No. 13-58

In the Supreme Court of the United States

IN RE ELECTRONIC PRIVACY INFORMATION CENTER,
PETITIONER

ON PETITION FOR A WRIT OF MANDAMUS AND PROHIBITION, OR A WRIT OF CERTIORARI, TO THE FOREIGN INTELLIGENCE SURVEILLANCE COURT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should issue a writ of mandamus and prohibition to review the Foreign Intelligence Surveillance Court's determination that the government has "reasonable grounds to believe" certain telephony records are "relevant to an authorized investigation." 50 U.S.C. 1861(b)(2)(A).

2. Whether this Court has jurisdiction in this case to issue a writ of certiorari to the Foreign Intelligence Surveillance Court under 50 U.S.C. 1803(b) and 1861(f)(3).

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OPINION BELOW

Petitioner has identified as the opinion below a previously classified order of the Foreign Intelligence Surveillance Court, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things [etc.]*, Docket No. 13-80, Secondary Order (F.I.S.C. Apr. 25, 2013) (Secondary Order). See Pet. App. 1a-3a. The United States government has declassified the Secondary Order.

JURISDICTION

The Foreign Intelligence Surveillance Court entered the Secondary Order on April 25, 2013. The petition for a writ of mandamus and prohibition or a writ of certiorari was filed on July 8, 2013. Petitioner invokes this Court's jurisdiction under 28 U.S.C. 1651 and 50 U.S.C. 1803 and 1861(f). As explained below, see pp. 34-35, *infra*, this Court lacks jurisdiction to

issue a writ of certiorari to the Foreign Intelligence Surveillance Court.

STATEMENT

1. a. Congress enacted the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. 1801 *et seq.*, to authorize and regulate certain governmental surveillance of communications and other activities conducted to gather foreign intelligence. As originally enacted, FISA regulated domestically focused electronic surveillance. See 50 U.S.C. 1801(f).[1] The statute created a procedure for the government to obtain ex parte judicial orders authorizing such surveillance upon a showing that, *inter alia*, the target of the surveillance was a foreign power or an agent of a foreign power. 50 U.S.C. 1804(a)(3), 1805(a)(2). Congress amended FISA in 1994 and 1998 to add provisions enabling the government to obtain ex parte orders authorizing physical searches, pen registers, and trap-and-trace devices. See Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, § 807(a)(3), 108 Stat. 3443-3452 (50 U.S.C. 1821-1829); Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, § 601(2), 112 Stat. 2404-2410 (50 U.S.C. 1841-1846).

FISA created a special court, the Foreign Intelligence Surveillance Court (FISC), composed of district court judges appointed by the Chief Justice, to adjudicate the government's applications for ex parte orders. 50 U.S.C 1803(a). Congress specified that proceedings before the FISC are to be "conducted as

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[1] Unless otherwise noted, all citations of FISA in this brief are to the 2006 edition of the United States Code as supplemented, where relevant, by the Code's 2011 Supplement.

expeditiously as possible" with records "maintained under [appropriate] security measures." 50 U.S.C. 1803(c).

FISA also established a process for appellate review of orders issued by a FISC judge. FISA created a Foreign Intelligence Surveillance Court of Review (FISA Court of Review), comprising three federal judges appointed by the Chief Justice. 50 U.S.C. 1803(b). The FISA Court of Review has "jurisdiction to review the denial of any application" by the government to conduct surveillance. *Ibid.*; see also, *e.g.*, 50 U.S.C. 1822(d), 1881a(h)(6). If the FISA Court of Review "determines that [an] application was properly denied," the government may then file a petition for a writ of certiorari in this Court to challenge that determination. 50 U.S.C. 1803(b). As amended in 2008, FISA also now authorizes the FISC to sit en banc to review any order "on its own initiative" or "upon the request of the Government." 50 U.S.C. 1803(a)(2)(A); see FISA Amendments Act of 2008, Pub. L. No. 110-261, § 109(b)(1)(B), 122 Stat. 2464.

In addition to this system of judicial review, FISA established procedures for congressional oversight. In particular, the Attorney General must furnish certain reports detailing activities under the provisions discussed above semiannually to the Senate Select Committee on Intelligence, the Permanent Select Committee on Intelligence of the House of Representatives, and the Senate and House Judiciary Committees. See 50 U.S.C. 1808, 1826, 1846.

b. In 1998, Congress added a provision to FISA providing for the FBI to apply for an ex parte order authorizing specified entities (*e.g.*, common carriers, vehicle rental facilities) to release to the FBI copies of

business records. See Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, § 602, 112 Stat. 2411. That provision required the FBI's application to the FISC to "specify that * * * there are specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power." 50 U.S.C. 1862(b)(2)(B) (2000).

In 2001, Section 215 of the USA PATRIOT Act replaced FISA's business-records provision with a broader provision, codified at 50 U.S.C. 1861. The new provision authorizes the FBI to apply to the FISC "for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities." 50 U.S.C. 1861(a)(1). Section 1861 originally provided that the FBI's application "shall specify that the records concerned are sought for" such an investigation. 50 U.S.C. 1861(b)(2) (Supp. I 2001). In 2006, Congress amended Section 1861 to provide that the FBI's application must include "a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation." 50 U.S.C. 1861(b)(2)(A); see USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 106(b), 120 Stat. 196.

Section 1861 also includes other requirements for an order to produce business records or other tangible things. The investigation to which the request relates must be authorized and conducted under guidelines approved by the Attorney General under Executive

Order No. 12,333 (or a successor thereto), which governs the acquisition of foreign intelligence. 50 U.S.C. 1861(a)(2)(A) and (b)(2)(A); see Exec. Order No. 12,333, 3 C.F.R. 210 (1981 Comp.), reprinted as amended in 50 U.S.C. 401 note. In addition, the application must "enumerat[e] * * * minimization procedures adopted by the Attorney General * * * that are applicable to the retention and dissemination by the Federal Bureau of Investigation of any tangible things to be made available" to the FBI under the order. 50 U.S.C. 1861(b)(2)(B). FISA defines "minimization procedures" to mean, among other things, "specific procedures that are reasonably designed in light of the purpose and technique of an order for the production of tangible things, to minimize the retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information." 50 U.S.C. 1861(g)(2).

If the FBI makes the requisite factual showing, a FISC judge "shall enter an ex parte order as requested, or as modified, approving the release of tangible things." 50 U.S.C. 1861(c)(1). The order must "describe the tangible things," "include the date on which the tangible things must be provided," and "provide clear and conspicuous notice" that the recipient is prohibited from disclosing that the FBI "has sought or obtained tangible things pursuant to an order." 50 U.S.C. 1861(c)(2)(A)-(C) and (d)(1). Consistent with the need for secrecy in the investigation, the order "shall not disclose that such order is issued for purposes of [a foreign intelligence] investigation." 50 U.S.C. 1861(c)(2)(E).

c. Section 1861 establishes specialized procedures for the recipient of an order to challenge it in court. The statute provides that a person who receives a Section 1861 order may challenge the "legality of that order by filing a petition with" the FISC. 50 U.S.C. 1861(f)(2)(A)(i). The "presiding judge" of the FISC "shall immediately assign" the petition to one of the FISC's judges, who "shall conduct an initial review of the petition" within 72 hours to determine whether "the petition is frivolous." 50 U.S.C. 1861(f)(2)(A)(ii). If the judge determines that the petition is "not frivolous," the judge "shall promptly consider the petition," *ibid.*, and may grant the petition "only if the judge finds that [the] order does not meet the requirements" of Section 1861 or "is otherwise unlawful," 50 U.S.C. 1861(f)(2)(B).

Once the FISC judge rules, the government or the recipient of the order may seek en banc review before the full FISC, 50 U.S.C. 1803(a)(2)(A), or may file a petition for review with the FISA Court of Review, 50 U.S.C. 1861(f)(3). After the FISA Court of Review renders a written decision, "the Government or any person receiving such order" may petition this Court for writ of certiorari "to review such decision." *Ibid.* Unless a Section 1861 order has been "explicitly modified or set aside consistent with this subsection," it "remain[s] in full effect" during review. 50 U.S.C. 1861(f)(2)(D).

As with other provisions of FISA, and consistent with the basic objectives of the statute, Section 1861 expressly provides that "[a]ll petitions under this subsection shall be filed under seal," the "record of proceedings * * * shall be maintained under [appropriate] security measures," and "[j]udicial pro-

ceedings under this subsection shall be concluded as expeditiously as possible." 50 U.S.C. 1861(f)(4) and (5). Section 1861 also requires the Attorney General to report all requests under Section 1861 annually or semiannually to the Senate and House Intelligence and Judiciary Committees. 50 U.S.C. 1862(a); see also 50 U.S.C. 1862(b) and (c), 1871(a)(4).

d. Section 1861 was originally scheduled to expire on December 31, 2005. See USA-PATRIOT Act, Pub. L. No. 107-56, § 224, 115 Stat. 295. Congress, however, has repeatedly extended its sunset date. Section 1861 is currently scheduled to expire on June 1, 2015. See PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-14, § 2(a), 125 Stat. 216.

2. The government has developed a counterterrorism program under Section 1861 in which it compiles and retains business records created by certain telecommunications companies (the Telephony Records Program). The records collected under the Telephony Records Program consist of "metadata"—such as information about what numbers were used to make and receive calls, when the calls took place, and how long the calls lasted. Decl. of Acting Assistant Director Robert J. Holley, Federal Bureau of Investigation, at ¶ 5, *ACLU* v. *Clapper* (S.D.N.Y. Oct. 1, 2013) (13-cv-03994 Docket entry No. 62); Decl. of Teresa H. Shea, Signals Intelligence Director, National Security Agency, at ¶ 7, *Clapper*, *supra* (Oct. 1, 2013) (13-cv-03994 Docket entry No. 63). The records collected under the program do not include any information about the content of those calls or the names, addresses, or financial information of any party to the calls. Holley Decl. ¶¶ 5, 7; Shea Decl. ¶ 15. Through targeted computerized searches of those records, the

National Security Agency (NSA) endeavors to uncover connections between terrorist organizations and previously unknown terrorist operatives located in this country. Holley Decl. ¶ 5; Shea Decl. ¶¶ 8-10.

In response to unauthorized disclosures about the Telephony Records Program, the government has now confirmed the program's existence. Although aspects of the program remain properly classified, the government has declassified and made available to the public certain facts about the program. See generally *Administration White Paper: Bulk Collection of Telephony Metadata under Section 215 of the USA PATRIOT Act* (Aug. 9, 2013) (White Paper).[2] Because petitioner elected to initiate its challenge directly in this Court, the public record in this case does not describe the program as implemented by the government. The following description is drawn from the White Paper and recent government filings in *ACLU* v. *Clapper*, No. 13-cv-03994 (S.D.N.Y.).

a. Under the Telephony Records Program, the FBI has obtained FISC orders under Section 1861 directing certain telecommunications companies to produce records of the telephony metadata previously discussed. Holley Decl. ¶ 6. The companies create and maintain these records as part of their business of providing telecommunications services to customers. *Id.* ¶ 10; Shea Decl. ¶ 18. The NSA consolidates the metadata records provided by different telecommunications companies into one database. Shea Decl. ¶ 23. That compilation enables the agency's analysts to draw connections, across providers, between numbers

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[2] The White Paper is available online at http://apps.washingtonpost.com/g/page/politics/obama-administration-white-paper-on-nsa-surveillance-oversight/388/.

reasonably suspected to be associated with terrorist activity and with other, unknown numbers. Holley Decl. ¶¶ 5, 8; Shea Decl. ¶¶ 46, 60.

The FISC orders governing the Telephony Records Program provide that the records may be accessed only for counterterrorism purposes (and technical maintenance). Holley Decl. ¶ 8. NSA intelligence analysts may access the records to obtain foreign intelligence information only through queries of the records using telephone numbers or other identifiers associated with terrorist activity approved as "seeds" by one of 22 designated officials in NSA's Homeland Security Analysis Center or other parts of NSA's Signals Intelligence Directorate. Shea Decl. ¶ 31. Such approval may be given only upon a determination by one of those designated officials that there exist facts giving rise to a "reasonable, articulable suspicion" that the selection term to be queried is associated with one or more of the specified foreign terrorist organizations approved for targeting by the FISC. Holley Decl. ¶¶ 15-16.

Once an NSA intelligence analyst has obtained approval to conduct a query, the query is limited to records of communications within three "hops" from the seed. Shea Decl. ¶ 22. The query results thus will include only identifiers and their associated metadata having a direct contact with the seed (the first "hop"), identifiers and associated metadata having a direct contact with first "hop" identifiers (the second "hop"), and identifiers and associated metadata having a direct contact with second "hop" identifiers (the third "hop"). *Ibid.* Following that trail of connections allows the analyst to discover information that may not be readily ascertainable through targeted

intelligence-gathering techniques. *Id.* ¶ 46. For example, the query might reveal that a seed telephone number has been in contact with a previously unknown U.S. telephone number. *Id.* ¶ 58. Chaining out to the second and third hops to examine the contacts made by that telephone number may reveal a contact with other telephone numbers already known to the government to be associated with a foreign terrorist organization. *Id.* ¶¶ 47, 62.

As of October 1, 2013, fourteen different judges of the FISC, on thirty-four separate occasions, have approved Section 1861 orders directing telecommunications service providers to produce records in connection with the Telephony Records Program. Shea Decl. ¶ 14. Under those orders, the government must periodically seek renewal of the authority to collect telephony records (typically every 90 days). *Ibid.* When failures to comply with the minimization procedures set forth in the orders due to human error or technological issues have occurred, the Executive Branch has reported those failures to the FISC and has worked promptly to remedy them. *Id.* ¶¶ 36-43.

b. In early 2007, the Department of Justice began providing all significant FISC pleadings and orders related to the Telephony Records Program to the Senate and House Intelligence and Judiciary Committees. See White Paper 18. By December 2008, all four committees had received the FBI's initial application and the first order authorizing the telephony records collection. See *ibid.* The Executive Branch provided all later pleadings and orders reflecting significant legal developments regarding the program to all four committees. See *ibid.*

In December 2009, the Department of Justice provided a classified briefing paper to the House and Senate Intelligence Committees that could be made available to all Members of Congress regarding the Telephony Records Program.[3] Both Intelligence Committees made that classified briefing paper available to all Members of Congress before Congress extended the authorization of Section 1861 without change in 2010.[4] See Act of Feb. 27, 2010, Pub. L. No. 111-141, § 1(a), 124 Stat. 37 (extending sunset of USA PATRIOT Act, including Section 1861, until February 28, 2011).

3. a. Petitioner is a "non-profit public interest research center," Pet. App. 4a, that seeks to challenge directly in this Court an order issued by a FISC judge on April 24, 2013 (the Secondary Order). Petitioner seeks a writ of mandamus and prohibition in this Court, or, in the alternative, a writ of certiorari. Petitioner was not a party to the proceeding in the FISC that resulted in the Secondary Order. Nor was it subject to, named in, or served with that order.

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[3] See Letter from Assistant Attorney General Ronald Weich to the Honorable Silvestre Reyes, Chairman, House Permanent Select Committee on Intelligence (Dec. 14, 2009); *Report on the National Security Agency's Bulk Collection Programs Affected by USA PATRIOT Act Reauthorization* 3 (Dec. 2009).

[4] See Letter from Sen. Diane Feinstein, Chairman, and Sen. Christopher Bond, Vice Chairman, Select Committee on Intelligence, to Colleagues (Feb. 23, 2010); Letter from Rep. Silvestre Reyes, Chairman, Permanent Select Committee on Intelligence, to Colleagues (Feb. 24, 2010); see also 156 Cong. Rec. H838 (daily ed. Feb. 25, 2010) (statement of Rep. Hastings); 156 Cong. Rec. S2109 (daily ed. Mar. 25, 2010) (statement of Sen. Wyden).

The Secondary Order reflects the finding by a FISC judge that the FBI's application for an "[o]rder requiring the production of tangible things * * * satisfies the requirements of 50 U.S.C. § 1861." Pet. App. 1a. The order requires the recipient of the order, Verizon Business Network Services, Inc. (VBNS), to provide the NSA with "call detail records or 'telephony metadata' created by [VBNS] for communications (i) between the United States and abroad; or (ii) wholly within the United States, including local telephone calls." *Id.* at 1a-2a. The Secondary Order explains that "[t]elephony metadata includes comprehensive communications routing information" but does not include "the substantive content of any communication" or "the name, address, or financial information of a subscriber or customer." *Id.* at 2a. Petitioner contends that the order affects it because petitioner "is currently a Verizon telephone customer and has been since prior to April 2013." *Id.* at 5a.

On July 31, 2013, the Director of National Intelligence substantially declassified a "Primary Order," which granted the government's application for an order directing production of records under Section 1861 and was issued in conjunction with, and on the same day as, the Secondary Order. See *In re Application of the FBI for an Order Requiring the Production of Tangible Things [etc.]*, Docket No. 13-80, Primary Order 1-2 (F.I.S.C. Apr. 25, 2013) (Primary Order).[5] The Primary Order directs the government to comply with minimization procedures that limit the extent to which information received under the Secondary Order may be reviewed, used, or disseminated

[5] See http://www.dni.gov/files/documents/PrimaryOrder_Collection_215.pdf.

and requires submission of monthly reports to the FISC detailing how the database has been accessed. See *id.* at 4-17; see also 50 U.S.C. 1861(b)(2)(B), (g) and (h). The record underlying the Primary and Secondary Orders—including the government's applications to the FISC—remains classified.

b. The Secondary Order expired on July 19, 2013. See Pet. App. 3a. On that day, the government announced that it had filed an application with the FISC seeking renewal of the authority to collect telephony records and that the FISC had renewed that authority.[6]

c. On August 29, 2013, a judge of the FISC issued an opinion concluding that the Telephony Records Program meets the statutory requirements under Section 1861 and complies with the Fourth Amendment. That opinion was partially declassified on September 17, 2013. See Amended Mem. Op., Docket No. 13-109 (Aug. 29, 2013) (Aug. 29 Op.).[7]

4. Since the disclosure of the Telephony Records Program, parties have sued the government in federal district courts to enjoin the program. See *Clapper*, *supra* (filed June 11, 2013); see also *First Unitarian Church of L.A.* v. *NSA*, 13-cv-03287 (N.D. Cal. filed July 16, 2011); cf. *Klayman* v. *Obama*, 1:13-cv-00851-RJL (D.D.C. filed June 6, 2013). No district court has

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[6] See Office of the Director of National Intelligence, *Foreign Intelligence Surveillance Court Renews Authority to Collect Telephony Metadata* (July 19, 2013), http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/898-foreign-intelligence-surveillance-court-renews-authority-to-collect-telephony-metadata.

[7] See http://www.uscourts.gov/uscourts/courts/fisc/br13-09-primary-order.pdf.

yet ruled on those challenges or otherwise adjudicated the lawfulness of the program.

ARGUMENT

Petitioner asks this Court to entertain in the first instance its challenge to the statutory basis for a counterterrorism program approved by the FISC. According to petitioner (Pet. 17-25), the Telephony Records Program does not comply with Section 1861's requirement that there exist "reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation." 50 U.S.C. 1861(b)(2)(A). Petitioner asks this Court to issue a writ of mandamus and prohibition to the FISC or, in the alternative, to grant certiorari to review the Secondary Order. The petition, however, does not meet the stringent requirements for mandamus relief, and this Court lacks jurisdiction to issue a writ of certiorari to the FISC in these circumstances. Accordingly, the petition should be denied.

I. THE PETITION DOES NOT SATISFY THE REQUIREMENTS FOR MANDAMUS RELIEF

The All Writs Act, 28 U.S.C. 1651(a), authorizes this Court to issue a writ of mandamus to a lower court "in aid of" the Court's jurisdiction. As this Court has explained, however, mandamus is a "'drastic and extraordinary' remedy" that is "'reserved for really extraordinary causes.'" *Cheney* v. *United States Dist. Ct.*, 542 U.S. 367, 380 (2004) (quoting *Ex parte Fahey*, 332 U.S. 258, 259-260 (1947)).[8]

[8] Petitioner has also styled its requested relief as a "writ of prohibition." The modern "writ of prohibition" is often used interchangeably with the writ of mandamus, see *Kaiser Gypsum* v. *Kelly*, 921 F.2d 1310, 1313 (3d Cir. 1990), cert. denied, 499 U.S. 976

This Court's rules accordingly instruct that "[i]ssuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised." Sup. Ct. R. 20.1. Mandamus relief is available only where three requirements are met: "[i] the writ will be in aid of the Court's appellate jurisdiction, * * * [ii] exceptional circumstances warrant the exercise of the Court's discretionary powers, and * * * [iii] adequate relief cannot be obtained in any other form or from any other court." *Ibid.*; Pet. 12; see *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010). The petition does not satisfy those requirements.

First, consistent with the basic nature of proceedings before the FISC and the foreign-intelligence objectives of the statute, Congress has permitted only the government or the recipient of an order to appeal FISC rulings under Section 1861. 50 U.S.C. 1861(f)(3). Accordingly, there is a substantial question whether the mandamus relief sought by petitioner, which is not a recipient of a Section 1861 order and was not a party to the proceedings before the FISC, would be "in aid of the Court's appellate jurisdiction." Sup. Ct. R. 20.1. At the very least, petitioner's status as a non-recipient and non-party weighs heavily against mandamus relief. *Second*, the proper way for petitioner to challenge the Telephony Records Program is to file an action in federal district court to enjoin the program, as other parties have done. Although the government may assert certain threshold defenses to such a suit, those same defenses apply in

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(1991), and petitioner has not argued that the requirements for a writ of prohibition differ from the requirements for a writ of mandamus.

this Court, and so this Court does not provide a more suitable forum for petitioner to raise its challenge in the first instance. *Finally*, petitioner has not shown a "clear and indisputable" right to relief, *Cheney*, 542 U.S. at 381, or identified exceptional circumstances warranting mandamus. Petitioner has not demonstrated Article III standing, and FISA does not grant third parties the right to enforce the requirements of Section 1861. In any event, the Telephony Records Program fully complies with Section 1861.

A. FISA Provides That Only The Government Or The Recipient Of An Order May Seek Appellate Review Of A FISC Decision Under Section 1861

Petitioner is not permitted to seek appellate review of a determination under Section 1861. Congress established that only specified parties—the government or the recipient of an order—may seek review in this Court of a FISC decision under Section 1861. See 50 U.S.C. 1861(f)(3). Thus, for example, if the party ordered to produce business records under Section 1861 elected to challenge a FISC decision affirming or modifying the order, it could appeal to the FISA Court of Review and later seek certiorari review in this Court. Petitioner, which was not the recipient of the order, is not permitted by statute to seek such review.

There is a substantial question whether a mandamus petition would be "in aid of" this Court's appellate jurisdiction if the Court could never have jurisdiction over an eventual appeal by the mandamus petitioner—at least where, as here, the mandamus petitioner was not a party to the lower-court proceedings, Congress has clearly specified and limited the class of persons who can invoke appellate jurisdiction, and

mandamus relief is not necessary to facilitate appellate review by such a party.[9] As this Court has explained, "[w]here the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions." *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 30 (1943). That is because "[t]he historic use of writs of prohibition and mandamus directed by an appellate to an inferior court has been to exert the *revisory appellate power* over the inferior court." *Ex parte Peru*, 318 U.S. 578, 582-583 (1943) (emphasis added); see also *Ex parte United States*, 287 U.S. 241, 246 (1932). Here, however, as petitioner acknowledges (Pet. 15-16), this Court would never have jurisdiction over an appeal of the Secondary Order brought by petitioner under Section 1861(f)(3). And petitioner has not argued that it even has a right to participate in proceedings before the FISC, that it has a separate statutory avenue to appeal a Section 1861 order apart from Section 1861(f)(3), or that mandamus relief would be necessary to facilitate this Court's ability to review the Secondary Order if properly challenged by a party that has such rights. Accordingly, there is a substantial question whether mandamus would be "in aid of the Court's appellate jurisdiction," Sup. Ct. R. 20.1, and in any event these considerations weigh heavily against the extraordinary relief of mandamus.

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[9] Cf. *Chandler* v. *Judicial Council of the Tenth Circuit*, 398 U.S. 74, 115 (1970) (Harlan, J., concurring in the denial of writ) (explaining that a mandamus challenge by a district judge may be permissible because parties to cases assigned to a different judge may have no adequate means to appeal purportedly unlawful case assignments).

That conclusion is not undermined by decisions cited by petitioner's amici that have allowed media entities to seek mandamus relief to obtain public access to lower-court proceedings under *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980). See Profs. James E. Pfander & Stephen I. Vladeck Amicus Br. 12-13. As an initial matter, the mandamus petitioners in those cases had first intervened or otherwise participated in proceedings in the district court and then sought mandamus. Because the media entities were parties to the particular proceedings below, they could properly invoke the appellate jurisdiction of the circuit court and thus could satisfy at least that prerequisite to mandamus. See *In re Boston Herald, Inc.*, 321 F.3d 174, 175-176 (1st Cir. 2003) ("A magistrate judge allowed the intervention but denied the motion to unseal."); *Oregonian Pub. Co.* v. *U.S. Dist. Ct. for Dist. of Or.*, 920 F.2d 1462, 1463-1464, 1466 (9th Cir. 1990) ("The district court allowed The Oregonian to intervene in the case."), cert. denied, 501 U.S. 1210 (1991).[10]

More generally, if a statute allows appeal by all parties to a proceeding, a person not technically a party "is often allowed to appeal" "if the decree affects his interest." *West* v. *Radio-Keith-Orpheum Corp.*, 70 F.2d 621, 623-624 (2d Cir. 1934) (Hand, J.);

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[10] See also *In re Application of the U.S. for an Order Pursuant to 18 U.S.C. Section 2703(D)*, 707 F.3d 283, 288-289 (4th Cir. 2013) (petitioners "moved the [district] court to vacate the [order], unseal all documents relating to the [order], and unseal and publicly docket any other [pertinent] orders"); *Baltimore Sun Co.* v. *Goetz*, 886 F.2d 60, 62-63 (4th Cir. 1989) (media organization "petitioned to intervene" and district court denied motion to unseal affidavit on the merits).

see also *Devlin* v. *Scardelletti*, 536 U.S. 1, 7 (2002) ("We have never * * * restricted the right to appeal to named parties to the litigation"); *id.* at 9 ("[P]etitioner will only be allowed to appeal that aspect of the District Court's order that affects him."). As a result, in appropriate circumstances involving general appellate-jurisdiction statutes, *e.g.*, 28 U.S.C. 1291, persons who were permitted to participate in proceedings before the lower court but are not named parties may seek mandamus if they could also ultimately seek appellate review.

Here, by contrast, Section 1861(f)(3) specifically permits appeals by only the government or the recipient of the order. It would defeat the evident purpose behind Section 1861's express limitation on the persons who can appeal to the FISA Court of Review and ultimately invoke this Court's certiorari jurisdiction if a third party for whom there is no basis to participate even before the FISC could obtain review by changing the label on its appellate papers to seek mandamus relief instead. "[T]o grant the writ in [this] case would be a plain evasion of the Congressional enactment." *Roche*, 319 U.S. at 30 (internal quotation marks and citation omitted); see also *Carlisle* v. *United States*, 517 U.S. 416, 429 (1996) ("Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.") (quoting *Pennsylvania Bureau of Corr.* v. *United States Marshals Serv.*, 474 U.S. 34, 43 (1985)).

Amici also err in asserting that this Court's decision in *United States* v. *Denedo*, 556 U.S. 904 (2009), supports the proposition that mandamus relief is appropriate as long as the Court would have jurisdiction over an appeal by some party other than the party

seeking the relief. See Pfander & Vladeck Amicus Br. 12. In *Denedo*, the Court stated that relief under the All Writs Act turns on this Court's "subject-matter jurisdiction over the case or controversy." 556 U.S. at 911. But by observing that jurisdiction under the All Writs Act "is contingent on" a court's Article III jurisdiction in a case involving a writ of *coram nobis*, *ibid.*, *Denedo* did not purport to do away with other limits on writs of mandamus under the Act. Adopting the rule proposed by petitioner would allow circumvention of an express statutory limit on this Court's appellate jurisdiction—in the name of "aid[ing]" the Court's jurisdiction—by allowing persons who are not parties and who are statutorily excluded from ordinary appellate review to inject themselves into proceedings by seeking review through mandamus.

B. Petitioner Has Not Shown That Review Would Be Unavailable In District Court But Available In This Court

1. Mandamus relief is unwarranted unless "the party seeking issuance of the writ" has "no other adequate means to attain the relief he desires." *Cheney*, 542 U.S. at 380 (quoting *Kerr* v. *United States Dist. Ct.*, 426 U.S. 394, 403 (1976)). In the government's view, petitioner cannot challenge the Telephony Records Program on statutory grounds in any court because of certain threshold barriers. See pp. 24-28, *infra*. But if those threshold impediments did not prevent petitioner's challenge, the proper course would be to file suit in a federal district court. That is the ordinary means to challenge assertedly unlawful government action, and petitioner has identified no special circumstances here that require its statutory challenge to begin in this Court. Indeed, other plain-

tiffs have recently filed such claims advancing legal arguments similar to those advanced by petitioner. Those cases are currently pending in district courts. See p. 13, *supra*. If petitioner can bring its claim in any court, that is the proper avenue to challenge the Telephony Records Program.

It is true that if petitioner were to file a challenge in a district court, the United States may raise certain threshold defenses to petitioner's ability to obtain an order enjoining government officials from implementing the Telephony Records Program. But that does not suggest that petitioner should be allowed to seek mandamus here, because those same threshold arguments apply in this Court. For example, the government would argue in both forums that FISA impliedly precludes a third party from seeking to enforce the requirements of Section 1861. See, *e.g.*, Defs' Mem. of Law in Supp. of Mot. to Dismiss Compl., *Clapper*, *supra* (Aug. 26, 2013) (13-cv-03994 Docket entry No. 33); pp. 25-28, *infra*. The substantive defenses that the government possesses therefore could not serve to render this Court the only suitable forum to adjudicate petitioner's claim in the first instance.

Nor does the fact that the FISC has approved the Telephony Records Program suggest that review must begin in this Court and not in a district court. In general, no constitutional or procedural bar prohibits a plaintiff from seeking injunctive relief that, if granted, would conflict with an order previously entered in another proceeding to which the plaintiff was not a party. See *Taylor* v. *Sturgell*, 553 U.S. 880, 892-893 (2008); *Martin* v. *Wilks*, 490 U.S. 755, 761 (1989). Petitioner might not obtain through a claim for equitable relief in district court precisely the same relief

that it seeks to obtain in this Court, namely, "vacatur" of the Secondary Order issued by the FISC. Pet. 14. But this Court's Rule 20.1 requires, as a condition of mandamus relief, that petitioner have no "adequate relief" in any appropriate "form." Here, an equitable claim in district court could, if successful, allow petitioner to obtain a declaratory judgment against the responsible Executive Branch officials that the Telephony Records Program (which the Secondary Order authorizes) is not consistent with FISA or, if appropriate, to obtain an injunction against those officials barring its implementation as to petitioner.

2. In any event, whether or not an equitable cause of action in district court could afford petitioner "adequate relief," this Court would not be the appropriate forum in which to bring an action in the first instance. This Court is "a court of final review and not first view." *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012) (citation omitted). Thus, an "application for the writ [of mandamus] ordinarily must be made to the intermediate appellate court, and made to this court as the court of ultimate review only in * * * exceptional cases." *Ex parte United States*, 287 U.S. at 249; see also *In re Blodgett*, 502 U.S. 236, 240 (1992) (per curiam) (denying mandamus because petitioner had not first sought relief in the court of appeals).

The FISA Court of Review is the intermediate court with jurisdiction over FISC decisions under Section 1861. See 50 U.S.C. 1803(b) and (f); 50 U.S.C. 1861(f)(3). The All Writs Act authorizes the FISA Court of Review, like this Court and "all courts established by Act of Congress," to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of

law." 28 U.S.C. 1651(a). If petitioner were correct that this Court could grant mandamus relief, at the behest of a person who was a stranger to proceedings before the FISC, with respect to a FISC order directed at a telecommunications service provider, then the FISA Court of Review would appear to have the same mandamus authority under the All Writs Act. See, *e.g.*, *Roche*, 319 U.S. at 24-25. Petitioner, however, failed to seek a writ of mandamus from the FISA Court of Review before requesting one from this Court.

Petitioner argues that it cannot seek relief from the FISA Court of Review because "[t]he FISC may only review business record orders upon petition from the recipient or the Government," and the FISA Court of Review may review "decisions to affirm, modify, or set aside business record orders [only] after a petition by the Government or the recipient." Pet. 15-16 (citing 50 U.S.C. 1803(a)(2)(A), 1861(f)(3)). The United States agrees that the statute precludes a person like petitioner from appealing a Section 1861 order. But the same holds true for certiorari review by this Court. See 50 U.S.C. 1861(f)(3); p. 16, *supra*. Petitioner has offered no explanation for why, if petitioner is correct that this statutory bar does not foreclose mandamus relief by this Court, it would nevertheless foreclose mandamus relief by the FISA Court of Review.

C. No Exceptional Circumstances Justify Exercise Of This Court's Discretionary Powers, And Petitioner Has Not Demonstrated A "Clear And Indisputable" Right To A Writ Of Mandamus

Even if the other requirements for mandamus were met, petitioner has not demonstrated "exceptional

circumstances warrant[ing] the exercise of the Court's discretionary powers," Sup. Ct. R. 20.1, or a "clear and indisputable" right to issuance of the writ, *Cheney*, 542 U.S. at 381. Petitioner essentially argues that the judges of the FISC have misapplied a statutory standard in requiring VBNS to provide copies of certain of its own business records to the NSA. That argument does not demonstrate that petitioner has a clear and indisputable entitlement to mandamus relief.

1. Petitioner's argument suffers from two threshold flaws. First, petitioner has not identified a theory under which it has Article III standing to challenge the Telephony Records Program. See *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). Because petitioner elected to initiate its challenge directly in this Court rather than a district court, it has not submitted a complaint that sets forth its purported basis for standing. See *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006) ("[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.") (internal quotation marks, internal citation, and emphasis omitted). To the extent that petitioner is concerned that the government might use information contained in telephony records pertaining to its members in a way that impedes petitioner's activities, the mandamus petition does not establish that it is more than speculative that the NSA has reviewed, or might in the future review, records pertaining to petitioner's members, particularly given the stringent, FISC-imposed restrictions that limit access to the database to counterterrorism

purposes. Petitioner "cannot manufacture standing merely by inflicting harm on [itself] based on [its] fears of hypothetical future harm that is not certainly impending." *Clapper*, 133 S. Ct. at 1151.

Second, petitioner—an entity that was not the recipient of a Section 1861 order—lacks the statutory authority to obtain judicial review of compliance with Section 1861's "relevance" requirement. Congress expressly provided that a Section 1861 order "shall remain in full effect" unless it has been "explicitly modified or set aside consistent with this subsection." 50 U.S.C. 1861(f)(2)(D). Through its request for mandamus relief, petitioner seeks to "modif[y] or set aside" the Secondary Order in a manner that is not "consistent" with Section 1861. Section 1861's text therefore precludes that extra-statutory challenge.

More generally, "when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 349 (1984); see 5 U.S.C. 701(a)(1). Implied preclusion can be determined from a statute's "express language," as well as "from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Community Nutrition Inst.*, 467 U.S. at 345; see also *United States* v. *Fausto*, 484 U.S. 439, 443-455 (1988). Similarly, "'[w]hen Congress has dealt in particularity with a claim and [has] intended a specified remedy'—including its exceptions—to be exclusive, that is the end of the matter." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 132 S. Ct.

2199, 2205 (2012) (quoting *Block* v. *North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286 n.22 (1983)); see 5 U.S.C. 702.

Congress has impliedly precluded challenges alleging violation of FISA's statutory provisions by a person who is not the recipient of a Section 1861 order—*i.e.*, is not the person whose business records the order requires to be produced. Consistent with the basic purpose of the statute, Section 1861, like the other provisions of FISA, requires a secret and expeditious process that involves only the government and the recipient of the order. The recipient, for example, may not "disclose to any other person that the [FBI] has sought or obtained" an order under Section 1861. 50 U.S.C. 1861(d)(1). The statute also creates a specific appeal process under which only the government or the "person receiving a production order" may challenge the order or appeal the FISC's decision with respect to the order. 50 U.S.C. 1861(f)(2)(A)(i); see also 50 U.S.C. 1861(f)(3). Further review of any determinations may also be obtained only by the government or "any person receiving such order." *Ibid.*

Indeed, where Congress intended to allow any private party to sue the government alleging violations of FISA's statutory provisions outside of the FISC, it has expressly so provided. In the same Act in which Congress added Section 1861, for example, it created a private right of action against the government under certain provisions of FISA. See USA PATRIOT Act, Pub. L. No. 107-56, § 223, 115 Stat. 293. Under that provision, "[a]ny person who is aggrieved by any willful violation of," *inter alia*, Sections 1806(a), 1825(a), or 1835(a) may initiate an action for money damages in a district court. Congress did not, however, elect to

give private plaintiffs a cause of action to enforce Section 1861. 18 U.S.C. 2712(a); see also 50 U.S.C. 1810, 1828 (other civil remedies). That choice, particularly considered in conjunction with Congress's decision not to afford third parties a mechanism to challenge Section 1861 orders, makes clear that Congress intended to prohibit statutory challenges by anyone who is not a recipient of a Section 1861 order. That limitation makes sense in light of the fact that the business records at issue belong to the telecommunications companies that receive Section 1861 orders, not to third parties. See *United States* v. *Miller*, 425 U.S. 435, 440-441 (1976).

Petitioner's view that any person to whom a telecommunications provider's business record pertains may challenge the order as inconsistent with Section 1861 would have deleterious consequences for the functioning of foreign-intelligence surveillance by greatly expanding and complicating judicial proceedings that involve classified information. And if petitioner were correct that a third party could seek to enforce Section 1861's "relevance" requirement, then presumably third parties could similarly enforce Section 1861's other statutory requirements. The government's application for a Section 1861 order, for example, must also "enumerat[e]" "minimization procedures adopted by the Attorney General * * * that are applicable to the retention and dissemination by the Federal Bureau of Investigation of any tangible things." 50 U.S.C. 1861(b)(2)(B). Petitioner's theory would allow third parties to argue that the Attorney General's minimization procedures were inadequate or had been violated in a particular instance. Congress could not have intended such an intrusion into the

Nation's foreign-intelligence gathering in litigation initiated by third parties.

2. Even assuming that petitioner has Article III standing to challenge the Telephony Records Program, that the statute permits a third party to challenge a Section 1861 order on statutory relevance grounds, and that mandamus could ever conceivably be available directly in this Court, the petition does not present exceptional circumstances warranting this Court's immediate intervention. Unlike the cases on which petitioner relies—which involved compelling allegations of significant constitutional violations, extraordinary harm that could not be remedied at final judgment, or lower courts' *ultra vires* actions—petitioner's challenge essentially reflects its bare disagreement with the FISC's interpretation of the statutory term "relevant" and its application in the special context of telephony metadata records.

a. Section 1861 authorizes the production of business records where there are "reasonable grounds to believe" that the records are "relevant" to an authorized and properly predicated ongoing FBI investigation of specific terrorist organizations. In this context, records are relevant to the investigation if they could lead to other material that could bear on an issue in the investigation. In the related contexts of civil and criminal discovery, the term "relevance" has been understood broadly. This Court, for example, has construed the phrase "relevant to the subject matter involved in the pending action" as "broadly * * * encompass[ing] *any matter that bears on, or that reasonably could lead to other matter that could bear on*, any issue that is or may be in the case." *Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340, 351

(1978) (emphasis added); see *United States* v. *R. Enters., Inc.*, 498 U.S. 292, 301 (1991) (grand jury subpoena will be upheld against judicial challenge unless "there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation"); *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 68-69 (1984) (statutory "relevance" criterion for administrative subpoena encompasses "virtually any material that might cast light on the allegations" at issue in an investigation). Applying that broad understanding of relevance, lower courts, in appropriate circumstances, have authorized discovery of large volumes of information where the requester seeks to identify smaller amounts of information within the data that could directly bear on the matter. See, *e.g.*, *In re Subpoena Duces Tecum*, 228 F.3d 341, 350-351 (4th Cir. 2000); *In re Grand Jury Proceedings*, 827 F.2d 301, 305 (8th Cir. 1987).

Congress was aware of that broad understanding of the word "relevance" when it passed Section 1861. See 50 U.S.C. 1861(c)(2)(D) (comparing Section 1861 to "a subpoena duces tecum"); 152 Cong. Rec. 2426 (2006) (statement of Sen. Kyl) ("Relevance is a simple and well established standard of law. Indeed, it is the standard for obtaining every other kind of subpoena, including administrative subpoenas, grand jury subpoenas, and civil discovery orders."). Absent any countervailing indications, therefore, this Court should presume that Congress intended to incorporate a broad understanding of relevance into Section 1861. See *FAA* v. *Cooper*, 132 S. Ct. 1441, 1449 (2012).

That presumption is confirmed by several factors particular to Section 1861. First, the statute requires

a demonstration only that there are "*reasonable grounds to believe*" that the records sought are "relevant" to an authorized investigation. 50 U.S.C. 1861(b)(2)(A) (emphasis added). The "reasonable grounds" formulation implies a standard under which the FISC should credit the government's reasonable judgments about relevance. Second, unlike civil discovery rules, which limit discovery to matters "relevant to the *subject matter* involved in the action," Fed. R. Civ. P. 26(b)(1) (emphasis added), Section 1861 requires only that the records be relevant to an "authorized investigation." 50 U.S.C. 1861(b)(2)(A). That suggests that records that facilitate the government's use of investigative tools meet the relevance standard. Section 1861, moreover, was enacted to combat terrorism and to facilitate foreign-intelligence gathering—goals that often require the government to identify potential threats before they materialize. A narrow understanding of relevance would be antithetical to those statutory objectives.

Furthermore, when Congress added the relevance standard in 2006, it did not adopt proposals to limit that standard so that it would encompass only records pertaining to individuals suspected of terrorist activity. Compare S. 2369, 109th Cong., 2d Sess. § 3 (2006) (requiring government to demonstrate that records "pertain to a foreign power or an agent of a foreign power," "are relevant to the activities of a suspected agent of a foreign power," or "pertain to an individual in contact with, or known to, a suspected agent of a foreign power"), with 50 U.S.C. 1861(b)(2)(A). Congress was therefore well aware that it was establishing a broad standard.

b. The Telephony Records Program satisfies the relevance requirement of Section 1861 because, in light of the distinctive features of telephony metadata records, there are "reasonable grounds to believe" that the compilation and retention of the records will lead investigators to information pertinent to the FBI's counterterrorism investigations. See *CIA* v. *Sims*, 471 U.S. 159, 171 (1985) ("[F]oreign intelligence [gathering] consists of securing all possible data pertaining to foreign governments or the national defense and security of the United States.") (second brackets in original; citation omitted). The process that the NSA employs to query the records—under which it identifies connections between numbers associated with terrorist organizations and numbers that are currently unknown—draws upon its access to a broad collection of telephony metadata created by multiple telecommunications companies. See Shea Decl. ¶ 58. Unless the records created by different companies are aggregated, it may not be feasible for the NSA to identify chains of communications that cross different telecommunications networks. *Id.* ¶ 60.

The conclusion that the Telephony Records Program complies with Section 1861 does not suggest, as petitioner contends (Pet. 22), that the "relevance" standard has no meaning. The government does not contend that Section 1861—which applies to all "tangible things," not only telecommunications records—may be used to collect in bulk records of any type. Rather, telecommunications records have characteristics not common to other types of records—specifically, their highly standardized and interconnected nature—that make them readily susceptible to analysis in large datasets to bring previously un-

known connections between and among individuals to light. The same cannot be said of myriad other types of records that might be subject to a Section 1861 order. In the distinctive and particularly critical context of telecommunications, all of the records are relevant to an authorized investigation, because it is only with the full set that this investigative tool can be used most effectively.

As of October 1, 2013, fourteen different judges of the FISC, on thirty-four separate occasions, have approved orders like the Secondary Order at issue here. Shea Decl. ¶ 14. Congress extended the authorization in Section 1861 after being notified that the Executive Branch and the FISC had interpreted the law to permit the Telephony Records Program. See Aug. 29 Op. 27 ("When Congress subsequently reauthorized Section [1861] without change, except as to the expiration date, that re-authorization carried with it the Court's interpretation of the statute, which permits the bulk collection of telephony metadata under the restrictions that are in place."); see also *Shell Oil*, 466 U.S. at 69 ("Congress undoubtedly was aware of the manner in which the courts were construing the concept of 'relevance' and implicitly endorsed it by leaving intact the statutory definition of the Commission's investigative authority."). Given these circumstances, at minimum, petitioner has failed to demonstrate that the Secondary Order "amount[s] to a judicial usurpation of power or a clear abuse of discretion." *Cheney*, 542 U.S. at 380 (internal quotation marks and citations omitted).

3. Petitioner argues that its petition presents "exceptional circumstance[s]" because the Secondary Order allows the government to obtain information

about petitioner's "confidential attorney-client relationships and other privileged information," Pet. 31-32; "chills [its] ability to advocate" under the First Amendment, Pet. 34; and "threatens the autonomy of the Legislative and Judicial branches," Pet. 36. Petitioner, however, does not show that the records—which include no content—have been queried in a manner that implicates any of these issues, and the relevant FISC orders impose strict limitations on querying. The questions presented in the petition, moreover, do not encompass any constitutional issues.[11]

Nor do the cases on which petitioner relies (Pet. 19) provide a basis for issuing an extraordinary writ here. One of them held that a writ of mandamus may be appropriate where a district court refuses to execute a nondiscretionary duty implicating "the proper conduct of our foreign relations." *Ex parte Peru*, 318 U.S. at 589. The other cases concern gross abuses of judicial power. See, *e.g.*, *Mallard* v. *United States Dist. Ct.*, 490 U.S. 296, 309 (1989) (district court ordered statutorily unauthorized "coercive appointment[] of counsel"); *Schlagenhauf* v. *Holder*, 379 U.S. 104, 121 (1964) (district court ordered four "sweeping [medical] examinations" of petitioner only "by disregarding plainly expressed limitations" on district court's authority); see also *De Beers Consol. Mines, Ltd.* v. *United States*, 325 U.S. 212 (1945) (preliminary

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[11] One amicus argues that the Telephony Records Program violates the Fourth Amendment. See Cato Inst. Amicus Br. 10-24. That argument lacks merit, see *Smith* v. *Maryland*, 442 U.S. 735, 739-746 (1979), but in any event it is not advanced in the petition. The constitutionality of the program is being litigated in pending district-court actions.

order would cause injury that could not be subsequently redressed). The judicial conduct at issue in those cases bears no resemblance to petitioner's objection to the proper interpretation and application of a non-jurisdictional statutory term in the particular context of telephony records.

II. THIS COURT LACKS JURISDICTION TO ISSUE A WRIT OF CERTIORARI

As an alternative to mandamus, petitioner seeks a writ of certiorari under 50 U.S.C. 1803 and 1861(f)(3). See Pet. 2. This Court, however, lacks jurisdiction to issue a writ to the FISC under those provisions. Accordingly, the alternative request should be denied as well.

Section 1861(f)(3) authorizes this Court to grant a petition for a "writ of certiorari" to the FISA Court of Review filed "by the Government or any person receiving [a FISC] order." 50 U.S.C. 1861(f)(3). The petition does not satisfy that provision's prerequisites both because petitioner requests a petition for certiorari to the FISC, not the FISA Court of Review, and because petitioner is not a "person receiving [a FISC] order." Likewise, Section 1803 authorizes this Court to consider a "petition of the United States for a writ of certiorari" from a FISA Court of Review "determin[ation] that [a FISA] application was properly *denied*." 50 U.S.C. 1803(b) (emphasis added). Section 1803 does not authorize challenges to *granted* applications or petitions by parties other than the government. And, as with Section 1861(f), it authorizes peti-

tions only from decisions by the FISA Court of Review, not the FISC.[12]

CONCLUSION

The petition for a writ of mandamus and prohibition, or a writ of certiorari, should be denied.

Respectfully submitted.

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[12] Petitioner does not rely on this Court's general certiorari jurisdiction under 28 U.S.C. 1254, nor could it. Section 1254 authorizes this Court to review "[c]ases in the courts of appeals" at the request of "any party." Petitioner was not a party to the proceedings below, and neither the FISC nor the FISA Court of Review is a "court[] of appeals" within the meaning of Section 1254, see 28 U.S.C. 41, 43(a).