No. 21-1017

IN THE

Supreme Court of the United States

CAROLYN JEWEL, ET AL.,
Petitioners,

v.

NATIONAL SECURITY AGENCY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of the Center for Democracy & Technology and New America's Open Technology Institute as *Amici Curiae* In Support of Petitioners

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

"[E]xtensive surveillance programs . . . carry profound implications for Americans' privacy and their rights to speak and associate freely." *A.C.L.U. v. United States*, 142 S. Ct. 22, 23 (2021) (Gorsuch, J., dissenting from denial of cert., joined by Sotomayor, J.). *Amici* are non-profits dedicated to understanding and addressing such implications. The Center for Democracy and Technology (CDT) is a non-profit, public interest organization representing the public's interest in an open Internet and promotes the constitutional and democratic values of free expression, privacy, equality, and individual liberty. New America's Open Technology Institute (OTI) is a non-profit organization working to ensure that every community has equitable access to technology and its benefits, and that government surveillance is subject to robust safeguards that protect individual rights. To those ends, CDT and OTI regularly file amicus briefs in cases addressing the lawfulness of surveillance programs.

This is just such a case. Petitioners challenge the lawfulness of the government's bulk collection and surveillance of Americans' internet records. The district court held, and the Ninth Circuit affirmed, that the state secrets privilege precluded it from

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[1] Pursuant to Rule 37, *amici* affirm that no counsel for a party authorized this brief in whole or in part and that no person other than *amici* and its counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37, *amici curiae* provided counsel of record timely notice of their intent to file this brief and consent was granted.

reaching the merits of Petitioners' constitutional claims. Left to stand, these decisions abdicate judicial review of government surveillance programs.

Mistakenly, the courts below felt compelled to choose *between* national security and reaching the constitutional questions. But that is a false choice. *Amici* show that as a practical matter courts can (and often do) *balance* national security and litigants' rights to reach constitutional questions implicating classified information. Courts routinely balance disclosure of classified evidence with criminal defendants' due process and fair trial rights. And courts have balanced access to highly classified national security information with the constitutional *habeas* rights of people detained as enemy combatants. The Court should grant review to clarify that state secrets do not insulate surveillance programs from judicial review.

STATEMENT OF THE CASE

Petitioners challenged the lawfulness of the government's surveillance, including bulk collection of internet records and surveillance through Section 702 "Upstream" collection. In support of their claim, Petitioners developed a 1000-page public evidentiary record. Petitioners also sought (and, after extensive litigation, the district court reviewed) classified information pursuant to procedures set forth in Section 1806(f) of the Foreign Intelligence Surveillance Act (FISA).

The district court found that the state secrets privilege precluded "a fair and full adjudication of

[Petitioners'] claims and Defendants' defenses." Pet. App. at 42a. The district court determined it "can go no further" and instead "accept[ed that] the assertion of the state secrets privilege . . . mandate[s] the dismissal of this action." *Id.* Feeling "unable to address the sum of all evidence relevant to standing," the district court filed a supplemental classified order granting defendants' motion for summary judgment. *See id.* at 31a, 45a. The Ninth Circuit affirmed without addressing a single piece of Petitioners' evidence and without reviewing the district court's classified order. *Id.* at 1a–4a.

SUMMARY OF THE ARGUMENT

This case brings to the fore the tension inherent in balancing constitutional rights and national security. But however that balance is struck, courts should not abdicate their vital role in maintaining it.

The judiciary plays two important, but separate, roles regarding the surveillance at issue in this case. First, the Foreign Intelligence Surveillance Court (FISC) has limited subject matter jurisdiction to review, authorize, or decline to authorize surveillance *ex ante*. While this provides a valuable safeguard against executive overreach, it is not sufficient. FISC cannot foresee all ways in which individual liberties may be implicated, and even if it could, its means of ensuring compliance with its mandates are limited. Thus, courts must also play a second essential role: to review executive action *ex post* through adversarial judicial proceedings.

Such *ex post* judicial review is critical to oversight of the intelligence community, and is essential to the vindication of legal and constitutional rights. Serious abuses of the government's surveillance powers persist in ways that are otherwise difficult to redress. Oversight within the executive branch consists primarily of advisory authorities. The legislature can draft rules for the intelligence community but cannot ensure compliance. And the FISC's circumscribed jurisdiction limits its ability to ensure approved procedures are appropriately implemented or to redress intentional (or accidental) violations of its orders. *Ex post* judicial review is therefore critical to prevent an end-run around other checks on government surveillance.

Yet the decisions below effectively eliminate *ex post* judicial review of government surveillance. Neither court reached the merits of Petitioner's claims. Instead, the Ninth Circuit—without analyzing a single piece of petitioners' 1000-page public evidentiary record and without reviewing the district court's classified order—affirmed the district court's "accept[ing] the assertion of the state secrets privilege . . . mandate[s] the dismissal of this action." Pet. App. at 42a. But if Petitioners' extensive showing of public evidence is insufficient to avoid dismissal under the state secrets privilege, then it is doubtful "whether *any* electronic surveillance case could ever proceed to the merits." *Wikimedia Found. v. Nat'l Sec. Agency/Cent. Sec. Serv.*, 14 F.4th 276, 309 (4th Cir. 2021) (Motz, J., concurring in part).

In many contexts, however, courts regularly balance the needs of national security with the

demands of the constitution to reach questions regarding constitutional rights. *Amici* discuss herein two situations closely analogous to the situation at bar: the handling of classified information in addressing criminal defendants' due process and fair trial rights; and the review and disclosure of sensitive national security information in constitutional *habeas* cases brought by designated enemy combatants. In both situations, the presence of classified (or state secret) information does not preclude reaching the merits of the constitutional question. Similarly, the presence of state secrets in the case at bar should not render Petitioners' claims nonjusticiable.

Furthermore, elimination of *ex post* judicial review is untenable in light of separation of powers principles. "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *United States v. Reynolds*, 345 U.S. 1, 9–10 (1953). Yet, in the national security context, the rulings below threaten to "relegat[e federal courts] . . . to the role of bit player in cases where weighty constitutional interests ordinarily require us to cast a more 'skeptical eye.'" *Wikimedia*, 14 F.4th at 306 (Motz, J., concurring in part).

This Court should grant certiorari to clarify that courts are competent to review and decide cases based on both unclassified and classified evidence in cases involving national security. Courts otherwise risk abdicating their critical role in vindicating constitutional and legal rights in the national security context and in providing oversight over electronic surveillance. Undisturbed, the decisions below enable exactly what the Founders intended the Constitution

to guard against: the "gradual and silent encroachments by those in power" upon the "freedom of the people." James Madison, *Speech in the Virginia Ratifying Convention on Control of the Military* (Jun. 16, 1788).

ARGUMENT

I. Meaningful *ex post* judicial review of surveillance activities is necessary to protect constitutional and legal rights.

"In framing a government . . . the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." The Federalist No. 51, at 268 (J. Madison) (George W. Carey & James McClellan, eds., 2001). Thus, "separate and distinct exercise[s] of the different powers of government . . . [are] essential to the preservation of liberty." *Id*. at 269.

To meet the "great difficulty" of regulating the government's extensive surveillance programs, our system relies upon the separation of powers: the Executive must assess the proper exercise of its own power; the Legislative must set statutory limits on surveillance; and the Judiciary must review the Legislative's rules and the Executive's implementation. However, significant abuses and misuses of the government's surveillance authority exist and will likely persist in the absence of effective judicial review.

A. *Ex post* judicial review is essential to protect Americans' legal and constitutional rights.

Section 702 of FISA permits the government to conduct surveillance through collection of communications, including with the compelled assistance of telecommunications providers. All three branches participate in the oversight and regulation of surveillance activities under Section 702.

Several Executive branch entities provide oversight of surveillance activities. One such entity is the Privacy and Civil Liberties Oversight Board (PCLOB), an independent agency within the Executive Branch providing oversight and advice on, *inter alia*, the implementation of surveillance policies and procedures. The agency is empowered to investigate and has issued public reports regarding its findings. *See, e.g.*, Privacy & Civil Liberties Oversight Bd., *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* (2014) ("*Section 702 Report*"); Privacy & Civil Liberties Oversight Bd., *Report on the Telephone Records Program Conducted Under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court* (2014) ("*Section 215 Report*"). Additionally, several Inspectors General are empowered to investigate alleged abuses of surveillance authorities and may issue reports, recommendations, and guidance. *See, e.g.,* D.O.J. Off. of the Inspector General, Oversight & Review Div., *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane*

Investigation, at 410–14 (2019) ("*Crossfire Hurricane Report*").

Although they play important oversight roles, these entities and officers, on their own, are insufficient to check abuses by the Executive Branch. For example, "the government continually pushes the boundaries set by the [Foreign Intelligence Surveillance] court and Congress, at times crossing them entirely." Laura K. Donohue, *The Evolution and Jurisprudence of The Foreign Intelligence Surveillance Court and Foreign Intelligence Surveillance Court of Review*, 12 Harv. Nat'l Sec. J. 198, 265 (2021). Thus, in the complex and highly fact-dependent context of electronic surveillance, oversight within the executive branch is unlikely to provide a sufficient check against the Executive's efforts to test the limits of its own power.

The legislative branch also plays an essential role in conducting oversight of government surveillance. As Congress made clear in enacting FISA, it understood the country could not "rel[y] solely on executive branch discretion to safeguard civil liberties" against potential "abuses of domestic national security surveillance." H.R. Rep. 95-1283, at 21 (1978).[2] Thus, Congress has a role in conducting oversight hearings to examine surveillance activities. *See id.* at 117 (proposing "aggressive oversight" to ensure that "should abuses occur, they will not go undiscovered, undisclosed, or unpunished"). Without such oversight, the Executive might prevent "findings

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[2] The Senate, in particular, expressed concern regarding its sense that the "judiciary has been reluctant to grapple with them [intelligence activities]." S. Rep. 94-755, Book II, at 6 (1976).

revealing [its] malfeasance from reaching the light of day." Donohue, 12 Harv. Nat'l Sec. J. at 265. And Congress, of course, can legislate the rules which the Executive must follow, or revise rules in light of uncovered abuses. *See, e.g.*, Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015 ("*USA FREEDOM Act of 2015*"), 129 Stat. 268 (2015) (ending bulk telephone records collection program under Section 215 of the PATRIOT Act following, *inter alia*, revelations by Edward Snowden).

Article III courts play critical roles in ensuring that government surveillance is conducted in accordance with constitutional and statutory requirements—both through *ex ante* review and e*x post* adjudication. In the Section 702 context, the FISC reviews and approves annual certifications authorizing surveillance. The FISC's review is limited to approving targeting, minimization and querying procedures. *See* 50 U.S.C. § 1881a(i). Importantly, it "does not review the targeting of particular individuals." PCLOB, *Section 702 Report*, at 27. Further, the FISC can offer only limited redress to U.S. person subjected to illegal surveillance.[3]

Because of their inherent limitations, legislative action and *ex ante* FISC review are often unable to effectively remedy specific harms visited upon particular individuals. Even the best-crafted

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[3] For example, when the court learned that the National Security Agency had been conducting unlawful surveillance for three years, it could do little more than remind the Agency that such behavior was criminalized by FISA. *Redacted*, 2011 WL 10945618, at *6 n.15 (F.I.S.C. Oct. 3, 2011).

legislation or compliance regime cannot guard entirely against the government deliberately (or inadvertently) overstepping its authority. Yet the FISC's limited *ex ante* jurisdiction under Section 702 does not encompass complaints of illegal surveillance brought by individuals. *See, e.g.*, *In re Proc. Required by 702(i) of FISA Amends. Act of 2008,* No. MISC 08-01, 2008 WL 9487946, at *5 (F.I.S.C. Aug. 27, 2008). Furthermore, the FISC's *ex ante* review is generally at the mercy of the executive's representations (which are not always accurate). *See, e.g.*, *In re Accuracy Concerns re FBI Matters Submitted to FISC*, 411 F. Supp. 3d 333, 335 (F.I.S.C. 2019) ("When FBI personnel mislead [the National Security Division] in the ways described above, they equally mislead the FISC.").

Thus, searching *ex post* judicial review is necessary to remedy misuses and abuses of the government's surveillance authority. (A fact which Congress recognized by, for example, providing a private civil right of action against the United States in district courts for use of information obtained in violation of FISA. *See* 18 U.S.C. § 2712.)

B. Absent effective *ex post* judicial review, serious abuses or misuses of the government's surveillance authority will persist.

Instances of abuse uncovered by FISC have exposed agencies' disregard for their statutory and constitutional boundaries. In one example, FISC's review of the FBI's Section 702 minimization and querying procedures revealed that the FBI had collected and retained significant volumes of private

U.S. person information and had regularly conducted unreasonable searches of that information. *Redacted*, 402 F. Supp. 3d 45, 86–88 (F.I.S.C. 2018). Further, despite a statutory requirement to do so, the FBI failed to distinguish "between United States-person query terms and other query terms." *Id.* at 68.

This resulted in a massive violation of Americans' civil liberties. The FBI had "conducted tens of thousands of unjustified queries of Section 702 data," risking significant and "unwarranted intrusion into the private communications of a large number of U.S. persons." *Id.* at 87. Thus, the FISC found that the FBI's procedures violated the Fourth Amendment.[4] *Id.* at 88; *see also* Memorandum Opinion and Order, Section 702 2019 Certification, at 61-73 (F.I.S.C. Dec. 6, 2019) (raising "significant questions" with the FBI's querying practices), https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2019_702_Cert_FISC_Opinion_06Dec19_OCR.pdf.

In another example, the NSA not only exceeded its permissible surveillance authority, but "ha[d] been acquiring Internet transactions since before" it was authorized to do so. *Redacted*, 2011 WL 10945618, at

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[4] "The FBI's use of unjustified queries squarely implicates [the Fourth Amendment's goal to protect individuals from arbitrary government intrusions on their privacy]: the FBI searched for, and presumably examined when found, private communications of particular U.S. persons on arbitrary grounds . . . . The government is not at liberty to do whatever it wishes with those U.S.-person communications, notwithstanding that they are 'incidental collections occurring as a result of" authorized acquisitions . . . [T]he FBI's querying procedures and minimization procedures are not consistent with the requirements of the Fourth Amendment." *Redacted*, 402 F. Supp. 3d at 87–88.

*6 (F.I.S.C. Oct. 3, 2011). The NSA had also (and more than once) misled the FISC regarding that program: this incident "mark[ed] the third instance in less than three years in which the government ha[d] disclosed a substantial misrepresentation regarding the scope of a major collection program." *Id.* at *5 n.14.

These violations are not outliers; they are par for the course. Professor Donohue's more fulsome review of FISC opinions demonstrates "the government's repeated failure to comply with judicial direction and submission of inaccurate and false statements to the court." Donohue, 12 Harv. Nat'l Sec. J. at 265.

The FISC is not alone in its assessment of the violations of the FISA process by the intelligence community. For example, the Department of Justice's review of the "Crossfire Hurricane" investigation, including the FISA applications pertaining to FBI surveillance of Carter Page, found "significant inaccuracies and omissions" leading to "repeated failures to ensure the accuracy of information presented to the FISC." *Crossfire Hurricane Report*, at 413–14. The Inspector General later concluded that his team "d[id] not have confidence that the FBI [had] executed [its procedures] in compliance with FBI policy." *See Mgmt. Advisory Memo. from Michael E. Horowitz, Inspector Gen., to Christopher Wray, Director, FBI, regarding the Audit of the Federal Bureau of Investigation's Execution of its Woods Procedures for Applications Filed with the Foreign Intelligence Surveillance Court Relating to U.S. Persons*, at 2 (2020), https://repository.library.georgetown.edu/handle/10822/1058475.

Similarly, following leaks by Edward Snowden, the PCLOB conducted a review of bulk collection of telephone records conducted under Section 215 of the PATRIOT Act. In its public report, the PCLOB determined that the program "lack[ed] a viable legal foundation under Section 215." PCLOB, *Section 215 Report*, at 168. In litigation, the Second Circuit later agreed. *See A.C.L.U. v. Clapper*, 785 F.3d 787, 826 (2d Cir. 2015) ("[T]he telephone metadata program exceeds the scope of what Congress has authorized and therefore violates § 215."). Yet the intelligence community did not end this program until Congress enacted the USA FREEDOM Act in 2015, by which time the program had been operating beyond the bounds of any statutory authorization for over a decade. *See* 50 U.S.C. §§ 1841, 1842 (2015) (ending bulk phone records collection).

These abuses make paramount the availability of effective and searching *ex post* judicial review of government surveillance. And litigants (including Petitioners, have sought review of these (and similar) violations. *Cf. Wikimedia*, 14 F.4th at 281 (plaintiffs sued to challenge, end, and purge records obtained through NSA's "Upstream surveillance"); *United States v. Hasbajrami*, 945 F.3d 641, 660–61 (2d Cir. 2019) ("[R]aisi[ing] an as-applied challenge to the constitutionality of warrantless collection and review of [plaintiff's] communications under Section 702."). Unfortunately, and improperly, the government's assertion of the state secrets privilege has effectively rendered these violations nonjusticiable.

As the next section shows, that result is not necessary. Article III courts are capable of addressing the merits of the constitutional questions raised, and

this Court should grant review to ensure that courts play this critical oversight role.

II. Article III courts can (and do) enforce individual rights without compromising national security.

Article III courts routinely balance national security concerns and constitutional rights, including when adjudicating due process for criminal defendants and *habeas* rights for people designated as enemy combatants. Those courts have addressed the merits of constitutional questions while securely handling classified national security information.

Instead of recognizing the importance and competence of Article III courts, the Ninth Circuit's approach would effectively eliminate their role in overseeing intelligence surveillance and in vindicating violations of statutory and constitutional rights in that context. That is an anomalous result, as *amici* explain, and this Court should grant review to reaffirm the critical role of judicial oversight.

A. Courts routinely adjudicate criminal defendants' constitutional rights in the context of classified information.

When the government seeks to rely on classified evidence in a criminal trial, courts must evaluate the impact on a defendant's due process or fair trial rights. The Classified Information Procedures Act (CIPA) provides a procedure for *in camera* review of classified information prior to its disclosure in criminal cases. 18 U.S.C. app. 3 *et seq.* CIPA attempts to balance the government's need for

confidentiality with the defendant's constitutional rights. *See United States v. O'Hara*, 301 F.3d 563, 567–68 (7th Cir. 2002) (CIPA balances government confidentiality and defendants' due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963)); *United States v. Lustyik*, 833 F.3d 1263, 1271 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 822 (2017) (CIPA "balance[s] the government's need for confidentiality with the defendant's right to a fair trial").

Under CIPA a court may undertake *in camera* review of classified information to balance secrecy with the defendants' constitutional rights. After review, the court may take a range of actions. It could, *inter alia*, "treat[the] classified information as privileged, meaning that it might not be discoverable even if relevant," *United States v. Muhtorov*, 20 F.4th 558, 628 (10th Cir. 2021); it could disclose the information to the defendant, *id.*; it could permit modified disclosure (such as a redacted document, a summary of information, or a substitute statement "admitting relevant facts that the classified information would tend to prove"), 18 U.S.C. app. 3 § 4; or it could selectively disclose some information but not other information, *see O'Hara*, 301 F.3d at 568, 569 n.4 (affirming disclosure of ten specific statements after *in camera* review).

Article III courts routinely review and adjudicate constitutional rights in the context of classified information under CIPA. In *O'Hara*, the district court held an on-the-record (but sealed) *in camera* hearing regarding *Brady* material. 301 F.3d at 567–68. Although the court found "that the majority of the information contained therein was not *Brady*

material," the court ordered the disclosure of ten statements under a protective order, five of which were eventually read to the jury. *Id.* at 567, 568 n.2

On appeal, the Seventh Circuit "review[ed] the confidential and sealed record" and confirmed it was "satisfied with the district court's *Brady* analysis". *Id.* at 569 n.4. It then held that disclosure of the subset of ten statements sufficiently preserved the defendant's due process rights and avoided a *Brady* violation. *Id.* at 569.

Courts have even reviewed Section 702 material under CIPA to adjudicate defendants' due process rights. In *Muhtorov*, the defendant alleged that *Brady* required disclosure of traditional FISA and Section 702 materials, and requested that the district court review those materials under CIPA. *See Muhtorov*, 20 F.4th at 624. The district court reviewed those materials *in camera* and held that *Brady* did not require disclosure or discovery. *Id.* On appeal, the Tenth Circuit panel, after an "independent review" of those confidential materials, affirmed the district court, finding that, under *Brady*, the materials were neither "favorable" nor "material," and therefore did not need to be disclosed. *Id.* In its independent review, the 10th Circuit weighed defendant's due process rights against disclosure: "Had the district court, or we, concluded that the surveillance of Mr. Muhtorov failed to comply with Section 702's minimization and targeting requirements, he would have a stronger *Brady* argument." *Id.* at 624 n.42.

Review of classified information under CIPA by both district and appellate courts is an important

bulwark protecting constitutional rights. Appellate courts have routinely conducted searching review of confidential material when weighing defendants' constitutional rights. *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989) (appellate court reviewing classified record and materials in assessing defendant's right to access the material); *United States v. Aref*, 533 F.3d 72, 78–81 (2d Cir. 2008) (same); *United States v. Abu-Jihaad*, 630 F.3d 102, 140–43 (2d Cir. 2010) (same). The Ninth Circuit clearly erred when it failed to conduct a similar review of confidential evidence regarding the constitutionality of government surveillance in the instant case.

B. Courts have adjudicated Suspension Clause rights while protecting sensitive national security information.

Article III courts may also use their inherent powers to fashion appropriate safeguards for national security information. In litigation arising from Guantanamo Bay detentions, federal courts "have gradually forged an effective jurisprudence that seeks to address the government's interest in national security while protecting the right of prisoners to fairly challenge their detention." Hum. Rights First & The Constitution Project, *A Report from Former Federal Judges, Habeas Works: Federal Courts' Proven Capacity to Handle Guantanamo Cases* 1 (2010).

Under the Suspension Clause, U.S. Const. art. 1, § 9, cl. 2, aliens detained abroad may—under certain circumstances—challenge the basis for their

detention through *habeas* review. The Suspension Clause "entitles [such a] prisoner to a meaningful opportunity to demonstrate that he is being held" wrongly. *Boumediene v. Bush,* 553 U.S. 723, 779, (2008). Whether a detainee received a "meaningful opportunity" may turn on the sufficiency of their access to classified information or materials.

Courts weigh the government's national security interests against the prisoner's Suspension Clause right to a meaningful opportunity for *habeas* review. *Cf. Al Hela v. Trump*, 972 F.3d 120, 136 (D.C. Cir. 2021) (summarizing law), *vacated and reh'g en banc granted sub nom. Al-Hela v. Biden*, No. 19-5079, 2021 WL 6753656 (D.C. Cir. Apr. 23, 2021).

Those courts have utilized *in camera* review to strike appropriate balances between disclosure and a detainee's constitutional rights. In *Obaydullah*, the government provided defendant's counsel (who had a security clearance) with redacted, classified intelligence reports. *Obaydullah v. Obama*, 688 F.3d 784, 795–96 (D.C. Cir. 2012). After review of further classified material, the D.C. Circuit held that disclosure sufficed and "the government did not need to disclose further information about [the information's] source." *Id.* In *Al Odah*, the court ordered the government to provide petitioner's counsel with redacted versions of classified information in support of the individuals' detention. *Al Odah v. United States*, 559 F.3d 539, 544 (D.C. Cir. 2009) (remanding for consideration of materiality of disclosure). Similarly, in *Khan*, the D.C. Circuit opined that "the government may offer alternatives to providing classified information, as long as they

suffice to provide the detainee with a meaningful opportunity" to contest his detention. *Khan v. Obama*, 655 F.3d 20, 31 (D.C. Cir. 2011). The D.C. Circuit then affirmed that disclosure of redacted versions to defendant's counsel would suffice (particularly where the government provided unredacted versions to the district and appellate courts for review and confirmation). *Id.*

In all of these cases the government raised serious national security concerns regarding the disclosure and review of information justifying the detention of the men as enemy combatants. Yet even when faced with highly sensitive information (including, for instance, sources of military intelligence), each of these courts securely reviewed the evidence in question, and reached, adjudicated, and in the process balanced individuals' constitutional rights. The Ninth Circuit's failure to even review the classified evidence prior to affirming dismissal of the case abdicated its judicial responsibility.

III. The Ninth Circuit's opinion ignores Article III courts' competence (and duty) to balance constitutional rights with national security.

Article III courts do not need to choose *between* national security and constitutional rights: they have the tools and experience to *balance* them. Given that courts can (and do) routinely craft appropriate safeguards and procedures, the existence of state secrets should not, in this case, "mandate dismissal."

Petitioners have put forward a significant volume of public evidence—on both their standing and the merits of their claims. Indeed, the existence and workings of the Section 702 Upstream program have been widely reported. *See generally* PCLOB, *Section 702 Report*, at 35–41 (describing the rules governing and conduct of this surveillance). Additionally, as explained by Petitioner in greater detail, *see* Pet. at 8–10, FISA itself provides procedures for review of surveillance-related evidence sought by a private plaintiff to determine whether surveillance was lawful. Those procedures are at least as protective as the procedures devised by Congress in CIPA or by the courts in the Guantanamo Bay cases.[5]

The government's assertion that state secrets are involved should not constitute a jurisdictional bar, blocking judicial review. The Ninth Circuit, however, places government surveillance beyond judicial review, even in the face of litigation seeking to vindicate Americans' constitutional rights, and even where these claims are supported by unclassified evidence. Its failure to even consider the confidential information that formed the basis of the district court's opinion—a review which the Seventh Circuit undertook in *O'Hara*, the Tenth Circuit undertook in

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[5] As Petitioners explain, FISA provides powerful and flexible tools to courts (if they would use them), including *in camera* review of requested material, disclosure only if the surveillance was unlawful, and significant safeguards for national security. *See* Pet. at 10–12 (providing close analysis of *in camera* review authorized by Section 1806(f), disclosure only upon finding of unlawful surveillance under Section 1806(g), and "safety valves to protected against the erroneous disclosure or use of national security information" in Section 1806(h)).

Muhtorov, and the D.C. Circuit undertook in both *Obaydullah* and *Khan*—severely compounds that error.

The critical role of *ex post* judicial review cannot be overstated. The separation of powers will not tolerate executive power without check, and *ex post* judicial review is a critical pillar of oversight. Other checks on government surveillance should be pursued in tandem with, but cannot replace the efficacy of, judicial review.

CONCLUSION

"[T]he great[est] security . . . consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. . . . Ambition must be made to counteract ambition." The Federalist No. 51 at 268. The judiciary has the necessary constitutional means to weigh the interests of national security while adjudicating constitutional rights, as amply demonstrated in the context of criminal prosecutions and *habeas* proceedings. Perforce courts can do the same to assess violations of the Fourth Amendment through government surveillance. Courts must guard against a collapse of their ambition. They must instead endeavor to conduct searching review of the legality of the government's surveillance of Americans. The courts below had the tools (and the competence) to reach the merits of Petitioner's claim, yet they chose not to do so.

For the reasons set forth above, this Court should grant the petition for certiorari.

Respectfully submitted,

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