No. 20-1499

In the Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

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

BRIEF FOR PROFESSOR STEPHEN I. VLADECK AS AMICUS CURIAE IN SUPPORT OF PETITIONER

G. EDWARD POWELL III
Wilson Sonsini Goodrich & Rosati, PC
650 Page Mill Road
Palo Alto, CA 94304
(650) 493-9300

BRIAN M. WILLEN
Counsel of Record
BRIAN J. LEVY
Wilson Sonsini Goodrich & Rosati, PC
1301 Ave. of Americas
40th Floor
New York, NY 10019
(212) 497-7700
bwillen@wsgr.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Constitutional Provisions:

Statutes, Regulations, and Rules:

Other Authorities:

INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus Stephen I. Vladeck holds the Charles Alan Wright Chair in Federal Courts at the University of Texas School of Law and is a nationally recognized expert in the fields of national security, separation of powers, and surveillance law, including the Foreign Intelligence Surveillance Act ("FISA"). As relevant here, Professor Vladeck's writings include *The FISA Court and Article III*, 72 Wash. & Lee L. Rev. 1161 (2015), and *Military Courts and the All Writs Act*, 17 Green Bag 2d 191 (2014). Professor Vladeck has also testified on FISA reform before the House Permanent Select Committee on Intelligence.

Professor Vladeck's research and teaching focus on federal jurisdiction and the federal courts. He submits this brief as amicus curiae to explain why, if this Court lacks jurisdiction to issue a statutory writ of certiorari under 28 U.S.C. § 1254(1) or 50 U.S.C. § 1803(b), no obstacles prevent this Court from granting a common-law writ of certiorari under 28 U.S.C. § 1651(a).

SUMMARY OF ARGUMENT

The petition in this case raises important First Amendment questions that the courts below have improperly evaded. But the petition also presents significant issues regarding this Court's own jurisdiction to

---

[1] No counsel for any party to this case authored this brief in whole or in part, and no person other than the amici and their counsel made a financial contribution for the preparation or submission of this brief. All parties have consented to the filing of this brief.

review cases from the Foreign Intelligence Surveillance Court ("FISC") and the Foreign Intelligence Surveillance Court of Review ("FISCR"). Pet. 27–32. Whether the Court's statutory certiorari jurisdiction covers this case is an open question—but fortunately, not one that the Court need decide to grant the petition and address the merits of the case. That is because, especially if statutory certiorari is not available here, this is a paradigmatic case for common-law certiorari.

The common-law writ of certiorari originated in the supervisory power of the court of King's Bench, which could review and correct the proceedings of any inferior court. The writ was a discretionary writ, never available as of right to litigants, but suitable to ensure the consistent administration of the King's justice by lower courts. At the American founding, the States' highest courts inherited the jurisdiction of King's Bench within their respective territories, as did this Court for the United States—subject only to the limitations of Article III.

This Court retains power to issue a common-law writ of certiorari under the All Writs Act. 28 U.S.C. § 1651(a); Sup. Ct. R. 20.6. Traditionally, this Court has used the extraordinary writs available under the Act "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). Indeed, jurisdictional review is at the core of certiorari's common-law role. *Harris* v. *Barber*, 129 U.S. 366, 371–372 (1889) (citing *People* v. *Betts*, 55 N.Y. 600 (1874) and *Gaither* v. *Watkins*, 66 Md. 576 (1887)). And the All Writs Act retains this gap-filling role today.

The common-law writ of certiorari has seldom been used in recent years, but that is not because of abrogation or desuetude. The gaps common-law certiorari exists to fill have merely gotten smaller as this Court's interpretations of the various certiorari statutes have grown more and more expansive. See *Hohn* v. *United States*, 524 U.S. 236, 248 (1998). But where a gap exists, common-law certiorari is there as needed to fill it.

Assuming that statutory certiorari jurisdiction is not available here, this is exactly such a case. The FISC and FISCR are inferior Article III courts from which no appeal is expressly authorized, except in special circumstances not implicated here. It would be inconsistent with the basic structure of the federal judicial hierarchy for these inferior courts' jurisdictional rulings—which bar Petitioner here from any *consideration* of its constitutional claims by the FISC and FISCR, and perhaps by *any* court—to be final but yet not subject to supervisory review by this Court. Fortunately, that is not the situation. The common-law writ is in aid of this Court's appellate jurisdiction, exceptional circumstances exist, and no other court can compel the FISC or FISCR to release the records that the petition seeks.

ARGUMENT

28 U.S.C. § 1254 empowers this Court to issue writs of certiorari to the "courts of appeals." Although this Court has not previously decided whether the FISCR is a "court of appeals" under Section 1254, it need not decide that issue, nor whether certiorari is available under 50 U.S.C. § 1803(b). Even if this Court cannot issue a statutory writ of certiorari to review the FISCR's decision here, it retains the power

to issue the common-law writ of certiorari to review the decision below.

Amicus takes no position on the statutory jurisdictional question raised by the Petition. Of course, if statutory certiorari is available, then "adequate relief [could] be obtained in [an]other form," and common-law certiorari would not be required. *Pa. Bureau of Corr.* v. *U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985); *Roche*, 319 U.S. at 27–28. But, assuming that neither Section 1254 nor Section 1803(b) allow this Court to review the FISC's or FISCR's dispositions of serious First Amendment and jurisdictional questions that Petitioner has raised, then this is a classic case for common-law certiorari review.[2] The determinations that the FISC and FISCR have made in this case about the limits of their own jurisdiction should be, and indeed are, reviewable by this Court even when the government is not the requesting party.

I. The common-law writ of certiorari is appropriate here assuming that statutory certiorari is not available

The All Writs Act codifies this Court's power to "issue all writs necessary or appropriate in aid of [its] . . .

---

[2] The common-law writ of certiorari is the most appropriate tool based on the posture of the case—*i.e.*, review of the FISCR's ruling. But Amicus recognizes that the Court "does not 'hedge[] the grant of extraordinary writs with formal restrictions as to which particular writ must be demanded.'" Richard Wolfson, *Extraordinary Writs in the Supreme Court Since* Ex Parte Peru, 51 Colum. L. Rev. 977, 986 (1961). Thus, if the Court concludes that common-law certiorari were somehow technically inappropriate, it can and should issue a common-law writ of mandamus instead. Pet. 29–32.

jurisdiction[] and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). "The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute," which "empowers federal courts to fashion extraordinary remedies when the need arises." *Pa. Bureau*, 474 U.S. at 43. "The traditional use of such writs both at common law and in the federal courts has been, in appropriate cases, to confine inferior courts to the exercise of their prescribed jurisdiction or to *compel them to exercise their authority when it is their duty to do so*." *U.S. Alkali Exp. Ass'n* v. *United States*, 325 U.S. 196, 202 (1945) (emphasis added).

One of the extraordinary writs available to this Court under the All Writs Act is the "common-law writ of certiorari." Sup. Ct. R. 20.6. History shows that the common-law writ of certiorari is uniquely appropriate for situations like this case, in which a lower federal court has erroneously concluded that it lacks jurisdiction to consider a petition seeking to vindicate constitutional rights.

A. The common-law writ of certiorari predates the Founding and can still be employed today

1. The writ of certiorari originated at the court of King's Bench alongside the other prerogative writs of mandamus, prohibition, and quo warranto. Frank J. Goodnow, *The Writ of Certiorari*, 6:3 Pol. Sci. Q. 493, 497 (1891). To administer this prerogative, the King's Bench held "supervisory authority over inferior tribunals" and exercised this authority via the "prerogative or discretionary writs." *Hartranft* v. *Mullowny*, 247 U.S. 295, 299 (1918); *see also* 4 William Blackstone,

Commentaries *314–317 (describing certiorari as a prerogative writ of the King's Bench).

Certiorari practice at King's Bench formalized three ways for the King's prerogative to be exercised. First, certiorari could "bring up an indictment or presentment before trial in order to pass upon its validity, to take cognizance of special matters bearing upon it, or to assure an impartial trial." *Hartranft*, 247 U.S. at 299. Second, certiorari could serve as an "auxiliary writ in aid of a writ of error" to bring up any parts of a record omitted when a case was transferred for appeal. *Id.* at 300. Third, and most relevant here, certiorari served "as a *quasi* writ of error to review judgments of inferior courts of civil or of criminal jurisdiction, especially those proceeding otherwise than according to the course of the common law and therefore *not subject to review by the ordinary writ of error*." *Id.* (second emphasis added).

2. As this Court has recognized, the first Congress ratified the common-law writ of certiorari in the Judiciary Act of 1789:

> By section 14 of the Judiciary Act of September 24, 1789 (1 Stat. 81, c. 20), carried forward as section 716 of the Revised Statutes, this court and the Circuit and District Courts of the United States were empowered by Congress "to issue all writs, not specifically provided for by statute, which may be agreeable to the usages and principles of law"; and, under this provision, we can undoubtedly issue writs of certiorari in all proper cases.

In re Chetwood, 165 U.S. 443, 461–462 (1897); see also James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 Tex. L. Rev. 1433, 1456 (2000) (explaining that the Framers believed the Supreme Court could use discretionary writs to supervise lower courts). This Court has acknowledged that "[t]he purposes for which the writ is issued [in America and by the King's Bench] are alike." *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 249–250 (1864). Although we lack a "King as fountain of justice" (Goodnow, 6:3 Pol. Sci. Q. at 495), we have a Supreme Court and a Vesting Clause.

As under the English common law, common-law certiorari was, by "general and well-established doctrine," the means by which "the review and correction of the proceedings" "and determinations of inferior boards or tribunals of special jurisdiction" "must be obtained." *Ewing* v. *City of St. Louis*, 72 U.S. (5 Wall.) 413, 418–419 (1867). Those tribunals were not subject to review by the ordinary writ of error (*Hartranft*, 247 U.S. at 300) and certiorari review of them was "in the nature of a writ of error" (*Harris*, 129 U.S. at 369). For ordinary tribunals whose merits decisions were reviewable by writ of error, certiorari was available only to review jurisdictional determinations. *Id.* at 371–372 ("*Certiorari* goes only to the jurisdiction.").

3. This common-law version of the writ still exists today. The Court's Rules expressly provide for it: "[I]f the case involves a petition for a common-law writ of certiorari, . . . the parties shall prepare a joint appendix in accordance with Rule 26." Sup. Ct. R. 20.6.

Though the Court's power to issue the writ persists, it has done so infrequently as the scope of statutory certiorari has expanded. For instance, in *House* v.

Mayo, the district court and the court of appeals denied a certificate of probable cause to a habeas petitioner. The petitioner then sought a writ of certiorari. This Court concluded that no writ could issue under the certiorari statute because "the case was never 'in' the court of appeals, for want of a certificate of probable cause." 324 U.S. 42, 44 (1945). Nevertheless, the Court "grant[ed] a writ of certiorari to review the action of the court of appeals in declining to allow an appeal to it" under the All Writs Act. *Id*. at 44–45.

After *House*, review of "courts of appeals' denials of leave to appeal in forma pauperis and refusals to issue certificates of probable cause" was "the most recent expansion in the scope of the common-law writ." Dallin H. Oaks, *The Original Writ of Habeas Corpus in the Supreme Court*, 1962 Sup. Ct. Rev. 153, 186. But that development was short-lived. In subsequent cases, the Court often granted certiorari without indicating the basis for its issuance of certiorari. See, *e.g.*, *In re Shuttlesworth*, 369 U.S. 35 (1962) (granting certiorari without any statutory basis but not noting that fact). Eventually, in 1998, the Court overruled the statutory holding of *House*, holding that denials of certificates of appealability (which had replaced certificates of probable cause) *were* cases "in the courts of appeals for the purpose of" the statutory jurisdiction statute. *Hohn* v. *United States*, 524 U.S. 236, 248 (1998).[3] In dissent, four Justices argued that the

[3] The government noted an "apparent shift from common-law to statutory certiorari in the IFP cases" as well. Br. for United States, *Hohn* v. *United States*, No. 96-8986, 1997 U.S. S. Ct. Briefs LEXIS 756, at *39 n.14 (Dec. 23, 1997).

Court should adhere to *House* and therefore determine whether it could "issue a common-law writ of certiorari under the All Writs Act" under the circumstances. *Id.* at 263 (Scalia, J., dissenting).

While *Hohn* obviated the need for common-law certiorari in such cases, it remains available where needed. As historically, the writ is still a safety valve in such cases that meet the discretionary criteria for certiorari but do not technically meet the criteria of the certiorari statue: "The wholesome function of this particular writ is to permit the Supreme Court to review cases of which it could not otherwise accept jurisdiction." Wolfson, 51 Colum. L. Rev. at 984. As this Court has explained, the All Writs Act "contemplates the employment of [common-law certiorari] in instances not covered by" the certiorari statute "as a means 'of giving full force and effect to existing appellate authority and of furthering justice in other kindred ways.'" *In re 620 Church Street Bldg. Corp.*, 299 U.S. 24, 26 (1936). This is precisely such a case.

II. The petition here meets the three-part test set forth in Rule 20.1.

As discussed, the Court's power to issue the common-law writ of certiorari comes from the All Writs Act, 28 U.S.C. § 1651(a). The Court has distilled its discretion to issue extraordinary writs under the All Writs Act to a three-part test in its Rule 20.1:

> To justify the granting of any such writ, the petition must show that [1] the writ will be in aid of the Court's appellate jurisdiction, [2] that exceptional circumstances warrant the exercise of the Court's discretionary powers, and [3]

> that adequate relief cannot be obtained in any other form or from any other court.

This case meets all three prongs.[4]

A. The writ is in aid of the Court's appellate jurisdiction because Petitioner seeks review of federal questions decided by an inferior federal court decided

1. The Court has "appellate Jurisdiction, both as to Law and Fact," in all cases "arising under the Constitution" or "the Laws of the United States." U.S. Const. Art. III, § 2, Cl. 1. This Court has appellate jurisdiction to review this case because it is an appeal from an Article III court's ruling on questions arising under the Constitution and federal law.

The FISC and FISCR review only questions of federal law. See, *e.g.*, 50 U.S.C. § 1803(a)(1) (FISC has "jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States under the procedures set forth in this Act"). And the FISCR reviews only denials of applications made by the government to the FISC (50 U.S.C. § 1803(b)) as well as certain other decisions of the FISC applying FISA (50 U.S.C. §§ 1822(d), 1861(f)(3), 1881a(i)(6)(A), 1881a(j)(4), 1881b(f)(1),

---

[4] Even if the Court concluded that Petitioner did not meet all three parts of the Rule 20.1 test, the Court could still grant the common-law writ because "[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Schacht* v. *United States*, 398 U.S. 58, 64 (1970).

1881c(e)(1)). The FISC's and FISCR's decisions therefore fall within Article III's "arising under" head of federal jurisdiction. See U.S. Const. Art. III, § 2, Cl. 1 ("The judicial power shall extend to all cases, in law and equity, arising under this Constitution [and] the laws of the United States . . . .").

The FISC and FISCR are Article III courts. See, *e.g.*, *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 486 (FISC 2007) ("Notwithstanding the esoteric nature of its caseload, the FISC is an inferior federal court established by Congress under Article III."); see also Br. in Opp. for United States at 22, *In re Elec. Privacy Info. Ctr.*, No. 13-58 (Oct. 11, 2013) ("[T]he FISC is an inferior court established by Congress under Article III."). But even if they were not Article III courts, this Court would still have appellate jurisdiction to review their decisions. This Court frequently reviews decisions of state courts and "special tribunals," showing that "the Court has constitutional appellate jurisdiction to review an exercise of judicial power other than that conferred by Article III." Oaks, 1962 Sup. Ct. Rev. at 162; *Ortiz* v. *United States*, 138 S. Ct. 2165, 2176 (2018) ("[T]his Court's appellate jurisdiction, as Justice Story made clear ages ago, covers more than the decisions of Article III courts."). Accordingly, this Court has constitutional appellate jurisdiction over every decision by the FISC and FISCR. See U.S. Const. Art. III, § 2, Cl. 2 ("In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction . . . .").

That is underscored by the fact that Congress has enacted no fewer than seven different statutory provisions that expressly allow this Court to review decisions of FISC and FISCR via certiorari. See 50 U.S.C. §§ 1803(b), 1822(d), 1861(f)(3), 1881a(h)(6)(B),

1881a(i)(4)(D), 1881b(f)(2), 1881c(e)(2). But, because those statutes do not expressly define the FISCR as a "court of appeals" in our case, this is exactly the kind of gap that the common-law writ of certiorari is meant to fill.[5]

2. "[F]ederal jurisdiction is not optional . . . ." *BP P.L.C.* v. *Mayor of Baltimore*, No. 19-1189, 2021 U.S. LEXIS 2586, at *11 (May 17, 2021). When a lower federal court fails to exercise its "virtually unflagging" "obligation to hear and decide cases," this Court always has appellate jurisdiction to correct that error. *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (quoting *Sprint Commc'ns, Inc.* v. *Jacobs*, 571 U.S. 69, 77 (2013)) (cleaned up).

Certainly, this Court always has appellate jurisdiction to reverse a federal court's decision that exceeded its jurisdiction. See, *e.g.*, *Int'l Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, 304 U.S. 243, 251 (1938) (per curiam) (Supreme Court "necessarily has jurisdiction" to determine whether a lower court "acted without jurisdiction").

---

[5] Even if statutory appellate review of the FISCR does not square with the text of Section 1254, that would not show an intent to strip this Court of its historic common-law jurisdiction. See *Utah* v. *Evans*, 536 U.S. 452, 463 (2002) ("We do not normally read into a statute an unexpressed congressional intent to bar jurisdiction that we have previously exercised." (citation omitted)); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 103 (1869) ("doubtful words" cannot "withhold[] or abridg[e] this jurisdiction"); Stephen I. Vladeck, *The Increasingly "Unflagging Obligation": Federal Jurisdiction After Saudi Basic and Anna Nicole*, 42 Tulsa L. Rev. 553, 573 (2007) (describing clear statement rule in *Hamdan*).

The same is true when lower federal courts fail to exercise vested discretion. Indeed, just as they may not exceed their jurisdiction, "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *New Orleans Pub. Serv., Inc.* v. *Council of New Orleans*, 491 U.S. 350, 358 (1989). "The one or the other would be treason to the Constitution." *Id.* (quoting *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (quotation marks omitted)); cf. *In re Sealed Case*, 310 F.3d 717, 731–732 (FISCR 2002) (assuming that the FISC is bound by the "constitutional bounds that restrict an Article III court").

It is for precisely this reason—the need to address abuses of jurisdiction in either direction in cases that do not qualify for statutory certiorari (or earlier, writs of error)—that these supervisory writs exist:

> Under the [All Writs Act], the jurisdiction of this Court to issue common-law writs in aid of its appellate jurisdiction has been consistently sustained. . . . The writs thus afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction, or of compelling it to exercise its authority when it is its duty to do so.

Ex parte Republic of Peru, 318 U.S. 578, 582–583 (1943); see also *Ex parte United States*, 287 U.S. 241, 245–246 (1932); *McClellan* v. *Carland*, 217 U.S. 268, 279–280 (1910); *Ex parte Crane*, 30 U.S. (5 Pet.) 190, 193–194 (1831).[6]

---

[6] The rules of subject-matter jurisdiction in federal court implicate the Court's appellate jurisdiction because

B. This case involves exceptional circumstances that warrant application of the common-law writ

1. "[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." *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). There are at least two such "serious constitutional problems" here. First, by the government's lights, the FISC and FISCR lack original jurisdiction to hear Petitioner's claim, possibly making Petitioner's claim unreviewable.

That would raise a constitutional question of the highest order. See *Webster* v. *Doe*, 486 U.S. 592, 603 (1988) ("We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." (citation omitted)). If the FISC and FISCR were unreviewable and got the jurisdictional question wrong—limiting individuals' access to the FISC—no judicial forum could assess the merits of Petitioner's First Amendment claim.

A rule that FISC and FISCR decisions are unreviewable would also allow the FISC to hide its wide-reaching Fourth Amendment jurisprudence, preventing Americans from being able to protect their rights.[7]

---

they are a federal question. See, *e.g.*, U.S. Const. Art. III, § 2, Cl. 1; 28 U.S.C. § 1331.

[7] The only other means of review would be a collateral attack on the use of the intelligence in a criminal case, but

For instance, Edward Snowden's notorious leaks revealed "that the FISA Court had approved Section 215 [of the Patriot Act] orders authorizing the bulk collection of call detail records." Office of the Inspector General, U.S. Dep't of Justice, *A Review of the FBI's Use of Section 215 Orders for Business Records in 2012 Through 2014*, at 6 (Sept. 2016). Subsequently, other Article III courts concluded that the program violated FISA. See *United States* v. *Moalin*, 973 F.3d 977 (9th Cir. 2020) (citing *ACLU* v. *Clapper*, 785 F.3d 787, 826 (2d Cir. 2015)). That leak should not have been necessary to ensure that the FISC ruled within the boundaries of the Constitution and of FISA. To ensure public confidence, this Court should show that it can and will oversee the body of secret constitutional law created by the FISC and FISCR.

Second, the government may contend that this Court lacks either appellate jurisdiction or statutory power to review Petitioner's serious constitutional claim. But it is doubtful whether Congress could deprive the Supreme Court of appellate jurisdiction over constitutional cases. The Court—and not the Congress or the "inferior" courts—"has remained the ultimate expositor of the constitutional text." *United States* v. *Morrison*, 529 U.S. 598, 616 n.7 (2000); see also *Webster*, 486 U.S. at 611–612 (Scalia, J., dissenting) ("[I]f there is any truth to the proposition that judicial cognizance of constitutional claims cannot be eliminated, it is, at most, that they cannot be eliminated . . . from this Court's appellate jurisdiction over

---

the government rarely discloses that it used intelligence obtained through FISA. See, *e.g.*, Amicus Br. for Stephen I. Vladeck at 24–26, *Wikimedia Found.* v. *NSA*, No. 20-1191 (4th Cir. July 8, 2020), ECF No. 21-1.

cases . . . from federal courts, should there be any[] involving such claims."); cf. *Felker* v. *Turpin*, 518 U.S. 651, 667 (1996) (Souter, J., concurring) (if statute limited Supreme Court review, "the question whether the statute exceeded Congress's Exceptions Clause power would be open").

While some prominent scholars have argued that "Article III requires . . . that the Supreme Court must have the final judicial word in all cases . . . that raise federal issues," Steven G. Calabresi & Gary Lawson, *Essay: The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 Colum. L. Rev. 1002, 1005 (2007), the Court need not resolve that issue here. Instead, the Court should do what it has so often done when confronted with this same question: use constitutional avoidance to read the relevant statutes to allow the Court to exercise its jurisdiction. *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 575 (2006) (declining to adopt a statutory position that "raises grave questions about Congress' authority to impinge upon this Court's appellate jurisdiction"); see also Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 Harv. L. Rev. 869, 925 (2011) ("As in *McCardle* and *Yerger*, the Supreme Court read this restriction narrowly."); Stephen I. Vladeck, *The Increasingly "Unflagging Obligation": Federal Jurisdiction After* Saudi Basic *and Anna Nicole*, 42 Tulsa L. Rev. 553, 557–558 (2007) (similar).

The constitutional concerns that would arise if the Court truly lacked a means to review the FISC and FISCR's rulings are even more serious because the underlying First Amendment claim raised in this case is more than "colorable." *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 513 n.10 (2006) ("A claim invoking federal-

question jurisdiction . . . may be dismissed for want of subject-matter jurisdiction if it is not colorable . . . .").

The Court has never addressed whether the public's qualified First Amendment right of access applies in FISC cases, an issue of serious dispute. See Pet. 21–26 (making merits argument); Pet., *In re Elec. Privacy Info. Ctr.*, No. 13-58 (Oct 11, 2013). And it is an area of immense public interest. When a FISC opinion was leaked in 2013, FISC's secrecy became a front-page news story (*e.g.*, Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, N.Y. Times at A1 (July 6, 2013)) earning condemnations from politicians of both parties (*e.g.*, Sen. Jeff Merkley, Press Release, Senators: End Secret Law (June 11, 2013), https://www.merkley.senate.gov/news/press-releases/senators-end-secret-law; Andrea Peterson, *Patriot Act Author: 'There Has Been a Failure of Oversight.'*, Wash. Post The Switch (Oct. 11, 2013), https://www.washingtonpost.com/news/the-switch/wp/2013/10/11/patriot-act-author-there-has-been-a-failure-of-oversight/).

The possibility that FISC opinions authorize conduct that violates Americans' rights has become significantly more substantial because the numerous post-9/11 statutes amending FISA increased FISC's domain:

> The FISC's role has expanded greatly since its creation in 1978. As FISA has evolved and Congress has loosened its individual suspicion requirements, the FISC has been tasked with delineating the limits of the Government's surveillance power, issuing secret decisions

> without the benefit of the adversarial process.

ACLU v. *Clapper*, 959 F. Supp. 2d 724, 756 (S.D.N.Y. 2013), *aff'd in part and rev'd in part*, 785 F.3d 787 (2d Cir. 2015); see also Stephen I. Vladeck, *The FISA Court and Article III*, 72 Wash. & Lee. L. Rev. 1161, 1168–1176 (2015) (describing radical changes in the type of cases heard by the FISC). Petitioner's case is not a mine-run qualified-right-of-access case where a newspaper seeks to publicize salacious details; it is an especially challenging case because the secret opinions could implicate the public's constitutional rights.

2. In addition, the effects of FISC rulings on Americans' primary conduct and the United States' foreign affairs constitute exceptional circumstances warranting the exercise of the Court's discretionary powers.

First, the Court historically favored granting certiorari when the case raised a question that affected the general public. The Court's standard was to issue the writ of certiorari "only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916);[8] see also *Forsyth* v. *Hammond*, 166 U.S. 506, 514 (1897) (certiorari

[8] Chief Justice Taft's reference to "uniformity of the law" was echoed by a leading scholar who explained that "the granting of a common law writ of certiorari . . . has been governed for the most part by the same discretionary criteria as the granting of the statutory writ." Wolfson, 51 Colum. L. Rev. at 984. Here, the FISC and FISCR "ha[ve] decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

granted in *The Three Friends*, 166 U.S. 1 (1897), because the case would "disclose to each citizen the limits beyond which he might not go"). This is such a case. As the Petition explains, FISC's opinions can have "far-reaching implications for U.S. citizens and residents who are not the ostensible targets of the government's surveillance." Pet. 4. Only through disclosure of the FISC's opinions (or through unauthorized leaks) can Americans gain a rough sense as to what communication might or might not be surveilled through dragnet surveillance.

Second, the Court often granted discretionary writs when the cases touched upon foreign affairs. For instance, "the construction of acts of Congress in the light of treaties with a foreign government" was sufficiently weighty to justify common-law certiorari. *In re Woods*, 143 U.S. 202, 206 (1892) (describing *In re Lau Ow Bew*, 141 U.S. 583 (1891)); *Forsyth*, 166 U.S. at 514 (certiorari granted in *The Three Friends*, 166 U.S. 1 (1897), because "the question involved was one affecting the relations of this country to foreign nations"); *Fields* v. *United States*, 205 U.S. 292, 296 (1907) (denying certiorari because, among other things, the case did not "affect[] the relations of this nation to foreign nations"); *Balintulo* v. *Daimler AG*, 727 F.3d 174, 187–188 (2d Cir. 2013) (collecting cases).

Here, decisions by the Foreign Intelligence Surveillance Court implementing the Foreign Intelligence Surveillance Act directly affect foreign policy. See 50 U.S.C. § 1804(a)(3)(A) (applications for electronic surveillance must explain why the applicant believes "the target of the electronic surveillance is a foreign power or an agent of a foreign power"); 50 U.S.C. §§ 1801(e)(2)(B), 1804(a)(6)(A) (information sought must be "foreign intelligence information,"

which includes information necessary to "the conduct of the foreign affairs of the United States"). Indeed, the FISCR itself has held that, in all stages of counterintelligence, the government's "foreign policy concerns" are important. *In re Sealed Case No. 02-001*, 310 F.3d 717, 743 (FISCR 2002).

Finally, exceptional circumstances also exist here because "unless it can be reviewed under [the All Writs Act, the order below] can never be corrected if beyond the power of the court below." *De Beers Consol. Mines, Ltd.* v. *United States*, 325 U.S. 212, 217 (1945) (describing *U.S. Alkali Exp. Ass'n*, 325 U.S. 196). "If [the Court] lacked authority to" review decisions like this, then "decisions [by FISC or FISCR] to dismiss for want of jurisdiction would be insulated entirely from review by this Court." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 743 n.23 (1982).

C. Because of the FISC's unique power over its records, adequate relief cannot be obtained in any other form or from any other court

The final factor is that "adequate relief cannot be obtained in any other form or from any other court." This usually refers to a failure of a litigant to seek relief in an intermediate court. *In re Blodgett*, 502 U.S. 236, 240 (1992) ("The State should have lodged its objection with the Court of Appeals, citing the cases it now cites to us."); *Hohn*, 524 U.S. at 264 (Scalia, J., dissenting) ("Because petitioner may obtain the relief he seeks from a circuit justice, relief under the All Writs Act is not 'necessary.'"); cf. Wolfson, 51 Colum. L. Rev. at 977 ("[T]he Supreme Court has frequently said, in cases reviewable by the courts of appeals, that

application for such writs should be made in the first instance to the intermediate courts.").

Here, however, that obstacle has been removed. Petitioner has already sought relief in the FISCR, the intermediate court that reviews FISC opinions. See Br. in Opp. for United States at 22, *In re Elec. Privacy Info. Ctr.*, No. 13-58 (Oct. 11, 2013) (arguing that EPIC should have sought relief in the FISCR).

The government may argue here that Petitioner's case could be brought in a federal district court. Cf. Br. in Opp. for United States at 15, *In re Elec. Privacy Info. Ctr.*, No. 13-58 (Oct. 11, 2013) ("[T]he proper way for petitioner to challenge the Telephony Records Program is to file an action in federal district court to enjoin the program."). But this is not an appropriate substitute. Petitioner's case concerns access to the records of a particular Article III court—the FISC. Asking a separate Article III court to order the FISC to turn over those records would be awkward, at best. Unlike this Court, district courts have no clear supervisory power over the FISC or FISCR, under Article III or under FISA. See Stephen I. Vladeck, *Standing and Secret Surveillance*, 10 I/S: J. L. & Poly for the Info. Soc'y 551, 572 n.93 (2014) ("[FISC's] decisions are subject to supervisory *appellate* review by the FISA Court of Review and then the U.S. Supreme Court.").

Indeed, courts often request that parties seek relief from sealing and similar orders in the court that protected the records. See, *e.g.*, *United States* v. *Ochoa-Vasquez*, 428 F.3d 1015, 1025 (11th Cir. 2005) ("The *Ochoa-Vasquez* district judge, doubting his authority to overturn another judge's sealing order, instructed Ochoa to intervene in the *Bergonzoli* case to

obtain relief."); *Courthouse News Serv.* v. *Brown*, 908 F.3d 1063, 1070 (7th Cir. 2018) (instructing the district court to dismiss a request for access when plaintiff "is seeking to have one court tell another court that its level of access is not good enough"); *Dushkin Pub. Grp., Inc.* v. *Kinko's Serv. Corp.*, 136 F.R.D. 334, 335–336 (D.D.C. 1991) (declining to contravene S.D.N.Y. protective order "as a matter of comity" and instructing the party to make its request in that court).

And even if a coordinate Article III court could and would rule on whether the FISC records at issue should be public, that would answer only Petitioner's second question. The *first* question is "[w]hether 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." Pet. at i. That question is very significant, given the increasing role that the FISC and FISCR have assumed in light of the recent changes to FISA discussed above and the greater public debate around foreign intelligence surveillance activities. No court other than this Court can address that jurisdictional issue and decide, once and for all, whether the FISC and FISCR lack any authority to entertain the First Amendment claims that Petitioner has raised.

In short, this Court's supervisory power is the only judicial power that can check FISC's supervisory power over its own records and files. Coupled with the other circumstances discussed above, that warrants the use of common-law certiorari.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

G. EDWARD POWELL III
Wilson Sonsini Goodrich & Rosati, PC
650 Page Mill Road
Palo Alto, CA 94304
(650) 493-9300

BRIAN M. WILLEN
Counsel of Record
BRIAN J. LEVY
Wilson Sonsini Goodrich & Rosati, PC
1301 Ave. of Americas
40th Floor
New York, NY 10019
(212) 497-7700
bwillen@wsgr.com

Counsel for Amicus Curiae

MAY 2021