UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

IN RE OPINIONS & ORDERS ISSUED BY THIS COURT ADDRESSING BULK COLLECTION OF DATA UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT	Docket No. Misc. 13-08

MOVANTS' REPLY BRIEF IN RESPONSE TO THE COURT'S ORDER OF MAY 1, 2018

David A. Schulz
John Langford
Jennifer Pinsof
Media Freedom & Information Access Clinic, Abrams Institute
Yale Law School
P.O. Box 208215
New Haven, CT 06520
Phone: (203) 436-5827
Fax: (203) 432-3034
david.schulz@ylsclinics.org

Alex Abdo
Jameel Jaffer
Knight First Amendment Institute at Columbia University
475 Riverside Drive, Suite 302
New York, NY 10115
Phone: (646) 745-8500
alex.abdo@knightcolumbia.org

Patrick Toomey
Brett Max Kaufman
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
Fax: (212) 549-2654
ptoomey@aclu.org

Arthur B. Spitzer
Scott Michelman
American Civil Liberties Union Foundation of the District of Columbia
915 15th Street NW, 2nd Floor
Washington, D.C. 20005
Phone: (202) 457-0800
Fax: (202) 457-0805
aspitzer@acludc.org

Table of Contents

Table of Authorities

Cases

Rules

Statutes

Other Sources

Introduction

The government's arguments that this Court lacks subject matter jurisdiction over Movants' motion for access to the FISC's judicial opinions are groundless, defy precedent and common sense, and if accepted would have significant consequences across the federal courts.

First, the government acknowledges that the FISC, as an Article III court, has inherent power over its records, but instead proposes a novel distinction between a court's inherent powers and its ability to act upon a request to exercise those powers. That distinction has no support in precedent—indeed, this Court has explicitly rejected it. It is also irreconcilable with the government's concession that the FISC has jurisdiction to address *other* motions for publication: namely, those filed by recipients of FISC orders under FISC Rule 62. Ultimately, the government's position would drive a wedge between the inherent power of this Court to control its judicial opinions and those of its coordinate Article III courts. Indeed, it would leave this Court with less inherent authority over its own opinions and records than even executive-branch courts created under Article I. The government has not explained how or why that could be so, nor has it explained why that distinction would (if accepted) stop at court records and not extend to the other types of inherent powers that all courts enjoy.

Second, even if courts' inherent powers do not confer subject matter jurisdiction over motions seeking access to judicial opinions, the doctrine of ancillary jurisdiction plainly does. The government argues that ancillary jurisdiction cannot be a basis for subject matter jurisdiction here because the centuries-old judicial power over records and opinions is not as "essential" to this Court as to others, but that is incorrect. The FISC's ability to control access to its opinions is necessary to vindicate its authority as a tribunal—in fact, it exercises that power every time it declines to publish an opinion. Moreover, the FISC's resolution of motions for access to its

opinions is intertwined with its underlying proceedings, which give it familiarity with the government's national-security claims. Consequently, the FISC may exercise ancillary jurisdiction for either of the purposes recognized by the Supreme Court.

Third, the government argues that the Freedom of Information Act ("FOIA") effectively displaces the public's First Amendment right of access to FISC opinions, and that any claims for those opinions must be filed in ordinary federal courts. But FOIA does not apply to judicial records at all, and the standard for withholding executive-branch records under that law cannot adequately substitute for the more demanding First Amendment standard that applies to the sealing of court opinions. And, in any event, Congress has no power to strip an Article III court's authority over its records.

For these reasons and those that follow, the Court should find that it has subject matter jurisdiction over Movants' motion and proceed to decide the merits.

Argument

I. The FISC's inherent power over its records includes the power to resolve motions for access to those records.

This Court has jurisdiction over motions seeking access to its opinions for the straightforward reason that it has inherent power over its opinions. *See* Movants' Br. 4–8. The government acknowledges that the FISC possesses the inherent power to supervise and control access to its own opinions, just as other Article III courts do. *See* Gov't Br. 1; *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978). It proposes a wholly novel distinction, however, between a court's inherent power to control its opinions and its power to address motions for access to those opinions. Gov't Br. 1. Movants are not aware of any precedent supporting the government's theory, and the government cites none. To the contrary, *this* Court has repeatedly held that there is no distinction between its inherent power over its records and its jurisdiction to

address motions concerning those records. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 486–87 (FISC 2007); *In re Section 215 Orders*, No. Misc. 13-02, 2013 WL 5460064, at *5 (FISC Sept. 13, 2013); *In re Motion for Consent to Disclosure of Court Records*, No. Misc. 13-01 (FISC June 12, 2013), https://perma.cc/F27S-J7KN. Other courts have likewise described their jurisdiction over access-related motions as flowing from their inherent power. *See Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 782 (1st Cir. 1988) ("[C]ourts and commentators seem unanimous in finding such an inherent power to modify discovery-related protective orders, even after judgment, when circumstances justify."); *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995) (citing *Nixon*, 435 U.S. at 598); *Macias v. Aaron Rents, Inc.*, 288 F. App'x 913, 915 (5th Cir. 2008). *See generally Grant v. United States*, 282 F.2d 165, 168–69 (2d Cir. 1960) (Friendly, J.) (finding jurisdiction over petitions for restitution based "upon the inherent disciplinary power" of the court) (quoting *United States v. Maresca*, 266 F. 713, 717 (S.D.N.Y. 1920)); *United States v. Breit*, 754 F.2d 526, 530 (4th Cir. 1985) ("[A] district court has the inherent power, and thus jurisdiction, to reconsider interlocutory orders prior to entry of judgment on such orders.").

As these cases show, the government's distinction between power and jurisdiction is a false one. Whether courts exercise their inherent powers sua sponte or in response to a party's motion for access, they are exercising jurisdiction to decide the question of whether their records and proceedings should be open to the public or not—including the applicability of any First Amendment or common law right of access. *See Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140–41 (2d Cir. 2004) (upholding district court's decision, sua sponte, to unseal judicial records after finding that they were subject to a presumption of public access). Indeed, the Supreme Court has been clear that courts' exercise of their supervisory powers must comport with these

public access rights. *See Nixon*, 435 U.S. at 598–99; *Stern v. Trs. of Columbia Univ.*, 131 F.3d 305, 307 (2d Cir. 1997) (ordering district court, sua sponte, to review records filed wholesale under seal in order to determine whether their confidential treatment was warranted, without considering whether there was a person that had a specific interest in gaining access to them or maintaining them in the public files of the court); *Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) ("The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it)."). In other words, the courts' inherent power to control their records carries with it the jurisdiction—and the obligation—to determine questions of public access. No further grant of jurisdiction is necessary.

Indeed, the government does not dispute that the FISC has subject matter jurisdiction to address motions for publication by parties who receive surveillance orders. Gov't Br. 13–14 (citing FISC Rule 62). This concession is fatal to the government's argument. Nothing in FISA grants recipients of FISC orders the right to seek publication of the Court's opinions while withholding that right from third parties. Motions for publication under FISC Rule 62 do not fall within either of the "two categories of cases" the government says are expressly authorized by FISA, because they do not ask the Court to approve a government surveillance application or to adjudicate a recipient's challenge to FISA process it has received. Gov't Br. 1, 7 (citing 50 U.S.C. §§ 1861(f), 1881a). Instead, a recipient's motion under Rule 62 seeks the same relief that Movants seek here: it asks the Court to make its opinions available to the public. Through Rule 62 itself and in the Court's decisions, the FISC has recognized its subject matter jurisdiction to address these motions for public access. *See, e.g.*, Order, *In re Directives Pursuant to Section 105B of FISA*, No. 105B(g) 07-01 (FISC July 15, 2013), https://perma.cc/5MXQ-SHDS (Yahoo!

motion for publication of FISC opinion and records five years after proceedings had concluded). Whether filed by a telecommunications provider or another party, a motion for publication asks the FISC to exercise its inherent powers to provide public access to its judicial opinions. In terms of subject matter jurisdiction, there is no basis for distinguishing between these motions. As the Court has recognized, Article III standing remains a limitation on which parties may petition the FISC for access to its opinions, but that is a threshold Movants have already satisfied. *See In re Certification of Questions of Law*, No. 18-01, 2018 WL 2709456 (FISCR Mar. 16, 2018).

Accepting the government's argument would render this Court's inherent powers inconsistent with those of other Article III courts. The inherent power of courts to control access to their opinions falls squarely within their power to issue judicial opinions and, more broadly, to manage the judicial proceedings they oversee. *See* Br. of Amicus Curiae Laura Donohue 18–24. Exercising the power to control access to their records, courts routinely entertain third-party access motions without requiring a further basis for their jurisdiction. *See, e.g.*, *Nixon*, 435 U.S. 589; *Doe v. Pub. Citizen*, 749 F.3d 246, 264 (4th Cir. 2014); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 572–73 (8th Cir. 1988); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006); *In re N.Y. Times Co.*, 577 F.3d 401 (2d Cir. 2009).

The government's attempt to brush aside Movants' authorities by reference to section 1331 federal-question jurisdiction is meritless. 28 U.S.C. § 1331. First, federal-question jurisdiction is not how most courts have explained their authority to address access to judicial records—rather, to the extent they question their jurisdiction at all, they invoke their inherent power. *See, e.g.*, *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1047 (D.C. Cir. 1998) (explaining that "when the third party seeks to intervene for the limited purpose of obtaining

access to documents," it "do[es] not ask the district court to exercise jurisdiction over an additional claim on the merits, but rather to exercise a power that it already has, namely the power to modify a previously entered confidentiality order"); *Pub. Citizen*, 858 F.2d at 782 (describing the "inherent power to modify discovery-related protective orders, even after judgment, when circumstances justify."); *Pansy v. Stroudsburg*, 23 F.3d 772, 778 n.3 (3d Cir. 1994); *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992). Thus, the courts that have most closely examined their jurisdiction over motions to unseal court records or to modify protective orders have *not* relied on the federal-question statute, instead concluding that no additional basis for jurisdiction is required beyond their inherent power.[1] Second, even if section 1331 could have provided an alternative (although silent) basis for jurisdiction in some of the cases Movants rely on, that is no response to the numerous authorities—including the pronouncement of the Supreme Court in *Nixon*—recognizing that courts have inherent authority to grant or restrict access to their own records. Movants' Br. 4–6.

Significantly, the government is unable to coherently explain how, under its narrow theory, even specialized Article I courts like the bankruptcy courts regularly exercise jurisdiction over right of access motions. *See, e.g., In re Alterra Healthcare Corp.*, 353 B.R. 66, 73–74 (Bankr. D. Del. 2006); *In re Bennett Funding Grp., Inc.*, 226 B.R. 331 (Bankr. N.D.N.Y. 1998); *In re Symington*, 209 B.R. 678 (Bankr. D. Md. 1997). The government points to the bankruptcy courts' rules of procedure, *see* Gov't Br. 10, but if the government were correct that an express grant of jurisdiction from Congress were required to confer subject matter jurisdiction, those

[1] Similarly, courts in criminal cases routinely address third-party motions for access to their records or proceedings without pointing to section 1331, even though such motions fall outside of the statute that confers criminal jurisdiction. *See* 18 U.S.C. § 3231; *In re N.Y. Times Co.*, 577 F.3d 401 (2d Cir. 2009); *United States v. King*, 140 F.3d 76 (2d Cir. 1998); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d at 572–73.

procedural rules would not be enough. In truth, the bankruptcy courts have subject matter jurisdiction over right-of-access motions for the same reason this Court does: because they have the inherent power to control access to their opinions and records.

The government also ignores entirely Movants' citation to cases in which Article I military courts have applied the First Amendment right-of-access test. *See, e.g.*, *United States v. Hershey*, 20 M.J. 433, 436–38 (C.M.A. 1985); *United States v. Scott*, 48 M.J. 663, 665 (Army Ct. Crim. App. 1998). That omission is telling. The fact that military courts with specialized jurisdiction—which, like other Article I courts (and this Article III one), do not enjoy federal-question jurisdiction under 28 U.S.C. § 1331—regularly decide questions involving the public's right of access makes crystal clear that courts do not require an additional jurisdictional grant to consider such motions. Though military courts were established under Article I, they "have long been understood to exercise judicial power, of the same kind wielded by civilian courts." *Ortiz v. United States*, 138 S. Ct. 2165, 2175 (2018) (cleaned up); *see id.* at 2180 (explaining that military courts are "constitutionally rooted" and "render[] inherently judicial decisions"). Of course, this Court's judicial power comes from Article III, just like the regular federal courts whose powers the Supreme Court looked to in *Ortiz*. It would make little sense if Article I courts enjoyed jurisdiction rooted in their inherent judicial power while this Court did not.

The government's attempt to distinguish cases involving protective orders and sealing orders from this case fails. Gov't Br. 11. As the government points out, the FISC's records are maintained in secret pursuant to "judicial branch" requirements set out in the FISC Security Procedures and FISC Rule 3. *Id.* at 13. The fact that FISC has adopted a default rule that keeps all of its opinions secret unless ordered published, as opposed to publishing opinions unless they are individually ordered sealed, does not affect the jurisdictional question. In either case, the

courts are exercising their inherent powers to control access to their opinions and records. *See id.* (acknowledging that the FISC's rules "represent a decision to exercise the Court's powers over its records").

The government is also wrong to suggest that jurisdiction over third-party motions for access disappears once a proceeding has concluded. Gov't Br. 11. Courts routinely entertain third-party motions to intervene and unseal records long after matters have been resolved—*i.e.*, after the court has lost jurisdiction, federal question or otherwise, over the merits of the original dispute. *See, e.g.*, *Doe*, 749 F.3d at 252–53; *Oregonian Pub. Co. v. U.S. District Court*, 920 F.2d 1462, 1467–68 (9th Cir. 1990). In the same way, courts retain jurisdiction to lift protective orders. *See Pansy*, 23 F.3d at 779 (citing "the growing consensus among the courts of appeals that intervention to challenge confidentiality orders may take place long after a case has been terminated" and collecting cases); *In re Agent Orange Prod. Liab. Litig.*, 821 F.2d 139, 145 (2d Cir. 1987) ("It is undisputed that a district court retains the power to modify or lift protective orders that it has entered."); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990).

Ultimately, the government cites no case law in support of its novel claim that the FISC has the inherent power to control access to its records, but lacks jurisdiction to consider motions for access to those records. Indeed, the government's argument would leave the FISC in a unique position among courts: it would strip the FISC of the power to efficiently resolve motions for access to its own opinions—a power that all other Article III courts regularly exercise over their opinions. *See* Movants' Br. 7–8; Br. of Amicus Curiae Laura Donohue 18–24. In particular, the government would curtail the FISC's power over its opinions, and its proceedings more broadly, thereby channeling motions for access to those opinions to the district courts. *See* Movants' Br.

12–14. The government's argument, if accepted, would produce a bizarre result: one where parties must file suit asking a different federal court to compel the FISC to release its judicial opinions under the First Amendment. *See id.* That would defy well-recognized principles of comity among coordinate courts, it would defy Congress's intent to give this Court control over its own opinions, and it would invite potentially conflicting rulings from dozens of courts on the public's right of access to this Court's opinions. *See id.* at 13–15. That is surely not the result Congress envisioned in enacting FISA or that the Constitution permits in its conception of the judicial power. *See also Nixon*, 435 U.S. at 599 ("[T]he decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."). Within the limits of Article III's requirement of standing, it is this Court that may and must adjudicate the public's access to its opinions.

II. The FISC has ancillary jurisdiction over Movants' right-of-access motion.

If the Court believes that some further jurisdictional basis is required, ancillary jurisdiction plainly provides it. Ancillary jurisdiction, as the government acknowledges, permits courts—including this one—to exercise jurisdiction over a range of collateral proceedings that are technically distinct from the initial case. *See* Gov't Br. 8–9; Movants' Br. 8–9; 13 Charles Alan Wright et al., *Federal Practice & Procedure* § 3523 (3d ed. 2018) ("Wright & Miller"). For example, courts have ancillary jurisdiction over contempt proceedings, *see, e.g.*, *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380 (1994) (citing *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)); and proceedings related to the award of attorneys' fees, *see Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). As Movants have explained, courts, including the FISC, also have ancillary jurisdiction over proceedings regarding access to their records. *See* Movants'

Br. 9–11; *United States v. Hubbard*, 650 F.2d 293, 307 (D.C. Cir. 1980); *In re Sealed Case*, 237 F.3d 657, 664 (D.C. Cir. 2001).

Kokkonen recognizes that courts may exercise ancillary jurisdiction for "two separate, though sometimes related, purposes": (1) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees; or (2) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent. 511 U.S. at 379–80. Both of these purposes are satisfied here.

As to the first of these purposes, exercising ancillary jurisdiction over Movants' motion vindicates the FISC's authority over its own records. Indeed, D.C. Circuit precedent is illustrative of this principle. In *Hubbard* and *In re Sealed Case*, the D.C. Circuit recognized that, where a third party has a "legally cognizable interest in maintaining the confidentiality of . . . documents" under a court's control, courts have ancillary jurisdiction over a motion "initiating a distinct ancillary proceeding without intervening" which seeks to protect that interest. *In re Sealed Case*, 237 F.3d at 663–64; *see Hubbard*, 650 F.2d at 307–14. The government protests that *Hubbard* and *In re Sealed Case* have no application here because "[b]oth involve parties that alleged that their legal rights were about to be violated by unlawful disclosures of information in ongoing government enforcement actions." Gov't Br. 10. But Movants, like the intervenors in *Hubbard* and *In re Sealed Case*, allege a legally cognizable right to records in the FISC's control and assert that those rights are being violated by the manner in which the records are maintained. There is no reason why a court would have ancillary jurisdiction over proceedings where the alleged harm is a court's publication of records, but not over proceedings where the alleged harm

is a court's *non*-publication of records. The question is the same: should the records be public or not?[2]

The government also contends that this Court lacks ancillary jurisdiction because adjudication of Movants' motion is not "essential to the proper functioning of the FISC or the effectuation of its orders." Gov't Br. 9. But that claim is at odds with the basic functions of an Article III court, and with the FISC's duty to exercise its powers in keeping with the Constitution. As the Amicus Curiae explained at length, a court's "[i]ssuance of opinions is a core judicial power." Br. of Amicus Curiae Laura Donohue 4. And, "[i]f the issuance of judicial opinions is a core judicial power, then control over those opinions must be an essential inherent power." *Id.* at 20. It is axiomatic that courts cannot exercise their inherent powers in ways that violate the Constitution. *See, e.g.*, *Chambers*, 501 U.S. at 50 ("A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees."). That holds true for a court's exercise of its supervisory power over its records. *Cf. Citizens First Nat'l Bank*, 178 F.3d at 945. It is therefore "essential to the proper functioning of FISC" that it have jurisdiction to confront a claim that it has exercised its inherent power over its records in a manner that violates the Constitution.

This conclusion is buttressed by the government's concession that the FISC *does* have ancillary jurisdiction to entertain declaratory judgment motions by communications providers

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[2] To the extent the government pegs its distinction on the *ongoing* nature of the proceedings in *Hubbard* and *In re Sealed Case*, that distinction is irrelevant. "It is well established that a federal court may consider collateral issues after an action is no longer pending." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990); *see also K.C. ex rel. Erica C. v. Torlakson*, 762 F.3d 963, 969 (9th Cir. 2014) ("[T]he district court has broad, inherent authority over collateral matters such as attorney's fees, and such ancillary jurisdiction extends beyond dismissal of the underlying lawsuit."); *In re Austrian & German Bank Holocaust Litig.*, 317 F.3d 91, 98 (2d Cir. 2003) (similar).

asserting a First Amendment right to publish aggregate statistics concerning surveillance demands. Gov't Br. 9 n.8 (discussing providers' efforts to publish transparency reports); *see, e.g.*, Amended Mot., *In re Amended Mot. for Decl. J. of Google Inc.'s First Amendment Right to Publish*, No. Misc. 13-03 (FISC Sept. 9, 2013), https://perma.cc/W6Z5-UVGQ. Those motions, like Movants' own, do not challenge any surveillance order on the merits, nor do they even establish that the providers had received any FISC orders at all. *See id.* at 1 n.1. Instead, the motions seek a declaratory judgment on a collateral issue: whether certain non-disclosure requirements imposed by FISA violate providers' First Amendment rights. *See id.* If these motions, which seek the right to publish aggregate statistics concerning surveillance demands, satisfy the requirements of ancillary jurisdiction, so too does a motion like Movants', which seeks public access to FISC opinions issued in the course of similar proceedings. A motion for access to the FISC's judicial opinions—its core work product—relates at least as closely to the Court's ability to "manage its proceedings" as does a motion challenging a blanket non-disclosure rule imposed by FISA itself. *Cf. Twitter v. Holder*, 183 F. Supp. 3d 1007, 1013 (N.D. Cal. 2016) ("Nothing in the Amended Complaint would require the [district court] to interpret, review, or grant relief from any particular FISC order or directive."). Accordingly, ancillary jurisdiction is available here.

With respect to the other "purpose" recognized in *Kokkonen*, Movants' right-of-access motion is sufficiently "interdependent" with the underlying proceedings to support ancillary jurisdiction. 511 U.S. at 379–80. In deciding not to publish its opinions, this Court has presumptively concluded that the government's national-security interests justify non-

disclosure.[3] Movants' right-of-access motion is interdependent with that determination because it asks the Court to examine whether the government has a compelling interest that overcomes the right of public access to these opinions. *Cf. Nixon*, 435 U.S. at 599 (recognizing trial court's familiarity with facts bearing on public access); *Globe Newspaper Co. v. Super. Ct. for Norfolk Cty.*, 457 U.S. 596, 609 n.25 (1982) (same). The federal courts have often considered a similar question of interdependence when parties move to intervene seeking access to judicial records—and those courts have overwhelmingly found that sufficient "commonality" exists. *See* Fed. R. Civ. P. 24(b) (parties permitted to intervene when they have "a claim or defense that shares with the main action a common question of law or fact."). These courts have taken a broad view of commonality when a party challenges a sealing or non-disclosure order, finding that such a motion is intertwined with the underlying proceeding. *See, e.g.*, *Pansy*, 23 F.3d at 778 (collecting cases); *E.E.O.C.*, 146 F.3d at 1047 ("[Courts have held that] the issue of the scope or need for the confidentiality order itself presents a common question that links the movant's challenge with the main action."); *Beckman*, 966 F.2d at 474; *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 164 (6th Cir. 1987). The same interrelationship exists here, and supports the Court's jurisdiction.

Finally, under either path laid out in *Kokkonen*, this Court has ancillary jurisdiction over Movants' First Amendment right-of-access motion notwithstanding the fact that it does not have general federal-question jurisdiction under 28 U.S.C. § 1331. A federal court's ancillary jurisdiction flows from its jurisdiction over the original proceeding. "[I]f a federal court ha[s]

[3] Again, the government does not dispute that this Court has already exercised its inherent power over the opinions at issue. *See* Gov't Br. 13 ("The [FISC's security] requirements, imposed by the judicial branch (the Chief Justice and this Court), represent a decision to exercise the Court's powers over its records in an appropriate manner consistent with the national security concerns that led Congress to create this specialized Court."); *id.* at 14.

jurisdiction of the principal action, it may hear an ancillary proceeding, regardless of the citizenship of the parties, the amount in controversy, or any other factor that normally would determine subject matter jurisdiction." Wright & Miller § 3523. Thus, even courts that would *not* have federal-question jurisdiction to consider right-of-access motions—such as the bankruptcy courts and the Court of International Trade—may exercise ancillary jurisdiction over motions for access to their underlying proceedings. *See In re Valdez Fisheries Dev. Ass'n, Inc.*, 439 F.3d 545, 549 (9th Cir. 2006) (acknowledging that bankruptcy courts have ancillary jurisdiction); *In re Chateaugay Corp.*, 201 B.R. 48, 62 (Bankr. S.D.N.Y. 1996), *aff'd in part*, 213 B.R. 633 (S.D.N.Y. 1997) ("Bankruptcy courts have inherent or ancillary jurisdiction to interpret and enforce their own orders wholly independent of the statutory grant of jurisdiction under 28 U.S.C. § 1334."); *Cormorant Shipholding Corp. v. United States*, 33 C.I.T. 440, 446 (2009) (acknowledging that the Court of International Trade has ancillary jurisdiction). Here, the FISC has ancillary jurisdiction over Movants' motion for access to its opinions because it has jurisdiction to grant or deny surveillance applications under 50 U.S.C. § 1801 *et seq.*

For these reasons and those in Movants' opening brief, the FISC has ancillary jurisdiction to entertain Movants' motion.

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As Movants have explained in the preceding two sections, this Court's inherent power and ancillary jurisdiction supply two independent bases for the consideration of this motion for access. Some courts have suggested, however, that ancillary jurisdiction is the vehicle through which Article III courts exercise their inherent powers. In *United States v. Wahi*, 850 F.3d 296 (7th Cir. 2017), for example, the Seventh Circuit suggested that ancillary jurisdiction is the "formal name" for a court's inherent power. *Id.* at 298; *see also United States v. Meyer*, 439 F.3d

855, 860 (8th Cir. 2006) (explaining that in *Kokkonen*, "[t]he Supreme Court viewed the inherent power of the federal courts as a subset of the second category of ancillary jurisdiction"); *In re Austrian & German Bank Holocaust Litig.*, 317 F.3d at 99 (noting availability of ancillary jurisdiction "to consider exercising 'inherent power' of federal courts"). Whatever the answer to this doctrinal question, the result here is the same. The Court has jurisdiction to consider Movants' motion either on the basis of its inherent power, on the basis of ancillary jurisdiction, or because it has ancillary jurisdiction to exercise its inherent power over its judicial opinions.

III. FOIA does not displace this Court's authority to address motions for public access to its judicial opinions.

In asserting that Movants' access motion should be pursued in a federal district court under the Freedom of Information Act, it is clear that the government fundamentally misunderstands FOIA and the nature of the FISC's power over its records.

First, FOIA is no substitute for the public's First Amendment right of access to this Court's opinions. FOIA did nothing to constrain the public's ability to seek access to judicial opinions, including FISC opinions, from the courts themselves. In fact, Congress carefully limited FOIA's disclosure mandates to "agency" records, 5 U.S.C. § 552(a)(1)–(3), and made clear that an "agency" subject to FOIA "does *not include* . . . the courts of the United States," *id.* § 551(1) (emphasis added). FOIA "was not intended to restrict the federal courts—either by mandating disclosure or by requiring non-disclosure" of judicial records. *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177 (6th Cir. 1983); *Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 672 (D.C. Cir. 2017). Moreover, if Congress had intended FOIA to serve as the sole vehicle for access to this Court's opinions, it would have required the government to, at a minimum, maintain copies of this Court's orders. But it is black-letter law that FOIA imposes no obligation on agencies to create or maintain specific records. *See, e.g.*,

Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 152 (1980). Nor does FISA itself impose such an obligation; it only requires the government to maintain copies of certain orders and certifications it makes to the FISC. *See* 50 U.S.C. § 1881a(h)(5), (*l*)(3).

Second, and relatedly, FOIA's standard for disclosure does not displace the First Amendment standard that applies when a party seeks access to judicial opinions. *See, e.g.*, *In re N.Y. Times Co.*, 828 F.2d 110, 115–16 (2d Cir. 1987) ("Obviously, a statute cannot override a constitutional right."). The government argues that "the standard of review for judicial consideration of Executive Branch classification decisions results not from the text of FOIA, but from the Executive Branch's responsibility and competence for safeguarding national security information." Gov't Br. 15–16. That is incorrect; while the executive branch's general responsibility over classified information may have motivated various exemptions in FOIA that allow for the withholding of classified information, the text itself controls. Moreover, the Constitution demands more rigorous scrutiny of classification decisions than FOIA. *Cf. N.Y. Times v. United States* (*Pentagon Papers*), 403 U.S. 713 (1971). For example, FOIA's requirement that the executive branch produce all "reasonably segregable" non-exempt material is less demanding than the First Amendment's requirement that closure be "narrowly tailored" to serve an "overriding" government interest. *Press-Enter. Co. v. Superior Court* (*Press-Enterprise I*), 464 U.S. 501, 510 (1984). More fundamentally, when FOIA requesters seek access to FISC orders and opinions as "agency records" under FOIA, this Court lacks any opportunity to itself consider whether the opinions should be published or to direct the executive branch to undertake a declassification review.

Third, Congress has no power to eliminate this Court's authority to control access to its opinions. To hold that FOIA displaced the FISC's Article III authority over its own opinions

would raise serious separation-of-powers concerns: it would prevent the FISC from exercising authority over access to its own precedential opinions—*the* quintessential judicial documents—and reassign that authority to the executive branch. That result would run afoul of the foundational principle that the "'judicial Power of the United States' must be reposed in an independent Judiciary." *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59–60 (1982) (quoting U.S. Const. art. III, § 1). One would not expect Congress to test the boundaries of the Constitution's division of power "without saying so." *Metlife, Inc.*, 865 F.3d at 675. It did not do so, in FISA or in FOIA.

Finally, neither decision of this Court cited by the government supports its argument that this Court lacks jurisdiction to entertain Movants' right-of-access motion because of FOIA. In *In re Motion for Release of Court Records*, this Court specifically held that it *does* have jurisdiction over right-of-access motions. 526 F. Supp. 2d at 486–87. And in *In re Section 215 Orders*, this Court did not dismiss a right-of-access claim for lack of jurisdiction; instead, it simply dismissed the claim as a matter of comity where there was ongoing FOIA litigation for the same opinions at issue in a district court, and it did so "without prejudice to reinstatement of a motion for publication with the FISC after resolution of the FOIA litigation." No. Misc. 13-02, 2013 WL 5460064, at *7 (FISC Sept. 13, 2013).

IV. Whether the FISC's publication of its opinions would conflict with Congress's and the executive branch's interests in secrecy goes to the merits, not to jurisdiction.

The government argues that the Court's "inherent supervisory power over its records" is limited by executive-branch and congressional interests in regulating "access to national security information." Gov't Br. 12; *see id.* at 14 & n.12. But as this Court has explained, "[h]ow the FISC exercises its supervisory power over its records, and the extent to which release of its records is either prohibited by statute (or by statutorily required security procedures) or

compelled by the Constitution or the common law, go directly to the merits of the ACLU's claims, and not to the Court's jurisdiction over the ACLU's motion." *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 486–87. If anything, the executive branch's and Congress's interests in secrecy might be relevant to the "experience" or "logic" prongs of the First Amendment right-of-access test, or to whether the government has demonstrated a substantial probability of harm to a compelling interest sufficient to justify the continued sealing of court records sought by Movants. *See Press-Enter. Co. v. Superior Court* (*Press-Enterprise II*), 478 U.S. 1, 9–11 (1986). In other words, that analysis does not bear on the Court's jurisdiction. It bears on the merits—and Movants have already explained why executive and congressional regulation of national-security information does not shield this Court's records from the First Amendment right of access. *See* Motion for the Release of Court Records 12–21 (Nov. 7, 2013); Movants' Reply Br. 8–10 (Dec. 20, 2013) (citing cases applying First Amendment right of access to judicial records involving classified information).

Conclusion

For the foregoing reasons, Movants respectfully request that the Court release the judicial opinions at issue with only those limited redactions that meet the strict test for overcoming the constitutional right of public access.

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Respectfully submitted,

/s/ Patrick Toomey

Patrick Toomey
Brett Max Kaufman

David A. Schulz
John Langford
Jennifer Pinsof

Media Freedom & Information
Access Clinic*
Abrams Institute
Yale Law School
P.O. Box 208215
New Haven, CT 06520
Phone: (203) 436-5827
Fax: (203) 432-3034
david.schulz@ylsclinics.org

Alex Abdo
Jameel Jaffer
Knight First Amendment Institute at
Columbia University
475 Riverside Drive, Suite 302
New York, NY 10115
Phone: (646) 745-8500
alex.abdo@knightcolumbia.org

American Civil Liberties Union
Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
Fax: (212) 549-2654
ptoomey@aclu.org

Arthur B. Spitzer
Scott Michelman
American Civil Liberties Union
Foundation of the District of Columbia
915 15th Street NW, Second Floor
Washington, D.C. 20005
Phone: (202) 457-0800
Fax: (202) 457-0805
artspitzer@acludc.org

Counsel for Movants

* This memorandum has been prepared with the assistance of Yale Law School student, Christine D'alessandro. This brief does not purport to present the institutional views of Yale Law School, if any.

CERTIFICATE OF SERVICE

I, Patrick Toomey, certify that on this day, August 1, 2018, a copy of the foregoing brief was served on the following persons by the methods indicated:

By email and UPS delivery

Maura L. Peterson
Litigation Security Group
U.S. Department of Justice
2 Constitution Square
145 N Street, N.E.
Suite 2W-115
Washington, DC 20530
Maura.L.Peterson@usdoj.gov

By email and UPS delivery

Jeffrey Smith
Counsel, Appellate Unit
U.S. Department of Justice
National Security Division
950 Pennsylvania Ave., N.W.
Washington, DC 20530
Jeffrey.Smith5@usdoj.gov

By email and UPS delivery

Laura Donohue
Georgetown University Law Center
600 New Jersey Ave., N.W.
Washington, DC 20001
ldk@georgetown.edu

/s/ Patrick Toomey
Patrick Toomey