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
Foreign Intelligence Surveillance Court of Review

BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 34 MEDIA ORGANIZATIONS IN SUPPORT OF PETITIONER

Bruce D. Brown
Counsel of Record
Katie Townsend
Gabe Rottman
Madeline Lamo
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW
Suite 1020
Washington, D.C. 20005
bbrown@rcfp.org
(202) 795-9300

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICI CURIAE[1]

Amici are the Reporters Committee for Freedom of the Press, The Atlantic Monthly Group LLC, The Center for Investigative Reporting (d/b/a Reveal), Committee to Protect Journalists, Dow Jones & Company, Inc., First Amendment Coalition, First Look Institute, Inc., Freedom of the Press Foundation, Fundamedios Inc., Gannett Co., Inc., The Guardian U.S., Inter American Press Association, Investigative Reporting Workshop at American University, Los Angeles Times Communications LLC, The McClatchy Company, LLC, The Media Institute, Mother Jones, MPA - The Association of Magazine Media, National Freedom of Information Coalition, National Journal Group LLC, National Newspaper Association, National Press Club Journalism Institute, National Press Photographers Association, New England First Amendment Coalition, The New York Times Company, The News Leaders Association, News Media Alliance, Online News Association, POLITICO LLC, Radio Television Digital News Association, The Seattle Times Company, Society of Environmental Journalists, Society of Professional Journalists, Tully Center for Free Speech, and The Washington Post.

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[1] Pursuant to Supreme Court Rule 37, counsel for amici curiae state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; no person other than the amici curiae, their members or their counsel made a monetary contribution intended to fund the preparation or submission of this brief; counsel of record for all parties were given timely notice of the intent to file this brief; and counsel of record for all parties have provided written consent to the filing of the brief.

As news media organizations, publishers, and organizations dedicated to protecting the First Amendment interests of journalists, amici have a strong interest in this case. The decisions of the Foreign Intelligence Surveillance Court ("FISC") and the Foreign Intelligence Surveillance Court of Review ("FISCR") holding that they lack jurisdiction to hear right-of-access motions effectively close the courthouse door on members of the press seeking to assert a First Amendment right of access to significant judicial decisions that delineate the boundaries of the federal government's authority in the sphere of foreign intelligence surveillance.

This Court has long recognized that the press acts as a surrogate for the public when it exercises its First Amendment right of access to judicial proceedings and that such access is integral to the proper functioning of the judiciary. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality opinion). A presumptive First Amendment right of access to opinions and orders of the FISC facilitates the press's ability to fulfill this role. In order for the press to assert this right of access, the FISC and FISCR must have jurisdiction to hear motions for access.

SUMMARY OF THE ARGUMENT

The decision of the FISCR that prompted the Petition before the Court, if allowed to stand, would close the courthouse door to members of the press and the public seeking to inspect significant legal opinions of the FISC pursuant to the qualified First Amendment right of access to court records.

The FISCR's improperly crabbed reading of the Foreign Intelligence Surveillance Act ("FISA") that restricts the jurisdiction of both the FISC and the FISCR not only inhibits the press from informing the public about the constitutional and statutory parameters of the government's foreign intelligence surveillance authority, but also eliminates any avenue by which a court could consider whether a qualified First Amendment right of access to records of the FISC exists at all.

Public access to these opinions and orders is an essential safeguard against executive overreach, particularly in light of the FISC's recently-expanded mandate. While the FISC began as a court charged with considering discrete applications for foreign intelligence surveillance authority in specific investigations, its role has expanded—in part because of epochal changes in telecommunications technology—to resolving some of the weightiest and most complex constitutional questions presented today. For instance, it now has the statutory mandate to authorize programmatic surveillance involving the collection of data transiting U.S. telecommunications infrastructure, including that of journalists in the United States and around the world.

Accordingly, amici offer two arguments in support of Petitioner.

First, applying the framework articulated by this Court in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"), both "logic" and "experience" support a qualified constitutional right of access to FISC opinions containing significant legal analysis.[2] 478 U.S. at 8–9. As the history of overreach by intelligence agencies that led to FISA's enactment demonstrates, the FISC is an integral safeguard for constitutional freedoms when the government seeks to deploy its vast authority to conduct foreign intelligence surveillance in the United States. The FISC's legitimacy and effectiveness in that mission depend on the ability of the public to oversee its work, and "logic" accordingly supports a right of access. And other Article III courts consistently recognize a right of access to their opinions and orders, including those which involve legal and constitutional issues in the national security context. That the same qualified, constitutional right apply to FISC opinions is therefore essential for meaningful public oversight, and to ensure that the overreach that led to the FISC's creation does not recur.

Second, the FISCR's jurisdictional holding—effectively that *no court* has the authority to

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[2] Amici agree that, while the February 11, 2020 FISC decision denying a First Amendment right of access on the merits is not under review, this Court has the discretion to consider the merits along with the jurisdictional question. Amici accordingly address the merits here.

determine whether the public has a qualified First Amendment right of access to significant FISC opinions—itself raises significant constitutional concerns, as it would remove any avenue for members of the press and public to vindicate that right with respect to the FISC. FISA can and should be interpreted to avoid a system of rights without recourse—the practical impact of the FISCR's holding.

ARGUMENT

I. Both logic and experience support a First Amendment right of access to FISC opinions and orders.

As this Court held in *Press-Enterprise II*, to determine whether a qualified First Amendment right of access applies to a particular judicial proceeding, courts look to "two complementary considerations": experience and logic. 478 U.S. at 8–9. "[L]ogic" concerns whether "public access plays a significant positive role in the functioning of the particular process in question," while "experience" concerns whether the place and process in question have "historically been open to the press and general public." *Id.*

Justice Brennan first articulated the principles of experience and logic in *Richmond Newspapers*. 448 U.S. at 589 (Brennan, J., concurring). He explained that while "an enduring and vital tradition" of public access "has [a] special force" and "implies the favorable judgment of experience," the value of public access to any particular proceeding "must be

measured in specifics." *Id.* When the Court adopted this approach in *Press-Enterprise II*, it made clear that "experience" and "logic" are not rigid requirements but rather "complementary" and "related" considerations. *Press Enterprise II*, 478 U.S. at 8–9; *see also id*. at 10 n.3 (noting that some courts have recognized a constitutional right to pretrial proceedings given their "importance," even though they had "no historical counterpart"). Thus, in determining whether a constitutional presumption of public access attaches to a particular judicial proceeding or record, courts should "consult historical and current practice" and "weigh the importance of public access." *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring); *see also, e.g.*, *United States v. El-Sayegh*, 131 F.3d 158, 161 (D.C. Cir. 1997) (explaining that the lack of a historical tradition of access "by itself is of course not dispositive," and that a "new procedure that substituted for an older one would presumably be evaluated by the tradition of access to the older procedure").

While *Press-Enterprise II* concerned the First Amendment right of access to criminal proceedings, lower courts applying its framework have consistently recognized a qualified First Amendment right of access applicable to judicial records, as well as to non-criminal proceedings. *See, e.g.*, *United States v. Dejournett*, 817 F.3d 479, 481 (6th Cir. 2016) (records in criminal proceedings); *Doe v. Pub. Citizen*, 749 F.3d 246, 267–68 (4th Cir. 2014) (civil docket sheets, summary judgment rulings, and parties' summary judgment motions and accompanying materials); *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 298–99 (2d Cir. 2012) (administrative traffic

board proceedings analogous to court proceedings); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004) ("*Pellegrino*") (civil docket sheets); *see also Richmond Newspapers*, 448 U.S. at 580 n.17 (recognizing that "historically both civil and criminal trials have been presumptively open"). Here too, both logic and experience support a constitutional presumption of access to opinions and orders of the FISC containing novel or significant interpretations of law.

a. Historical events leading to the passage of FISA demonstrate that logic supports a right of access to FISC opinions and orders.

The logic inquiry under *Press-Enterprise II* looks to whether public access "plays a significant positive role" in the functioning of the process in question. 478 U.S. at 8. As reflected in the historical events that led to the passage of FISA, and as underscored by the technological advancements that require the FISC to issue rulings that implicate an ever-broadening array of constitutional concerns, logic firmly supports public access to FISC opinions and orders, including those containing novel or significant interpretations of law.

The relevance of the records sought by Petitioner—opinions and orders of the FISC containing novel or significant interpretations of law issued between September 11, 2001, and passage of the USA FREEDOM Act—extends far beyond any individual application filed with the FISC. The FISC interprets statutes that govern the scope of the

executive's investigative powers in the context of foreign intelligence surveillance, meaning that its rulings establish the boundaries of permissible surveillance activity by the federal government in this highly sensitive area. *See* Jonathan Manes, *Secret Law*, 106 Geo. L. J. 803, 806, 818 (2018). While some elements of these proceedings warrant secrecy, the blanket denial of any judicial avenue by which the press can seek to bring to light and report on those boundaries is troubling. Wholesale secrecy in this context precludes the press, and thus the public, from obtaining even a basic understanding of the rules by which the executive operates when conducting foreign intelligence and counterintelligence investigations on American soil. *See id.* One scholar explains the troubling nature of secrecy in this area through an analogy to ordinary criminal law enforcement:

> We do not flinch at the idea of a particular search warrant or surveillance order being issued under seal, that is, in secret. But the notion that the law of government searches and surveillance—the Fourth Amendment doctrines, statutes, and interpretations that govern this activity—could also be secret is intolerable.

Id. at 807.

The events leading to the passage of FISA demonstrate the "significant positive role" that public oversight of foreign intelligence surveillance law plays with respect to the FISC. FISA was passed in response to "two interrelated developments"—this

Court's 1972 decision in *United States v. U.S. District Court*, 407 U.S. 297 (1972) ("*Keith*"), and the revelation that the executive branch had systematically used its intelligence powers to surveil journalists and intimidate and silence political opponents and dissenters. Stephen I. Vladeck, *The FISA Court and Article III*, 72 Wash. & Lee L. Rev. 1161, 1164 (2015).

In *Keith*, this Court held that the protections of the Fourth Amendment apply in domestic surveillance investigations. 407 U.S. at 321. The Court recognized that unchecked investigatory power could enable the executive branch to chill and silence political dissidents and critics:

> History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect "domestic security." Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.

Id. at 314. Accordingly, the Court concluded that the safeguards of the Fourth Amendment are a necessary check on executive power when conducting domestic surveillance.

Just as this Court was considering the potential for abuse by the executive branch of unchecked investigatory power in the domestic surveillance context, the public began to learn that the executive branch had in fact engaged in a decades-long pattern of overreach and abuse of its authority. As first reported by *Washington Post* reporter Betty Medsger in 1971, the FBI had engaged in a secret counterintelligence program, known internally as COINTELPRO, since 1956. Betty Medsger, *Remembering an Earlier Time When a Theft Unmasked Government Surveillance*, Wash. Post (Jan. 10, 2014), https://wapo.st/3tLJzZS. Medsger reported, based on FBI documents she received in the mail, that the FBI employed such counterintelligence programs to enhance paranoia among dissenters, aiming to "get the point across there is an FBI agent behind every mailbox." *Id.* NBC journalist Carl Stern used the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), to access FBI documents that revealed the purpose of COINTELPRO: to disrupt and combat the efforts of domestic advocacy groups, including black nationalists, civil rights organizations, the Socialist Workers Party, anti-war advocates, and other facets of the New Left, as well as the Ku Klux Klan. Michael Isikoff, *NBC Reporter Recalls Exposing FBI Spying*, NBC News (Jan. 8, 2014), https://perma.cc/Q5G3-M2WY. As was reported on NBC's "Nightly News" program in December 1973, "the late J. Edgar Hoover ordered a nationwide campaign to disrupt the

activities of the New Left . . . . He ordered his agents not only to expose New Left groups, but to take action against them to neutralize them." *Id.*

Soon after, *The New York Times* reported that the CIA had also engaged in extensive domestic surveillance of individuals engaged in First Amendment-protected activity, including journalists. That surveillance began in the 1950s and continued through the Nixon presidency under a program codenamed "Operation CHAOS." Seymour M. Hersh, *Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years*, N.Y. Times (Dec. 22, 1974), https://perma.cc/G33A-6JSD; *'Operation Chaos'* . . . , N.Y. Times (June 11, 1975), https://perma.cc/N7AM-P38Q. As early as 1959, the CIA wiretapped and spied on news reporters to learn the identities of their confidential sources. Newsweek Archives, *Government Surveillance: U.S. Has Long History of Watching White House Critics and Journalists*, Newsweek (July 24, 2017), https://perma.cc/L8QZ-C5ST. And, in carrying out Operation CHAOS, the CIA infiltrated and surveilled small publications that voiced opposition to the Vietnam War. Linda Moon, *Journalist Watchlist Raises Specter of Civil Rights-Era Secret Surveillance*, Just Security (June 19, 2019), https://perma.cc/HVD4-EUKN; Angus Mackenzie, *Sabotaging the Dissident Press*, Colum. Journalism Rev. (Mar./Apr. 1981), https://bit.ly/3hsfnR1.

Similarly, in an operation known as "Minaret," conducted in the late 1960s and early 1970s, the National Security Agency tapped the communications of journalists critical of the White House, including

New York Times reporter Tom Wicker and *Washington Post* humor columnist Art Buchwald. Matthew M. Aid & William Burr, *Secret Cold War Documents Reveal NSA Spied on Senators*, Foreign Policy (Sept. 25, 2013), https://perma.cc/MN8D-Q8ZL.

The news of this widespread domestic surveillance prompted public outcry, leading to a congressional investigation of intelligence activity conducted by the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, led by Senator Frank Church (the "Church Committee"). Among the questions considered by the Church Committee were "whether the institutional procedures for directing and controlling intelligence agencies have adequately ensured their compliance with policy and law, and whether those procedures have been based upon the system of checks and balances among the branches of government required by our Constitution." S. Rep. No. 94-755, bk. II, at vii (1976). The Committee unearthed a "massive record of intelligence abuses over the years," and concluded that "intelligence activities have undermined the constitutional rights of citizens and that they have done so primarily because checks and balances designed by the framers of the Constitution to assure accountability have not been applied." *Id.* at 289.

In response to these intelligence abuses, as well as the *Keith* decision, Congress passed FISA in 1978. The Act sought to "provide oversight of what presidents had claimed as inherent authority for four decades." Andrew Rudalevige, The New Imperial Presidency 112 (U. Mich. Press 2006). Quoting from

the Church Committee Report, a Senate Report acknowledged that "intelligence agencies have frequently wiretapped and bugged American citizens," including "journalists and newsmen," "without the benefit of judicial warrant." S. Rep. No. 95-604, pt. I, at 7–8 (1977). The Senate Report recognized that such surveillance was both a clear violation of Fourth Amendment rights and the source of a "chilling effect" on the exercise of constitutional rights essential to political freedom. *Id.* This chilling effect threatened open discourse, press freedom, and peaceful dissent—for "where a law that relates to speech is unclear, 'it operates to inhibit the exercise of [First Amendment] freedoms' because '[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.'" Manes, *supra*, at 814 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)).

The Church Committee recognized that the potential chill from unchecked surveillance by intelligence agencies grows as the technology facilitating that surveillance advances, cautioning:

> In an era where the technological capability of Government relentlessly increases, we must be wary about the drift toward "big brother government." The potential for abuse is awesome and requires special attention to fashioning restraints which not only cure past problems but anticipate and prevent the future misuse of technology.

S. Rep. No. 94-755, bk. II, at 289 (1976).

The Church Committee's words of warning were prescient. Today, technological advancement has enabled the government to surveil an increasingly broad array of communications, in a manner that is ever more revelatory of Americans' private conduct, including, and especially, newsgathering efforts geared to informing the electorate about government activities in the national security and foreign intelligence sphere. Such developments include the shift of much communication to a worldwide, digital, packet-switched network of networks (the "internet"), as well as radical increases in computer processing power, data storage, and transmission speeds. Note, *Keeping Secrets in Cyberspace: Establishing Fourth Amendment Protection for Internet Communication*, 110 Harv. L. Rev. 1591, 1592–93 (1997). The government has also sought to develop increasingly complex analytical tools that, building on these advancements in basic telecommunications architecture, permit far more intrusive surveillance than the age of circuit-switched telephonic communication. *See* Steven Feldstein & David Wong, *New Technologies, New Problems—Troubling Surveillance Trends in America*, Just Security (Aug. 6, 2020), https://perma.cc/R67P-CV6Q. As such, the FISC and FISCR have been forced to "issue[] cutting-edge and complex constitutional rulings, decide[] matters of statutory construction, and address[] crucial issues of government power, all of which affect the rights of millions." Meenakshi Krishnan, *The Foreign Intelligence Surveillance Court and the Petition Clause: Rethinking the First*

Amendment Right of Access, 130 Yale L. J. Forum 723, 732 (2021).

The need for public oversight of the FISC's decision-making with regard to new surveillance technologies is illustrated by the decision of the U.S. Court of Appeals for the Second Circuit in *American Civil Liberties Union v. Clapper*, 785 F.3d 787 (2d Cir. 2015), which involved a challenge to the bulk telephonic metadata collection program conducted by the National Security Agency. That program was authorized by the FISC in May 2006 as a valid exercise of Section 215 of the USA PATRIOT Act ("Section 215")—which permits, when "relevant" to certain intelligence and counterterrorism investigations, the collection of "tangible things." *Id.* at 796. The Second Circuit held that such bulk telephonic metadata collection was not a valid exercise of Section 215 authority, but it noted also that the challenged program raised complex and important Fourth Amendment issues. *Id.* at 821, 824.

Had the press been able to inform the public about the FISC's May 2006 order interpreting Section 215 to allow for bulk telephonic metadata collection, members of the public, including legal scholars, national security experts, and civil liberties advocates, could have provided contemporaneous input on this practice—meaning that constitutional issues, as well as the correctness of the FISC's interpretation of Section 215, could have been considered almost a decade before the Second Circuit had the opportunity to pass on the issue. *Cf.* Manes, *supra*, at 820–21 (noting that after bulk telephonic metadata collection program became public

knowledge, lawyers raised constitutional concerns that "the FISC had apparently never considered," and Congress amended FISA).

The FISC exists to serve as a check on the executive, one created by Congress as a response to manifest historical overreach by intelligence agencies. In order to serve that role effectively, its legal analysis must be subject to public scrutiny, as are all other Article III courts. *See Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (explaining that, especially in criminal context, "[a] responsible press has always been regarded as the handmaiden of effective judicial administration . . . . The press . . . guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."). As explained by Jeremy Bentham and embraced by this Court: "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." *Richmond Newspapers*, 448 U.S. at 569 (quoting Jeremy Bentham, Rationale of Judicial Evidence 524 (1827)). The prerequisite of publicity is access, particularly by members of the press. As such, access would "play[] a significant positive role" in the functioning of the FISC, and "logic" requires a qualified right of access to opinions and orders of the FISC containing novel or significant interpretations of law.

b. Courts considering the legality and constitutionality of foreign intelligence surveillance consistently recognize a qualified right of access, demonstrating that

experience supports a right of access to FISC opinions and orders.

The "experience" inquiry under *Press-Enterprise II* takes into consideration whether the place and process in question have "historically been open to the press and general public." *Press-Enterprise II*, 478 U.S. at 8. When determining if a right of access attaches to a specific type of document, courts look to that document's role in the legal process, not its case-specific subject matter. *See, e.g.*, *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1093 (9th Cir. 2014) (separately analyzing whether there is a First Amendment right of access to transcripts, motions, and other filings); *cf. In re Application of Leopold to Unseal Certain Electronic Surveillance Applications and Orders*, 964 F.3d 1121, 1128 (D.C. Cir. 2020) (separately analyzing certain electronic surveillance orders and the Government's motions for them to determine whether a presumptive common law right of access attached); *In re Application of the United States for an Order Pursuant to 18 U.S.C. § 2703(d)*, 707 F.3d 283, 290–91 (4th Cir. 2013) (same).

Particularly with regard to judicial places and processes that are of a "relatively recent vintage," this inquiry is not limited to the practices of a particular forum, *In re Boston Herald, Inc.*, 321 F.3d 174, 184 (1st Cir. 2003), for such reasoning would inevitably preclude a finding of a tradition of openness. Instead, courts look to analogous proceedings and historical counterparts to determine whether there is a tradition of access to a type of judicial proceeding or record. *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 150 (1993)

("[T]he 'experience' test of *Globe Newspaper* does not look to the particular practice of any one jurisdiction, but instead 'to the experience in that *type* or *kind* of hearing throughout the United States.'") (emphasis in original) (quoting *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 323 (1st Cir. 1992)); *see also In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1337 (D.C. Cir. 1985) ("The more precise inquiry, however, is a functional rather than classificational one: whether information *of the sort at issue here*—regardless of its prior or current classification as court records—was traditionally open to public scrutiny.") (emphasis in original).

The FISC is of "relatively recent vintage," as it was created by the passage of FISA in 1978. While the FISC dismissed arguments that it is sufficiently new to merit consideration of historical analogues, Pet. App. at 109a–111a, it failed to account for the relative newness of the expanded scope of its role and authority. In addition to FISA's expanded role as described above, amendments to FISA in 2008 provided the FISC with the authority to issue annual authorizations for the "programmatic collection of communications . . . [that] would be reviewed by the FISC solely for adherence to a series of (detailed) procedural requirements," meaning that the "new § 702 of FISA appeared to enlist the FISC in ex ante approval of programmatic surveillance—as opposed to applying legal principles to specific facts." Vladeck, *supra*, at 1174–75.

The assumption underlying the FISC's determination that it would be inappropriate to look to analogous proceedings—that a court created

approximately forty years ago is not one of "relatively recent vintage"—runs counter to how the FISC actually operates in practice, both as a matter of its expanded statutory authority, and the need for the FISC to address complex questions concerning the legality of novel foreign intelligence surveillance tools and techniques. As described by the Second Circuit, this Court's decisions on the First Amendment right of access "focus not on formalistic descriptions of the government proceeding but on the kind of work the proceeding actually does and on the First Amendment principles at stake." *N.Y. Civil Liberties Union*, 684 F.3d at 299. Put simply, modern technology and congressional intervention have changed the FISC's remit to one much more in-line with other Article III courts charged with deciding questions of criminal and national security law. While the FISC's "singular caseload and statutory obligations," Pet. App. at 110a, may be relevant to this inquiry when they implicate "singular" processes at the FISC, the act of interpreting and applying law to facts in a reasoned FISC opinion, particularly in a significant or novel matter, is directly akin to the type of legal process that has traditionally been subject to a qualified right of access.

Accordingly, it is appropriate to consider analogous proceedings when determining whether there is a tradition of openness. And, looking to such analogues, it is clear that experience favors a right of access, as other Article III courts—including this Court—have consistently issued publicly available opinions and orders, including those on the legality of government surveillance in the interest of national security. *See, e.g.*, *Keith*, 407 U.S. 297 (ruling on

application of Fourth Amendment to domestic surveillance); *United States v. Moalin*, 973 F.3d 977 (9th Cir. 2020) (ruling on legality of surveillance conducted pursuant to FISA); *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984) (same).

In sum, here, both logic and experience support a qualified First Amendment right of access to opinions and orders of the FISC, including those containing novel or significant interpretations of law. The FISC and FISCR decisions that effectively deny any third party the ability to even litigate that question would, if allowed to stand, prevent the press from informing the public about important developments in national security practices that implicate the civil liberties and privacy of millions of individuals in the United States.

II. The press must be able to challenge denials of access.

a. A reading of the statute that prevents the FISC and the FISCR from considering motions for access is problematic under the canon of constitutional avoidance.

The FISCR's affirmance of the FISC's finding that it lacks jurisdiction to determine whether a qualified First Amendment right of access extends to significant FISC opinions, Pet. App. at 6a, 85a, raises serious constitutional concerns, as it eliminates any avenue for the press or public to assert that right.

In its April 24, 2020 decision, the FISCR hinted that access to FISC opinions and orders might be secured through other means—namely, by filing right-of-access motions with other district courts, or through a FOIA request and subsequent litigation. Pet. App. at 74a n.41, 84a n.77. Courts, however, have supervisory power over their own records, and it would disturb well-settled principles of judicial comity for district courts to interfere with this supervisory authority with respect to records of the FISC. *Cf. Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978) ("Every court has supervisory power over its own records and files . . . ."). And, while a FOIA request may provide a statutory means to access FISC opinions and orders, it is not a substitute for the First Amendment right of access to judicial proceedings and records, as FOIA is a statutory remedy, not a constitutional requirement applicable directly to the FISC.

Thus, a right-of-access motion to the FISC is the only way the First Amendment right of access could meaningfully be asserted. As this Court has recognized, there must be a viable path for individuals to vindicate their constitutional rights, including the First Amendment right of access to court proceedings. *Cf. Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) ("Of course, for a case-by-case approach to be meaningful, representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'") (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979) (Powell, J., concurring)). Multiple Circuit Courts of Appeals have recognized the importance of a First Amendment right of access

for docket sheets for this very reason: As described by the Second Circuit, a secret docketing system "violated the public's First Amendment right of access by rendering it impossible for anyone to exercise that right." *Pellegrino*, 380 F.3d at 96 (discussing *United States v. Valenti*, 987 F.2d 708 (11th Cir. 1993)); *see also Doe*, 749 F.3d at 268 ("[T]here is a more repugnant aspect to depriving the public and press access to docket sheets: no one can challenge closure of a document or proceeding that is itself a secret.").

In other contexts, this Court has recognized the constitutional imperative of maintaining an avenue by which individuals can meaningfully exercise their First Amendment rights. For example, the Court recognized a "common thread" running through its decisions protecting the right of civil rights advocacy organizations to litigate their claims: "collective activity undertaken to obtain *meaningful* access to the courts is a fundamental right within the protection of the First Amendment." *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 585 (1971) (emphasis added); *see also Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 437 (1963) (holding unconstitutional a Virginia statute prohibiting the solicitation of legal business on the grounds that the law rendered the NAACP's right to pursue civil rights litigation a "guarantee" of "purely speculative value"). Rights without the possibility of meaningful exercise are not rights at all. As such, the FISCR's jurisdictional determination raises significant constitutional concerns.

It is a "well-established principle that statutes will be interpreted to avoid constitutional difficulties."

Frisby v. Schultz, 487 U.S. 474, 483 (1988). "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466 (1989) (citation omitted). This rule of construction, known as the canon of constitutional avoidance, is a "cardinal principle" of statutory interpretation. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

FISA provides for the creation of "a court of review which shall have jurisdiction to review the denial of any application made under this chapter," 50 U.S.C. § 1803(b), and states that the FISCR "shall have jurisdiction to consider" petitions for review of four types of decisions by the FISC, *id.* §§ 1861(f)(3), 1881a(i)(6)(A), 1881a(j)(4)(A), 1881b(f)(1). The FISCR interpreted these provisions of FISA as an exhaustive list, and it reasoned that because the request for access "d[id] not fall within any of the categories of jurisdiction enumerated above," it lacked jurisdiction to hear the appeal. Pet. App. at 71a–73a. It noted also that "[a]lthough Congress has empowered most other federal courts to consider claims arising under the federal Constitution . . . Congress did not do so here." *Id.* at 73a–74a. Notably, the FISCR did not identify any specific provision of FISA that prohibits the FISC or FISCR from exercising jurisdiction over related or ancillary adjudications such as right-of-access motions. *See id.* at 71a–74a.

The FISCR's interpretation of the statute is problematic under the constitutional avoidance doctrine. The fact that a court is a specialty court of limited jurisdiction does not preclude it from hearing right-of-access motions. As noted by Petitioner, bankruptcy courts are, like the FISC, specialty courts of limited jurisdiction, yet they have jurisdiction to hear right-of-access motions. Pet. at 12. Just as Congress evinced no intent to prohibit bankruptcy courts from being able to hear right-of-access motions when it limited their jurisdiction to the matters enumerated in Title 11, Congress also evinced no intent to prohibit the FISC or FISCR from hearing such motions. FISA's provisions stating that the FISC and FISCR "shall have jurisdiction" to hear certain specific matters do not equate to a clear expression of congressional intent to prohibit the courts from hearing ancillary or related motions.

In the absence of such congressional intent, and in light of the canon of constitutional avoidance, FISA should not be read to circumscribe the FISC's and FISCR's jurisdiction so narrowly that they cannot consider an application for access to FISC's own opinions containing significant legal analysis.

b. This Court has jurisdiction to hear this Petition.

Petitioner comprehensively surveys the appropriate and alternative bases for this Court's jurisdiction either under its statutory authority to review decisions by Article III courts of appeal, or pursuant to the All Writs Act. Amici further note that FISCR's invocation of 50 U.S.C. § 1803(k) for the

proposition that it is not a "court of appeals," would, if allowed to stand, likewise preclude any court from ever considering whether a qualified First Amendment right of access applies to significant FISC opinions, as it would deny this Court the ability to exercise appellate jurisdiction over the FISCR in this context. That effect would raise the same constitutional considerations described above.

CONCLUSION

For the foregoing reasons, amici curiae respectfully urge the Court to grant Petitioner's writ of certiorari, or in the alternative, to grant Petitioner's writ of mandamus.

Respectfully submitted,

Bruce D. Brown
Counsel of Record
Katie Townsend
Gabe Rottman
Madeline Lamo
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW,
Suite 1020
Washington, D.C. 20005
bbrown@rcfp.org
(202) 795-9300

May 27, 2021