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

David A. Schulz
Hannah Bloch-Wehba
John Langford
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 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

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Introduction

This Court has subject matter jurisdiction over Movants' motion for access to the FISC's judicial opinions on two independent grounds.

First, as the FISC previously held, the Court has inherent authority and jurisdiction to adjudicate such a motion pursuant to its inherent, supervisory power over its own records. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 486–87 (FISC 2007). The FISC, like other Article III (and even most Article I) courts, possesses inherent powers essential to its functions as a court, including the power to regulate public access to the judicial opinions it issues. In FISA, Congress recognized the FISC's inherent powers, and the Court's own rules specifically reflect its authority to decide when the FISC's opinions should be released to the public.

Second, even if this Court accepts the proposition that it lacks the fundamental, inherent powers of other courts, the FISC may exercise ancillary jurisdiction over Movants' motion. Movants' motion for access to the Court's opinions is ancillary to the Court's proceedings ruling on government surveillance applications—proceedings over which the Court has undisputed jurisdiction. Thus, just as courts have recognized the existence of ancillary jurisdiction over motions seeking to bar public access to judicial records, so too may Article III courts exercise ancillary jurisdiction over claims seeking to vindicate a public right of access.

Moreover, for the Court to decide that it lacks subject matter jurisdiction over Movants' motion would be contrary to existing FISC precedent and would have the perverse effect of forcing *other* courts to decide whether and when the public has a right of access to *this* Court's judicial opinions. Even if the FISC lacked jurisdiction to resolve Movants' motion, the federal district courts would have jurisdiction to hear such First Amendment claims. But such a result

would be at clear odds with FISA's purpose of developing and relying on this Court's expertise in the consideration of matters relating to foreign intelligence surveillance. As a specialized Article III court created to oversee foreign intelligence surveillance, the FISC has both the power and the expertise to resolve motions for public access to its foundational opinions.

Procedural and Factual Background

On November 6, 2013, Movants filed the motion at issue here, seeking the release—pursuant to the First Amendment right of access and FISC Rule 62—of any FISC opinions addressing "the bulk collection of Americans' information." Mot. for Release of Court Records at 2. Movants filed the motion to inform the public about how the FISC construes the scope of government surveillance authority when intelligence agencies seek to collect Americans' information in bulk.

In response, the government identified four opinions of this Court. Two of the opinions had previously been released in redacted form by the FISC.[1] The two others were released by the government, also with redactions, while Movants' motion was pending.[2] The redactions in the opinions are substantial, making it difficult for a reader and the public to understand the FISC's legal analysis. In two of the opinions, dozens of pages are almost entirely redacted. *See* Kollar-Kotelly Opinion at 8–9, 31–38, 73–79; Bates Opinion at 36–52, 57–70. In addition, certain key facts, definitions, and concepts have been redacted, such as the types of "metadata" that the FISC

[1] Amended Memorandum Opinion, *In re Application of the FBI for an Order Requiring the Production of Tangible Things from* [*Redacted*], No. BR 13-109 (FISC Aug. 29, 2013), https://perma.cc/LF5Z-VCFR ("Eagan Opinion") (released Sept. 17, 2013); Memorandum, *In re Application of the FBI for an Order Requiring the Production of Tangible Things from* [*Redacted*], No. BR 13-158 (FISC Oct. 11, 2013), https://perma.cc/NWZ2-MXZU ("McLaughlin Opinion") (released Oct. 18, 2013).

[2] Opinion and Order, [*Redacted*], No. PR/TT [Redacted] (FISC released Nov. 18, 2013), http://1.usa.gov/19Ct5rl ("Kollar-Kotelly Opinion"); Memorandum Opinion, [*Redacted*], No. PR/TT [Redacted] (FISC released Nov. 18, 2013), http://1.usa.gov/19Ct7Q5 ("Bates Opinion").

reasoned were not protected by the Fourth Amendment and could therefore be collected in bulk by the government.[3]

There is no indication in the public record that the FISC had any role in determining which portions of its own opinions should be made public. The government appears to have determined unilaterally which parts of the FISC's orders should be redacted and kept secret. By contrast, in response to a separate access motion brought by the ACLU, the FISC required the government to explain and justify its proposed withholdings in another FISC opinion.[4] That review proved essential to securing public access to the court's opinion.[5] Once required to defend its withholdings, the government abandoned many of them. Nothing similar occurred here.

On March 16, 2018, following proceedings in this Court, the FISCR determined that Movants have standing to seek public release of the FISC's opinions. *In re Certification of Questions of Law*, No. 18-01, 2018 WL 2709456 (FISCR Mar. 16, 2018). The Court has now directed the parties to address a separate issue: whether the FISC has subject matter jurisdiction over Movants' motion for access. May 1, 2018 Briefing Order. The Court also invited Movants to address the merits of their claim "to the extent additional briefing relates to legal authority that has not been addressed in their prior submissions to the Court." *Id.*

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[3] *See* Kollar-Kotelly Opinion at 7–11, 19 ("[Redacted] like other forms of metadata, is not protected by the Fourth Amendment . . . ."); Bates Opinion at 2, 35, 71 ("The government requests authority to [redacted] categories of [sixteen pages of redacted material].").

[4] *See* Order, *In re Orders of this Court Interpreting Section 215 of the PATRIOT Act* ("*In re Section 215 Orders*"), No. Misc. 13-02 (FISC Nov. 20, 2013), https://perma.cc/29WY-TUGV.

[5] Opinion and Order, *In re Section 215 Orders*, No. Misc. 13-02 (FISC Aug. 7, 2014), https://perma.cc/KE97-PZWC.

Argument

I. The Court has subject matter jurisdiction over this motion for access because the FISC, like all Article III courts, has inherent authority over its records.

All Article III courts enjoy "certain implied powers [that] necessarily result to our Courts of justice from the nature of their institution." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (alteration removed) (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)). These inherent powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962). Inherent judicial authority includes the powers to punish contempt, to regulate admission to the bar, to discipline attorney misconduct, to dismiss lawsuits for failure to prosecute, and to enforce decorum in the courtroom. *See Chambers*, 501 U.S. at 43–44. It also encompasses the "supervisory power over [a court's] own records and files"—a power that includes jurisdiction to entertain claims for access to court records. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978); *see Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140 (2d Cir. 2004) (a court's supervisory power over its own records is "fundamental"). As the FISC has previously held, "it would be quite odd if the FISC did not have jurisdiction in the first instance to adjudicate a claim of right to the court's very own records and files." *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 486–87, 497.

As a specialized Article III court, the FISC "retains all the inherent powers that any court has." *Matter of Kevork*, 634 F. Supp. 1002, 1014 (C.D. Cal. 1985), *aff'd*, 788 F.2d 566 (9th Cir. 1986). That is unsurprising, as other specialized Article III courts (and even most Article I courts) possess these inherent powers, too. *See, e.g., Retamal v. U.S. Customs & Border Prot.*, 439 F.3d 1372, 1376 (Fed. Cir. 2006) (discussing inherent powers of the Court of International

Trade, a specialized Article III court); *Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346, 1358 (Fed. Cir. 2003) (same); *Estee Candy Co. v. United States*, 343 F. Supp. 1362, 1363 (Cust. Ct. 1972) (U.S. Customs Court, the former incarnation of the Court of International Trade, discussing its inherent power to "regulate and protect" officers of the court); *United States v. Hershey*, 20 M.J. 433, 436–38 (C.M.A. 1985) (applying First Amendment right-of-access test to military court-martial); *United States v. Scott*, 48 M.J. 663, 665 (Army Ct. Crim. App. 1998) (same); *In re Alterra Healthcare Corp.*, 353 B.R. 66, 73–74 (Bankr. D. Del. 2006) (same as to bankruptcy proceeding); *Stam v. Derwinski*, 1 Vet. App. 317, 319–20 (Vet. App. 1991) (same as to appeal in Court of Veterans Appeals). Indeed, Congress acknowledged the Court's inherent powers in FISA, and provided that the FISC "may establish such rules and procedures, and take such actions, as are reasonably necessary to administer [its] responsibilities under this chapter," 50 U.S.C. §§ 1803(g)(1), (h). *See also* Rules Enabling Act, 28 U.S.C. § 2071(a) ("The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business."). FISC Rule 62 preserves the Court's power to exercise control over its records, and the FISC has on multiple occasions recognized its inherent power and jurisdiction to entertain a motion for access to those records. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d at 486–87, 497; *In re Section 215 Orders*, No. Misc. 13-02, 2013 WL 5460064, at *5 (FISC Sept. 13, 2013).

In its recent briefing to the FISCR in this case, the government did not seriously dispute either the FISC's inherent power to control its records or its jurisdiction to adjudicate third-party claims of access. Instead, it contended that the FISC's inherent power extends only to cases "before it," not to "new cases." Gov't Opening Br. at 23–24, *In re Certification of Questions of Law*, No. 18-01 (FISCR Feb. 23, 2018), https://perma.cc/5DRU-63K7. But the power to

adjudicate motions for access to court records derives from a court's authority and control over those records and thus persists even after the underlying dispute has ended. Whether a case is pending or terminated, "[s]o long as [court files] remain under the aegis of the court, they are superintended by the judges who have dominion over the court." *Gambale*, 377 F.3d at 141; *see, e.g.*, *Carlson v. United States*, 837 F.3d 753, 756–57 (7th Cir. 2016) (adjudicating request to unseal 70-year-old grand jury records). Indeed, the ongoing nature of a court's "retained power" over its records "provides a safety valve for public interest concerns, changed circumstances[,] or any other basis that may reasonably be offered for later adjustment," *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 535 (1st Cir. 1993)—concerns pointedly raised by Movants' motion.

Moreover, if this Court lacks the inherent powers enjoyed by other Article III (and Article I) courts, this Court could not properly have published its rulings on earlier occasions, including as far back as 1981. *See In the Matter of the Application of the United States for an Order Authorizing the Physical Search of Nonresidential Premises and Personal Property*, No. [Redacted] (FISC 1981), https://perma.cc/V3XT-SY5V; *see also In re All Matters Submitted to the FISC*, 218 F. Supp. 2d 611 (FISC 2002), *abrogated by In re Sealed Case*, 310 F.3d 717 (FISCR 2002); *In re Directives Pursuant to Section 105B of FISA* ("*In re Directives*"), 551 F.3d 1004, 1016 (FISCR 2008) ("It would serve the public interest and the orderly administration of justice to publish this opinion."). And it is not clear on what basis this Court would be able to enforce its rulings with contempt, though both this Court and the FISCR have unmistakably relied upon their power to do so. *See, e.g.*, *In re Production of Tangible Things from* [*Redacted*], No. BR 08-13, 2009 WL 9157881, at *1 (FISC Jan. 28, 2009) (in response to government misrepresentations as part of FISC proceeding, ordering briefing on "whether the Court should take action regarding persons responsible for any misrepresentations to the Court or violation of

its Orders . . . through its contempt powers"); *In re Directives*, 551 F.3d at 1017 ("Any violation of this Order shall immediately be brought to the Court's attention. The unauthorized use or disclosure of classified information pertaining to this case may violate federal criminal law and could result in civil or criminal penalties for contempt of court."); *see also* Gov't Opp. 3, *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484 (FISC Aug. 31, 2007), https://perma.cc/2984-LKRQ (conceding that the FISC has the inherent power of contempt).

Although courts' inherent powers are limited to those "necessary to permit the courts to function," *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 819–820 (1987) (Scalia, J., concurring in judgment), the publication of opinions—at times in response to claims of public access—is a necessary and essential power. As the Third Circuit has explained:

> As ours is a common-law system based on the "directive force" of precedents, its effective and efficient functioning demands wide dissemination of judicial decisions. . . . Even that part of the law which consists of codified statutes is incomplete without the accompanying body of judicial decisions construing the statutes. Accordingly, under our system of jurisprudence the judiciary has the duty of publishing and disseminating its decisions.

Lowenschuss v. W. Publ'g Co., 542 F.2d 180, 185 (3d Cir. 1976) (quoting Benjamin N. Cardozo, *The Nature of the Judicial Process* 20, 21–22 (1963)); *see Scheiner v. Wallace*, No. 93-cv-0062, 1996 WL 633226, at *1 (S.D.N.Y. Oct. 31, 1996) ("The public interest in an accountable judiciary generally demands that the reasons for a judgment be exposed to public scrutiny." (citing *United States v. Amodeo*, 71 F.3d 1044, 1048–49 (2d Cir. 1995))). Dissemination of judicial opinions is necessary both for the public to understand what the law is and to preserve the legitimacy of the judicial process. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) ("[J]udicial precedents are . . . valuable to the legal community as a whole. They are not merely the property of private litigants."); *accord Lowenschuss*, 542 F.2d at 185; *see also Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) (Easterbrook, J.) ("What

happens in the halls of government is presumptively public business. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification."). Because publication of judicial opinions is a fundamental—and therefore necessary and inherent—power of all Article III courts, this Court has jurisdiction to consider motions seeking just that.

II. The FISC, like all Article III courts, has ancillary jurisdiction over motions for access to its records.

In addition to its inherent judicial power, this Court has an independent basis for exercising power over Movants' motion: ancillary jurisdiction. As Wright and Miller explain, courts may exercise ancillary jurisdiction over "a *claim* or an *incidental proceeding* (not a *case* itself) that does *not* satisfy requirements of an independent basis of subject matter jurisdiction." 13 Charles Alan Wright et al., *Federal Practice & Procedure* § 3523 (3d ed. 2018) ("Wright and Miller") (emphasis in original). In proceedings like these, in which claims are both "ancillary and dependent, the jurisdiction of the court follows that of the original cause." *Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934). Here, the Court may exercise ancillary jurisdiction because this motion concerns access to the Court's own opinions, which it issued in ruling on the surveillance applications brought before it. *See* 50 U.S.C. §§ 1803–1805.

The Supreme Court has recognized that federal courts retain ancillary jurisdiction to entertain motions or incidental proceedings when necessary to "protect [their] proceedings and vindicate [their] authority." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379, 380 (1994). "Under this concept, a district court acquires jurisdiction of a case or controversy in its

entirety, and, as an incident to the full disposition of the matter, may hear collateral proceedings when necessary to allow it to vindicate its role as a tribunal." Wright and Miller § 3523.2.[6] Courts routinely exercise ancillary jurisdiction over a broad range of proceedings related to functions that lie at the core of the judicial power. *See, e.g.*, *Jenkins v. Weinshienk*, 670 F.2d 915, 918 (10th Cir. 1982) ("Ancillary jurisdiction rests on the premise that a federal court acquires jurisdiction of a case or controversy in its entirety. Incident to the disposition of the principal issues before it, a court may decide collateral matters necessary to render complete justice."); *Garcia v. Teitler*, 443 F.3d 202, 208 (2d Cir. 2006) (same).[7] In *Kokkonen* itself, for example, the Supreme Court recognized that a court may exercise ancillary jurisdiction to exercise its contempt power. 511 U.S. at 379–80 (citing *Hudson*, 11 U.S. (7 Cranch) at 34 ("To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.")).

Significantly, courts have also exercised ancillary jurisdiction over motions to maintain judicial records under seal. In *United States v. Hubbard*, for example, the D.C. Circuit held that a court may exercise ancillary jurisdiction over the motion of a third-party intervenor in a criminal case that the district court should maintain certain documents under seal. 650 F.2d 293, 307

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[6] Congress codified a subset of the courts' authority to exercise ancillary jurisdiction in 28 U.S.C. § 1367. However, Congress "did not codify all of common law ancillary jurisdiction." *Robb Evans & Assocs., LLC v. Holibaugh*, 609 F.3d 359, 363 (4th Cir. 2010). Section 1367 "does not affect common law ancillary jurisdiction 'over related *proceedings* that are technically separate from the initial case that invoked federal subject matter jurisdiction,' which remains governed by case law." *Id.* (citing Wright & Miller, § 3523.2); *see also Nat'l City Mortg. Co. v. Stephen*, 647 F.3d 78, 85 (3d Cir. 2011) ("In other words, a court may exercise jurisdiction over related matters arising out of the case in which it has initial jurisdiction.").

[7] *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990) (proceedings related to costs, attorneys' fees, and sanctions); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 170 (1939) (same); *K.C. ex rel. Erica C. v. Torlakson*, 762 F.3d 963, 968 (9th Cir. 2014) (same); *In re Austrian & German Bank Holocaust Litig.*, 317 F.3d 91, 99 (2d Cir. 2003) (same); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 938 (D.C. Cir. 1984) (proceedings related to "defensive" anti-suit injunctions).

(D.C. Cir. 1980). Furthermore, as a procedural matter, the appeals court found it appropriate for the intervenor to invoke the trial court's jurisdiction by "proceed[ing] by simple motion." *Id.* at 310. Rejecting the intervenor's petition for a writ of mandamus, the D.C. Circuit emphasized that the trial court should *itself* consider the claim, "especially where, as here, the matter is urgent and largely dependent on an extensive record with which the trial judge is intimately familiar." *Id.* at 309; *see also In re Sealed Case*, 237 F.3d 657, 664 (D.C. Cir. 2001) (concluding that appellants "properly initiated" a separate "ancillary proceeding" seeking to maintain documents under seal).

Just as courts have recognized the existence of ancillary jurisdiction over a motion seeking to *prevent* public access to judicial records, so too may Article III courts exercise jurisdiction over claims seeking to vindicate a public right of access. Access to a court's records, or a court's proceedings, is so intimately connected with a court's ability to conduct its day-to-day affairs and to control the cases that come before it, that courts plainly have ancillary jurisdiction to consider motions for access collateral to those underlying proceedings. No other court is positioned to rule quickly, or with the same knowledge of the underlying facts. *See generally Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 560–61 (1980) (describing trial court's order to clear the courtroom and subsequent hearing to address the parties' interests in closure); *Globe Newspaper Co. v. Super. Ct. for Norfolk Cty.*, 457 U.S. 596, 609 n.25 (1982) (recognizing trial court's ability to ascertain the various parties' interests in public access versus closure). It would be incongruous—not to mention inefficient—to require such motions to be brought before a different court, in a different proceeding. Unsurprisingly, neither the Supreme Court nor the lower courts have suggested such a rule. *Flynt v. Lombardi*, 782 F.3d 963, 966–67 (8th Cir. 2015) (collecting cases holding that intervention, not filing a separate action, is the appropriate procedural vehicle for access claims seeking judicial records); *cf. Beckman Indus.,*

Inc. v. Int'l Ins. Co., 966 F.2d 470, 473 (9th Cir. 1992) (no independent jurisdictional basis required for access claims). Instead, the Supreme Court has explained that when representatives of the press and general public assert a First Amendment right of access to judicial proceedings, they "*must* be given an opportunity to be heard on the question of their exclusion." *Globe Newspaper Co.*, 457 U.S. at 609 n.25 (1982) (emphasis added).

Where a court's records are at issue, ancillary jurisdiction remains even after the underlying proceeding has concluded. For example, courts have exercised ancillary jurisdiction to "order the expungement of records, including arrest records," when the maintenance of those public records compounds an infringement of constitutional rights. *Sullivan v. Murphy*, 478 F.2d 938, 968 (D.C. Cir. 1973); *see United States v. Field*, 756 F.3d 911, 916 (6th Cir. 2014) ("[F]ederal courts . . . retain ancillary jurisdiction over motions [for expungement] challenging an unconstitutional conviction."); *United States v. Meyer*, 439 F.3d 855, 861 (8th Cir. 2006) (recognizing federal courts' ancillary jurisdiction to expunge court records of an unlawful arrest or conviction). Similarly, courts have entertained claims of a First Amendment right of access to their records even long after the original litigation has concluded. *See, e.g.*, *Carlson*, 837 F.3d at 756–57 (adjudicating request to unseal 70-year-old grand jury records); *Doe v. Pub. Citizen*, 749 F.3d 246, 253 (4th Cir. 2014) (directing district court to unseal records requested in post-judgment motion); *Oregonian Pub. Co. v. U.S. District Court*, 920 F.2d 1462, 1468 (9th Cir. 1990) (directing district court to unseal plea agreement after defendant pleaded guilty and was sentenced). District courts have also adjudicated petitions seeking to unseal search warrants and records of electronic surveillance and to publicly docket those records. *See, e.g.*, Petition to Unseal, *In re Petition of Jennifer Granick & Riana Pfefferkorn*, No. 16-mc-80206-KAW (N.D. Cal. Sep. 28, 2016) (ECF No. 1); *Matter of Leopold to Unseal Certain Elec. Surveillance*

Applications & Orders, No. 13-mc-00712, 2018 WL 1129660, at *1 (D.D.C. Feb. 26, 2018) (entertaining claim to "unseal almost twenty years of sealed government applications, and related orders, to obtain information about, and the contents of, electronic communications in criminal investigations now closed"). Courts have exercised jurisdiction over these petitions even where petitioners have been unable—because of widespread sealing—to identify the specific cases or docket numbers to which they are seeking public access.

In short, this Court's jurisdiction over individual surveillance applications and proceedings provides ancillary jurisdiction over motions for public access concerning those same applications and proceedings—access that goes to the heart of the Court's role as an adjudicative tribunal.

III. Holding that the FISC lacks power to hear right-of-access motions would impermissibly strip the FISC of authority over its records and would contravene Congress's intent in enacting FISA.

Either as a matter of inherent power or ancillary jurisdiction or both, the Court has power to adjudicate movant's request for access. Holding otherwise would create anomalous results that would deprive the FISC of its inherent authority over its records and clash with the purpose of FISA.

A. Holding that the FISC does not have jurisdiction to entertain a motion for access to its records would effectively deprive it of control of its own records.

If this Court did not have jurisdiction to entertain First Amendment right-of-access motions, Movants would be forced to bring their motion in a federal district court, which plainly would have jurisdiction to entertain the constitutional claims presented. *See* 28 U.S.C. § 1331. Doing so, however, would create a range of thorny problems.

As demonstrated above, this Court's subject matter jurisdiction to adjudicate motions for access to its own opinions is entwined with its inherent authority as a tribunal. A determination

that the FISC lacks jurisdiction to consider Movants' application would suggest that it is, despite its Article III status, a lesser "court." While the rule in *other* Article III courts is that court files that "remain under the aegis of the court . . . are superintended by the judges who have dominion over the court," *Gambale*, 377 F.3d at 141, a ruling against the FISC's jurisdiction here would mean that this Court lacks the same "aegis" and "dominion" over the matters that come before it. Indeed, it would also imply that this Court lacks authority to supervise litigants, enforce orders, and even to publish its own opinions—in direct conflict with the "inherent authority" explicitly contemplated by the statute, 50 U.S.C. § 1803(h), and the Court's (and the FISCR's) past practice, as described above.

The exercise of jurisdiction by a federal district court would also disturb ordinary principles of comity and deference among courts of coordinate jurisdiction. Indeed, it would not only invite, but practically ensure, duplicative litigation in multiple *other* courts over materials authored, stored, distributed, and managed by *this* one. *See, e.g.*, *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) ("As between federal district courts, . . . the general principle is to avoid duplicative litigation."); *see also Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94–95 (9th Cir. 1982); *Great N. Ry. Co. v. Nat'l R.R. Adjustment Bd., First Div.*, 422 F.2d 1187, 1193 (7th Cir. 1970); *W. Gulf Mar. Ass'n v. ILA Deep Sea Local 24, et al.*, 751 F.2d 721, 728 (5th Cir. 1985). A district court's exercise of jurisdiction over disputes concerning FISC opinions may also require the district court to adjudicate issues concerning FISC rules and procedures, over which this Court has statutory authority. 50 U.S.C. § 1803(g)(l). Such a tortured result strongly suggests that a holding against jurisdiction here would be erroneous. In fact, outside of this Court, the government has agreed that the prospect of other district courts entertaining claims to this Court's records would interfere with the basic and

inherent relationship this Court has with its own cases and files. In ongoing litigation in the Northern District of California, the government recognized that this Court was best positioned to determine whether its own orders need remain secret. It urged the district court, in the interests of "comity and orderly judicial administration," *not* to exercise its jurisdiction over First Amendment claims related to FISA orders received by the plaintiff. Defs.' Notice of Mot. & Partial Mot. to Dismiss at 13, *Twitter, Inc. v. Holder*, No. 14-cv-4480 (N.D. Cal. Jan. 9, 2015) (ECF No. 28). These concerns about intruding upon the authority of other courts to control their own records are common: in considering a petition to unseal surveillance documents, one magistrate judge concluded that she lacked authority to "reverse the sealing orders of other judges in this district." Order at 3, *In re Petition of Jennifer Granick & Riana Pfefferkorn*, No. 16-mc-80206-KAW (N.D. Cal. June 23, 2017) (ECF No. 36). While there may be cases in which a court could properly exercise jurisdiction over claims related to matters originating in a sister court (including this one), such a proceeding would clearly not be undertaken lightly.

Requiring Movants to pursue the relief sought here in one of the federal district courts would require those courts to engage in an unusual form of collateral review and would impinge on this Court's authority over its proceedings, rules, and procedures. Moreover, for the reasons explained below, this Court is the Article III court best equipped to assess—on the merits—whether its own opinions must be withheld in whole or in part from the public.

B. Holding that the FISC does not have jurisdiction to entertain right-of-access motions would contravene Congress's intent to vest expertise on FISA matters in the FISC.

In enacting FISA, Congress sought to ensure that a specialized tribunal would develop expertise in foreign intelligence surveillance matters—an expertise that extends to motions seeking public access to the Court's records. As the House Report observed, a specialized court

would "likely . . . be able to put claims of national security in a better perspective and to have greater confidence in interpreting this bill than judges who do not have occasion to deal with the surveillances under this bill." H.R. Rep. No. 95-1283, at 91 (1978). Similarly, the Senate explained that "[t]he need to preserve secrecy for sensitive counterintelligence sources and methods justifies . . . consolidation of judicial authority in a special court." S. Rep. No. 95-701, at 12 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 3973. At the same time, as noted above, Congress explicitly recognized the FISC's inherent authority to "establish such rules and procedures, and take such actions, as are reasonably necessary to administer [its] responsibilities under this chapter." 50 U.S.C. §§ 1803(g)(l), (h). Congress's intent to vest this Court with specialized expertise, while preserving its inherent authority as an Article III court, leaves jurisdiction over this motion where it logically belongs: with the FISC itself, which of course has close familiarity with its own opinions and proceedings.

The fact that a specialized tribunal has subject matter jurisdiction over a limited set of claims does not strip it of the authority inherent to the exercise of judicial power. Other courts of specialized jurisdiction have adjudicated motions seeking access to their records on authority similar to FISC's own. For instance, bankruptcy courts, which are established under Article I and whose power is limited to cases arising under Title 11 of the U.S. Code, *see* 28 U.S.C. § 157, have exercised jurisdiction over right-of-access motions brought by non-parties. *See, e.g.*, *In re Alterra Healthcare Corp.*, 353 B.R. 66 (holding that the court had jurisdiction over newspaper's challenge to sealing orders because the motion was "a core proceeding over which the Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1334(b) & 157(b)(2)(A)"); *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 analogy to bankruptcy proceedings is instructive: bankruptcy courts have repeatedly exercised jurisdiction over right-of-access motions, despite their limited subject matter jurisdiction, and have thus been able to effectuate their own inherent authority over their judicial records. Likewise, Congress intended for this Court to develop institutional competence in FISA-related proceedings, and the Court is well-equipped to adjudicate Movants' access motion.

While Congress may "limit the exercise of the inherent power of courts by statute and rule," the Supreme Court has made clear that courts "do not lightly assume that Congress has intended to depart from established principles such as the scope of a court's inherent power." *Chambers*, 501 U.S. at 47; *see Lin v. DOJ*, 473 F.3d 48, 53 (2d Cir. 2007) ("[B]efore we will conclude that Congress intended to deprive us of our inherent powers, we require something akin to a clear indication of legislative intent.").[8] Far from stripping this Court of its inherent powers, however, Congress explicitly preserved that authority. 50 U.S.C. § 1803(g), (h). Holding that this Court lacks jurisdiction to decide a motion seeking publication of its own opinions would divest the FISC of the inherent judicial authority recognized in FISA. And it would undermine the specialized expertise that Congress sought to create in this Court.

IV. Public disclosures of FISC opinions over the past four years support Movants' motion on the merits.

In the time since this motion was originally briefed in 2013, developments across all three branches of government confirm the logic of affording public access to the FISC's opinions. This movement toward disclosure more closely aligns the FISC with the well-

[8] Indeed, "[s]ome elements of [courts'] inherent authority are so essential to '[t]he judicial Power,' U.S. Const., Art. III, § 1, that they are indefeasible," and Congress may only "specify the manner in which [those] . . . powers . . . will be exercised, so long as the effectiveness of those powers is not impaired." *Chambers*, 501 U.S. at 59–60 (Scalia, J., concurring). That is the case here, where the Court's power over its own opinions and records is at stake.

established history of public access to judicial opinions, *see* Mot. for Release of Court Records 16–21, and supports Movants' claim on the merits.[9]

When Movants filed their motion in November 2013, only a handful of the FISC's opinions had been released in the Court's 35-year history. In the past four years, however, dozens of opinions and more than one hundred orders have been released, as the FISC, the Executive Branch, and Congress acknowledged the benefits of making the Court's legal reasoning available to the public. *See* Appendix, Br. of Amicus Curiae Laura Donohue, *In re Certification of Questions of Law*, No. 18-01 (FISCR Feb. 23, 2018), https://perma.cc/V6W6-X47V; Letter from Hon. John D. Bates, Dir. of the Admin. Off. of U.S. Courts, to Hon. Patrick J. Leahy at 6 (Aug. 5, 2014), https://perma.cc/Y5QS-BHP6 ("[R]ecent experience shows that the preparation and release of *redacted* opinions can, in some cases, contribute to public understanding of the FISA courts' work." (emphasis in original)). A number of these releases—including two of the opinions at issue in this motion—were initiated by the FISC itself and were posted to the Court's public electronic docket, which did not exist prior to 2013. *See* Eagan Opinion; McLaughlin Opinion. Similarly, the Court has rightly treated its judicial opinions addressing Movants' access motions as presumptively public, even before passage of the USA FREEDOM Act. *See, e.g.*, *In re Section 215 Orders*, 2013 WL 5460064, at *7; Opinion and Order Directing Declassification of Redacted Opinion, *In re Section 215 Orders*, No. Misc. 13-02 (FISC Aug. 7, 2014), http://1.usa.gov/1yekcfM. In this way, the FISC already routinely publishes certain subsets of its opinions just as other Article III courts publish their opinions.

Over the past four years, both the Executive Branch and Congress have also recognized the logic of releasing significant opinions of this Court to the public. The Privacy and Civil

[9] *See also* Br. of Amicus Curiae Laura Donohue at 2–27, *In re Certification of Questions of Law*, No. 18-01 (FISCR Feb. 23, 2018), https://perma.cc/2WUJ-R7SA.

Liberties Oversight Board, in preparing its report on the bulk telephony program, reviewed a number of the FISC's opinions and on that basis called for greater public disclosure: "[T]hese opinions describe (often in very accessible language) the scope of the government's authority and the ways in which that authority is implemented in contexts affecting the rights of Americans. There is thus public interest in the disclosure of these opinions." Privacy and Civil Liberties Oversight Board, *Report on the Telephone Records Program Conducted Under Section 215* 199–200 (Jan. 23, 2014), https://perma.cc/W4HA-S5QV. The President's Review Group issued a similar recommendation. "[I]n order to further the rule of law, FISC opinions or, when appropriate, redacted versions of FISC opinions, should be made public in a timely manner, unless secrecy of the opinion is essential to the effectiveness of a properly classified program." President's Review Group on Intelligence & Communications Technologies, *Liberty & Technology in a Changing World* 206–07 (Dec. 12, 2013), https://perma.cc/2LLX-H2ZN. In June 2015, as part of the USA FREEDOM Act, Congress responded to these calls for greater transparency by directing the government to publicly release significant opinions of this Court to the greatest extent practicable.[10] *See* 50 U.S.C. § 1872.

These developments reinforce Movants' arguments on the merits. They evince the same logic that has motivated the long history of public access to judicial opinions in this country: a recognition that, in a democracy committed to the rule of law, *publication* of judicial decisions is an essential corollary to judicial decisionmaking. *See, e.g.*, *Nash v. Lathrop*, 142 Mass. 29, 35–36 (1886) (cited by *Banks v. Manchester*, 128 U.S. 244, 253–54 (1888) (Blatchford, J.)); *Lowenschuss*, 542 F.2d at 185. As Movants have argued previously, the fact that certain FISC opinions contain classified information may affect the Court's ultimate determination of what

[10] Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act ("USA FREEDOM Act"), Pub. L. No. 114-23, 129 Stat. 268 (2015).

may be withheld from the public, but it does not place these opinions altogether beyond the reach of the First Amendment. Movants' Reply Br. 8–10 (citing cases where courts applied First Amendment right of access to opinions containing 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
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

David A. Schulz
Hannah Bloch-Wehba
John Langford
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

* 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, June 13, 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