Redacted], No. [Redacted] (FISC Nov. 6, 2015), https://www.intelligence.gov/assets/documents/702%20Documents/official-statement/20151106-702Mem_Opinion_Order_for_Public_Release.pdf.

[6] Opinion at 19, [Redacted], No. [Redacted] (FISC Apr. 26, 2017), https://www.dni.gov/files/documents/icotr/51117/2016_Cert_FISC_Memo_Opin_Order_Apr_2017.pdf (cleaned up).

relevant here: (1) in many cases, the government has filed surveillance applications containing material misrepresentations to sidestep statutory and constitutional limits on secret surveillance; and (2) the government has regularly failed to follow its own "minimization" procedures[7] when data about United States persons is collected incidental to targeted national-security investigations and has even used such over-collected, non-national-security information against U.S. persons to circumvent the baseline constitutional protection afforded by the Fourth Amendment.

1. The government has a long history of misrepresenting facts in its foreign intelligence surveillance applications to the detriment of American citizens. Although some of the misrepresentations can be traced to the government's repeated failure to follow its own internal accuracy procedures, colloquially known as "Woods procedures," others cannot be written off as mere carelessness.[8]

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[7] "Minimization procedures" are the procedures used to reduce the amount of information about United States persons collected, retained, and disseminated pursuant to a FISC order for tangible things, such as business records. *In re Application of the FBI for an Order Requiring the Production of Tangible Things*, 2015 WL 12696366, at *2-*3 (FISC Nov. 24, 2015).

[8] Order at 2-3, *In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*, Docket No. Misc. 19-02 (Apr. 3, 2020), https://www.fisc.uscourts.gov/sites/default/files/Misc%2019%2002%20Order%20PJ%20JEB%20200403.pdf (criticizing the FBI's failure to comply with Woods procedures and addressing "the need for the Court to monitor" the FBI "going forward").

One example is the NSA's history of misrepresenting the scope of its data collections to FISC. In one 2011 opinion, Judge Bates criticized the NSA for including a "substantial misrepresentation regarding the scope of a major collection program" for the "third [time] in less than three years."[9]

One such dragnet document collection was only authorized following a "flawed depiction of how the NSA uses [the acquired] metadata."[10] Having reviewed the subsequently revealed information on how the data was actually used, the court concluded that the NSA had "so frequently and systemically violated" the required standard for seeking business records that one "critical element of the overall [business record] regime ha[d] never functioned effectively."[11] The government's initial inaccurate representations generated a "misperception * * * [that] existed from the inception of [the] authorized collection in May 2006" until March 2009.[12] The NSA's failure to "accurately report" to FISC led to "daily violations of the minimization procedures * * * designed to protect [redacted] call detail records pertaining to telephone communications of U.S.

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[9] Opinion at 16 n.14, [Redacted], No. [Redacted] (FISC Oct. 3, 2011), https://www.eff.org/files/filenode/fisc_opinion_-_unconstitutional_surveillance_0.pdf.

[10] *Ibid.* (alteration in original; internal quotation omitted).

[11] Order at 11, *In re Production of Tangible Things From* [Redacted], No. BR 08-13 (FISC, Mar. 2, 2009), https://www.dni.gov/files/documents/section/pub_March%202%202009%20Order%20from%20FISC.pdf.

[12] *Ibid.*

persons located within the United States who are not the subject of any FBI investigation and whose call detail information could not otherwise have been legally captured in bulk."[13] Because of this misrepresentation, the government, without a warrant, obtained the business records of an untold number of U.S. persons.[14]

Later opinions highlight just how pervasive this practice of over-collecting data is. In 2011, FISC held that the government's minimization procedures were "statutorily and constitutionally deficient with respect to their protections of U.S. person information."[15] From that time forward, the NSA's minimization procedures "prohibited [the] use of U.S.-person identifiers to query the results of upstream Internet" data collected pursuant to a FISC order.[16] Despite that prohibition, the NSA disclosed in 2016 that its analysts "had been conducting such queries" with "much greater frequency" than it had previously disclosed.[17] As the government reviewed the scope of the abuses, it became clear that the "problem was widespread during all periods under review."[18]

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[13] *Id.* at 8-9.

[14] *Id.* at 6, 11.

[15] Opinion at 17, [Redacted], No. [Redacted] (FISC Apr. 26, 2017), https://www.dni.gov/files/documents/icotr/51117/2016_Cert_FISC_Memo_Opin_Order_Apr_2017.pdf (citation omitted).

[16] *Id.* at 19.

[17] *Ibid.*

[18] *Ibid.*

2. The Executive Branch has also, at times, flatly lied to FISC, the most publicized example of which happened during the 2016 election. There, the government submitted four applications seeking to surveil Carter Page, a U.S. citizen with ties to the Trump Campaign.

To support the applications, an FBI lawyer altered an email to read that Page, who had previously worked with the CIA, had *not* in fact been a government source.[19] Because of those alterations, the Page applications included information "unsupported or contradicted by information" in the FBI's possession, including "several instances" where information "detrimental to their case for believing that Mr. Page was acting as an agent of a foreign power" was withheld from the National Security Division.[20] As FISC well explained, "[w]hen FBI personnel mislead NSD in the ways described above, they equally mislead the FISC."[21] FISC ultimately held that the sheer amount of errors in the Page applications was "antithetical to the heightened duty of candor" and "call[ed] into question whether

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[19] Ryan Lucas, *Ex-FBI Lawyer Sentenced To Probation For Actions During Russia Investigation*, NPR (Jan. 29, 2021), https://www.npr.org/2021/01/29/962140325/ex-fbi-lawyer-sentenced-to-probation-for-actions-during-russia-investigation.

[20] Order at 2-3, *In Re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*, No. Misc. 19-02 (FISC Dec. 17, 2019), https://www.fisc.uscourts.gov/sites/default/files/MIsc%2019%2002%20191217.pdf.

[21] *Id.* at 1.

information contained in other FBI applications was reliable."[22]

It is impossible to know how many misrepresentations like those in the Carter Page applications have allowed the government to circumvent the Fourth Amendment's warrant requirement and surveil particular U.S. citizens without probable cause. But, if the government made such representations with even a small percentage of the frequency with which it misrepresented the scope of its collections, then it has happened far too regularly.

3. The harm from these widespread abuses continues. Just last month, the government released an opinion showing that many members of the FBI had used data collected without a warrant to conduct criminal investigations unrelated to national security.[23] The opinion followed a recent oversight review that unearthed 40 such inquiries of data collected pursuant to a FISC order to assist with criminal investigations relating to a broad array of supposed criminal activity, large and small.[24] Purportedly, "none of the * * * information" obtained pursuant to a FISC order was actually "used in a criminal or civil proceeding" or, implausible as it may seem, for "any investigative or evidentiary purpose."[25]

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[22] *Id.* at 3.

[23] Opinion at 42, [Redacted], No. [Redacted] (FISC Nov. 18, 2020), https://assets.documentcloud.org/documents/20691797/2020_fisc-cert-opinion_10192020.pdf.

[24] *Ibid.*

[25] *Id.* at 43.

But this provides little comfort considering that it was still "opened and reviewed" in a number of FBI field offices around the country, in connection with ongoing investigations.[26] These "apparent widespread violations" of the querying standard caused FISC great concern. But given that even the court lacked information about how the FBI was supposedly implementing new "system changes" and training its agents, it was unable to determine whether the current procedures "meet statutory and Fourth Amendment requirements."[27]

In sum, whatever the facts of a particular violation of the government's duty, its history of violating the heighted duty of candor in *ex parte* proceedings before FISC and FISCR is a powerful reason for this Court to grant review.

II. Those Abuses Will Continue if FISC's Work Continues in Secret, and Constitutional Checks and Balances Are Circumvented.

The government's long history of abusing the rights of Americans in *ex parte* proceedings will inevitably continue if this Court permits the decision below to stand. As the petition notes, the government cannot be the sole arbiter of whether any FISC opinions are released in any form. See Pet. 26-27 (arguing that FISC "inappropriately conflated the question of classification with the question of whether court opinions can constitutionally be withheld from the public"). Such unfettered authority would not only

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[26] *Ibid.*

[27] *Id.* at 44.

compound the already serious separation-of-powers concerns raised by FISC and FISCR by allowing the government to encroach the judiciary's inherent power over its own proceedings, it would also ensure that the government's abuses will only be discovered, if at all, long after they occur or when it suits some other political purpose of the Administration making the decision whether to disclose past wrongdoing.

1. By abdicating the inherent judicial power over its own records and proceedings, the decision below heightens the serious separation of powers and Article III problems raised by courts that resolve matters barely resembling a case or controversy, lack the benefit of adversarial presentation of the facts or law, and shield themselves from subsequent public or judicial debate over their decisions. Such abdication further weakens what the Founders considered the least dangerous branch—the federal Judiciary—while strengthening perhaps the most dangerous branch in the post-New Deal United States, the Executive.

While Article III courts, of course, exercise limited jurisdiction, *Kokkonen* v. *Guardian Life Ins. Co of Am.*, 511 U.S. 375, 377 (1994), they are nonetheless entrusted with the "province and duty * * * to say what the law is in particular cases and controversies." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (cleaned up). Though FISC and FISCR are courts of narrower jurisdiction and procedural safeguards than most, they nevertheless purport to exercise the judicial power of Article III. See 50 U.S.C. § 1803(a) & (b) (FISC is comprised of "11 district court judges"; FISCR is comprised of "three judges * * * from

the United States district courts or courts of appeals[.]").

As Article III courts, both FISC and FISCR possess inherent control over their own records. See Pet. App. 96a. And to be sure, as the Petitioners point out, the decision below allows the Executive Branch to encroach on that authority. See Pet. 19-20.

That decision below also suggests an improper encroachment by the Legislative Branch. Among the Framers' most important aims was the "sharp necessity to separate the legislative from the judicial power." *Plaut*, 514 U.S. at 221. While FISCR has suggested that its decision *respects* the separation of powers by reading its statutory remit narrowly, if it were true that either FISCR or FISC lack jurisdiction to consider Petitioner's motion, then Congress itself usurped from an Article III court the "power to adjudicate motions for access to its own opinions." See Pet. 20.

If the decision below were upheld, then, the already pervasive separation-of-powers issues inherent in the operation of both FISC and FISCR would only be heightened. For example, under the governing statute, FISC and FISCR judges purport to exercise the federal judicial power in situations that lack a basic requirement of a constitutional "case or controversy"—namely, genuinely adverse parties. See *Carney* v. *Adams*, 141 S. Ct. 493, 498 (2020) ("We have long understood that constitutional phrase to require that a case embody a genuine, live dispute between adverse parties, thereby preventing the federal courts from issuing advisory opinions."); *FEC* v. *Akins*, 524 U.S. 11, 20 (1998) ("[C]ourts will not pass upon

abstract, intellectual problems, but adjudicate concrete, living contests between adversaries.") (cleaned up); *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-241 (1937).[28]

And these problems persist despite recent congressional efforts to remedy them, such as with the USA Freedom Act of 2015. There, Congress authorized *amici* to appear before FISC and FISCR to respond to the government's applications, but never *required* such participation. Instead, the Act provides that FISC "shall" appoint an *amicus* when, "in the opinion of the court," a surveillance application presents a "novel or significant interpretation of the law"—unless, of course, FISC finds such an appointment inappropriate. 50 U.S.C. § 1803(i)(2). Naturally, FISC rarely makes such appointments. Only two *amici*, for example, were appointed in 2020 despite hundreds of government applications.[29] Any veneer of adversity

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[28] Because of the lack of a true adversarial process in FISC proceedings, then-Ambassador Lawrence Silberman once expressed concern that FISC would not be performing the "constitutionally sound adjudication of cases and controversies under Article III," but would instead be issuing decisions approaching the "traditionally prohibited advisory opinion." See Foreign Intelligence Electronic Surveillance: Hearing on H.R. 5794, 9745, 7308, and 5632 Before the Subcomm. on Legis. of the Permanent Select Comm. on Intelligence, 95th Cong. 224 (1978) (statement of Laurence Silberman). "[J]udges," he continued, "have traditionally issued search warrants *ex parte*," but "they have done so as part of a criminal investigative process which they have traditionally supervised in many ways, and [which,] for the most part, leads to a trial, a traditional adversary proceeding." *Ibid.*

[29] Hon. Roslynn R. Mauskopf, *Report of the Director of the Administrative Office of the U.S. Courts on activities of the*

introduced by the 2015 Act, then, has done little to remedy the separation-of-powers concerns with FISC and FISCR. Although FISC and FISCR purport to be Article III courts populated by Article III judges, they function suspiciously as an arm of the Executive, rather than the Judicial, branch.

The decision below removes the last vestige of a check on FISC and FISCR by precluding timely and consistent public knowledge of the court's decisions. That, in turn, makes it more difficult for voters to acquire the information needed to bring their concerns to the attention of their elected representatives and to demand laws requiring greater transparency from FISC and FISCR. The Court should grant the petition if for no other reason than to vindicate already weakened Article III powers and responsibilities.

2. Separation-of-powers concerns do not stop at the questionable usurpation of judicial functions but extend also to insulating the Executive from proper constitutional checks and balances. Simply put, it is inconsistent with the constitutional scheme that the Executive, the very branch that FISC has repeatedly condemned for violating its procedures, maintains the sole authority over when those abuses are disclosed to the public. Although the Executive has the primary authority to determine what underlying sensitive factual material should remain classified, Pet. App. 6a, FISC should be able to decide what *opinions* and legal conclusions to release to the public—subject only

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Foreign Intelligence Surveillance Courts for 2020, at 7 (Apr. 29, 2021), https://www.uscourts.gov/sites/default/files/fisc_annual_report_2020_0.pdf.

to necessary redactions—particularly if those opinions include consideration of potential or definitive government wrongdoing.

Absent such checks of independent disclosure of government wrongdoing, the public would have no effective means of holding the government accountable for violating their rights—seriously undermining the very premise of our "government of the people."[30] As observed during the Constitutional Convention, in "free governments the rulers are the servants, and the people their superiors and sovereigns."[31] Without "the power which *knowledge* gives," as James Madison once wrote, there can be no "popular Government."[32] A popular government "without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."[33]

The concern about information is exacerbated here by the fact that the government generally, and a current Administration in particular, has no incentive to implicate itself in its own wrongdoing. Nor,

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[30] George Washington, *Undelivered First Inaugural Address: Fragments, 30 April 1789*, Founders Online, https://founders.archives.gov/documents/Washington/05-02-02-0130-0002 (last accessed May 6, 2021).

[31] 2 The Records of the Federal Convention of 1787, at 120 (Max Farrand ed., 1911) (Madison's Notes, July 26, 1787) (quoting Benjamin Franklin).

[32] Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 *The Writings of James Madison* 103 (Gaillard Hunt, ed. 1910) (emphasis added).

[33] *Ibid.*

historically, has it done so. This is illustrated by the small number of opinions released in FISC's more than forty-year history: From its inception until 2013, only two opinions were publicly released. Pet. App. 119a. A few dozen opinions were then released in 2013 after Edward Snowden leaked information about mass surveillance. See Pet. App. 114a-116a.[34] It should not take a national scandal for the government's abuses to come to light.

But as it stands now, the overwhelming majority of FISC or FISCR orders or opinions are never released to the public at all. Pet. App. 119a, 119a n.23. And even when the government *does* decide to disclose such opinions, the timing itself is suspect and raises serious political questions which would not arise if FISC and FISCR themselves, as impartial tribunals, had the authority to release key opinions. For example, the public learned about the misrepresentations in the Carter Page applications—the first of which occurred during the Obama Administration—after President Trump was inaugurated, and when it could be used to undermine the Russian-collusion investigation into his campaign and intelligence agencies often viewed as hostile by the Trump Administration.

The current Administration likewise is not immune to the strategic temptation to release opinions implicating the prior Administration in wrongdoing. As noted earlier, the Office of the Director

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[34] Some circuits have since concluded that the surveillance program exposed by the leaks themselves violated the Foreign Intelligence Surveillance Act. See *United States* v. *Moalin*, 973 F.3d 977 (9th Cir. 2020); *ACLU* v. *Clapper*, 785 F.3d 787 (2d Cir. 2015).

of National Intelligence last month released a November 2020 FISC opinion revealing that the FBI under President Trump engaged in a series of unlawful queries into databases containing information received pursuant to a FISC order. When the public selectively learns of limited examples of secret wrongdoing only well after the fact, and in support of a competing Administration's criticism of its predecessor, constitutional checks and balances are undermined by making such disclosure a further tool of the Executive in power at any given moment.

For these reasons, the Court should put a proper check on executive encroachment by holding that FISC and FISCR have an inherent right to release their own opinions, thus implementing the People's right to know of the behavior of their agents and their ability to root out government abuse.

CONCLUSION

The decision below insulates the Executive Branch from public scrutiny for its surveillance activities despite a long history of abuses, while also depriving Article III courts of their inherent authority over their own opinions. In the process, it deprives the public of the right to scrutinize those opinions—one of the few checks the people have over the judiciary and over otherwise secret executive machinations. To prevent these harms and abuses, the petition should be granted.

Respectfully submitted.

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