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 OF *AMICI CURIAE* PROFESSORS JAMES E. PFANDER AND STEPHEN I. VLADECK IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici file this brief to explain why no jurisdictional or procedural obstacles prevent this Court from reaching the merits of Petitioner's claims. *Amici* are law professors whose research and teaching focus on federal jurisdiction and the federal courts—and who have written extensively about this Court, especially its power to issue extraordinary relief in exceptional cases. *Amici* express no view on the merits of the Petitioner's claims.

James E. Pfander is the Owen L. Coon Professor of Law at Northwestern University School of Law. As relevant here, Professor Pfander's extensive writings include *One Supreme Court: Supremacy, Inferiority, and the Judicial Power of the United States* (2009), *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 Nw. U.L. Rev. 191 (2007), Marbury*, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 Colum. L. Rev. 1515 (2001), and *Jurisdiction-Stripping and the Supreme Court's Power To Supervise Inferior Tribunals*, 78 Tex. L. Rev. 1433 (2000).

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[1]The parties have consented to the filing of this brief. Counsel of record for both parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

Stephen I. Vladeck is the Associate Dean for Scholarship and a professor of law at American University Washington College of Law. As relevant here, Professor Vladeck's writings include *The Supreme Court, Original Habeas, and the Paradoxical Virtue of Obscurity*, 97 Va. L. Rev. In Brief 31 (2011), *The Riddle of the One-Way Ratchet: Habeas Corpus and the District of Columbia*, 12 Green Bag 2d 71 (2008), and *Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III*, 95 Geo. L.J. 1497 (2007).

SUMMARY OF ARGUMENT

Petitioner asks this Court to issue an extraordinary writ under the All Writs Act, 28 U.S.C. § 1651, to confine the Foreign Intelligence Surveillance Court ("FISA Court") to the lawful exercise of its jurisdiction. In Petitioner's view, the FISA Court exceeded its authority under 50 U.S.C. § 1861 when it ordered Verizon to provide the government (on a continuing basis) with all of the telephony metadata it collects from its business customers, including Petitioner. Although Verizon is entitled to challenge that order, including by taking an appeal to the Foreign Intelligence Surveillance Court of Review ("FISA Court of Review"), *see* 50 U.S.C. § 1861(f)(2), (f)(3), it has apparently declined to do so. And Petitioner, which is not a party to the FISA Court proceedings, has no means of directly appealing the FISA Court's orders, even though, as a result of those orders, its metadata are turned over to the government. For Petitioner, then, an application for an extraordinary writ from this Court

is the only means of seeking appellate review of an order which, it argues, the FISA Court lacked the power to issue.

This Court's issuance of such a writ "is not a matter of right, but of discretion sparingly exercised," Sup. Ct. R. 20.1, and for good reason. Few cases can satisfy each of Rule 20's three requirements—"that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court."

Amici address only two of Rule 20's three prongs. We demonstrate that the writ Petitioner seeks would be in aid of the Court's appellate jurisdiction, and that adequate relief for Petitioner's claims cannot be obtained in any other form or from any other court. *Amici* take no position on whether "exceptional circumstances warrant the exercise of the Court's discretionary powers," since Petitioner has thoroughly addressed that question in its brief.

In addition, *amici* also demonstrate that Petitioner clearly has Article III standing to pursue such relief. Thus, if this Court agrees with Petitioner that "exceptional circumstances warrant the exercise of the Court's discretionary powers," there are no jurisdictional or procedural obstacles to this Court's issuance of the extraordinary relief Petitioner seeks.

ARGUMENT

I. This Court Has Jurisdiction To Provide the Relief Petitioner Seeks

Petitioner seeks extraordinary relief from this Court—an "original" writ of mandamus or prohibition[2] under the All Writs Act, 28 U.S.C. § 1651, directed to the Foreign Intelligence Surveillance Court ("FISA Court"). As unusual as such a request may be, this Court clearly has jurisdiction to issue the writ because it has both constitutional and statutory appellate jurisdiction over the FISA Court and the FISA Court of Review (*see* Sections I.B and I.C, below), and because the writ would aid this Court in its exercise of that appellate jurisdiction (*see* Section I.D).

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[2]As the Third Circuit has explained,

> Although a writ of mandamus may appear more appropriate when the request is for an order mandating action, and a writ of prohibition may be more accurate when the request is to prohibit action, modern courts have shown little concern for the technical and historic differences between the two writs. Under the All Writs Act, the form is less important than the substantive question [of] whether an extraordinary remedy is available.

Kaiser Gypsum Co. v. Kelly (*In re Sch. Asbestos Litig.*), 921 F.2d 1310, 1313 (3d Cir. 1990) (alteration in original; citations and internal quotation marks omitted). Thus, for ease of reference, *amici* hereafter refer to Petitioner's claim for relief as seeking a writ of mandamus.

A. Under the All Writs Act, this Court May Issue Writs of Mandamus "In Aid of" Its Appellate Jurisdiction

This Court has statutory and constitutional authority to issue "original" writs of mandamus in aid of its appellate jurisdiction. *See* 28 U.S.C. § 1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."). Such authority is unaffected by *Marbury*'s disclaimer of the Court's power to issue a truly "original" writ of mandamus. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). As Chief Justice Stone explained in *Ex parte Republic of Peru*,

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

318 U.S. 578, 582–83 (1943); *see also, e.g.*, *Ex parte United States*, 287 U.S. 241, 245–46 (1932); *McClellan v. Carland*, 217 U.S. 268, 279–80 (1910); *Ex parte Crane*, 30 U.S. (5 Pet.) 190, 193–94 (1831);

cf. Ex parte Bollman, 8 U.S. (4 Cranch) 75, 101 (1807) ("[T]his writ must always be for the purpose of revising that decision, and therefore appellate in its nature."). *See generally Felker v. Turpin*, 518 U.S. 651, 667 n.1 (1996) (Souter, J., concurring) ("Such a petition is commonly understood to be 'original' in the sense of being filed in the first instance in this Court, but nonetheless for constitutional purposes an exercise of this Court's appellate (rather than original) jurisdiction.").

Thus, this Court has jurisdiction to issue an original writ of mandamus in any case in which such relief is in aid of this Court's appellate jurisdiction—especially where, as here, the writ is sought to confine a lower court to the proper exercise of *its* jurisdiction. *See, e.g.*, *Will v. United States*, 389 U.S. 90, 95 (1967) ("The peremptory writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943))).

B. This Court Has Constitutional Appellate Jurisdiction Over the FISA Court and FISA Court of Review

When Congress created the FISA Court and the FISA Court of Review in 1978, it chose to staff the courts with existing Article III district and circuit judges, respectively. *See* Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, § 103, 92 Stat. 1783, 1788 (codified as amended at 50

U.S.C. § 1803). Insofar as their jurisdiction extends only to questions of federal law, Congress thereby ensured that the decisions of the FISA Court and FISA Court of Review fall within Article III's "arising under" head of federal jurisdiction. *See* U.S. Const. art. III, § 2, cl. 1 ("The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . ."). And, as explained below, Congress also provided that most of the decisions of these courts would ultimately be subject to review via writs of certiorari from this Court. *See post* at 9-10.

From their inception, then, the FISA Court and FISA Court of Review have been inferior tribunals within the Article III hierarchy, with jurisdiction circumscribed by Article III. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 486 (FISA Ct. 2007) ("Notwithstanding the esoteric nature of its caseload, the FISC is an inferior federal court established by Congress under Article III."); *see also In re Sealed Case*, 310 F.3d 717, 731–32 (FISA Ct. Rev. 2002) (applying to the FISC "the constitutional bounds that restrict an Article III court"); *United States v. Cavanagh*, 807 F.2d 787, 791 (9th Cir. 1987) (Kennedy, J.) ("[T]he judges assigned to serve on the FISA court are federal district judges, and as such they are insulated from political pressures by virtue of the protections they enjoy under article III, namely life tenure and a salary that cannot be diminished.").

It therefore follows that decisions by the FISA Court and FISA Court of Review are within the ambit of this Court's constitutional appellate jurisdiction. *See* U.S. Const. art. III, § 2, cl. 2 ("In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

Because this Court may exercise constitutional appellate jurisdiction over the FISA Court and FISA Court of Review, the All Writs Act thereby empowers it to issue writs of mandamus in aid of that jurisdiction. As Professor Pfander has argued, this Court may issue writs to inferior courts even in cases in which it may lack *direct* statutory appellate jurisdiction over those courts. *See* James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power To Supervise Inferior Tribunals*, 78 Tex. L. Rev. 1433, 1494–98 (2000).

This conclusion follows, Pfander explains, because the source of this Court's appellate jurisdiction is the Constitution itself—unlike the power of the lower federal courts, which is derived entirely from statutes. *See id.* at 1497–98; *see also* Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 Sup. Ct. Rev. 153, 187 & n.157. *See generally* Richard F. Wolfson, *Extraordinary Writs in the Supreme Court Since Ex parte* Peru, 51 Colum. L. Rev. 977, 991 (1951) ("[T]he [*Ex parte Peru*] Court found that, with respect to cases coming from the federal courts, its power [under the All Writs Act] was practically limitless.").

C. This Court Has Statutory Appellate Jurisdiction Over the FISA Court and FISA Court of Review That Encompasses the Order Petitioner Seeks To Challenge

In addition, there are seven different statutory provisions pursuant to which this Court may review decisions of the FISA Court and FISA Court of Review via certiorari. *See* 50 U.S.C. §§ 1803(b), 1822(d), 1861(f)(3), 1881a(h)(6)(B), 1881a(i)(4)(D), 1881b(f)(2), 1881c(e)(2). One of those provisions contemplates review of the FISA Court orders[3] that Petitioner seeks to challenge: Section 215 of the USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 287, created 50 U.S.C. § 1861(f)(3), which provides that:

> A petition for review of a decision . . . to affirm, modify, or set aside a[] [section 215] order by the Government or any person receiving such order shall be made to the [FISA Court of Review], which shall have jurisdiction to consider such petitions. The [FISA Court of Review] shall provide for the record a written statement of the reasons for its decision and, on petition by the Government or any person receiving such order for writ of certiorari, the record shall be transmitted under seal to the

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[3] *See In re Application of the FBI for an Order Requiring the Production of Tangible Things From Verizon Bus. Network Servs., Inc.*, Docket No. BR 13-80 (FISA Ct. Apr. 25, 2013), *available at* http://epic.org/privacy/nsa/ Section-215-Order-to-Verizon.pdf.

> Supreme Court of the United States, which shall have jurisdiction to review such decision.

50 U.S.C. § 1861(f)(3). Under § 1861, then, either the government or the recipient of a section 215 order may challenge that order—before a FISA Court judge, *id.* § 1861(f)(2)(A), then before the *en banc* FISA Court, *id.* § 1803(a)(2)(A), then via petition for review in the FISA Court of Review, *id.* § 1861(f)(3), then via certiorari in this Court, *id.*

Thus, this Court possesses statutory certiorari jurisdiction—via the FISA Court of Review—over decisions by the FISA Court including the one Petitioner seeks to challenge.

D. A Writ of Mandamus Would Therefore be "In Aid of" this Court's Appellate Jurisdiction

To be clear, the writ Petitioner seeks in this case is directed to the FISA Court, and not the FISA Court of Review. But the All Writs Act does not—and has never been understood to—limit this Court's power to issue writs in aid of its appellate jurisdiction solely to those courts over which this Court possesses *direct* appellate jurisdiction. *See, e.g.*, Pfander, *supra*, at 1494–98 (explaining that this understanding follows from a view of the All Writs Act as vindicating this Court's *constitutional* appellate jurisdiction). Instead, as Justice Sutherland explained in *Ex parte United States*, "this court has full power in its discretion to issue the writ of mandamus to a federal District Court, although the case be one in respect of which direct appellate jurisdiction is vested in the Circuit Court of Appeals—this court having ultimate discretionary

jurisdiction by certiorari . . . ." 287 U.S. at 248; *see also Ex parte Peru*, 318 U.S. at 585.[4]

Ex parte United States nevertheless emphasized that "application for the writ *ordinarily* must be made to the intermediate appellate court, and made to this court as the court of ultimate review only in such exceptional cases." 287 U.S. at 249 (emphasis added). But as these cases illustrate, such a constraint is not a *jurisdictional* limit on this Court's authority, but rather reflects the merits-based requirement for mandamus relief—which *amici* address below—"that adequate relief cannot be obtained in any other form *or from any other court*." Sup. Ct. R. 20.1 (emphasis added).

Because Petitioner is seeking to challenge an Article III court's decision over which this Court has both statutory and constitutional appellate jurisdiction, then, the All Writs Act empowers this

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[4]Justice Brennan has suggested that the 1948 revision to the Judicial Code narrowed the scope of the All Writs Act, at least with regard to the authority of *lower* courts to issue writs of mandamus to courts over which they lacked direct appellate jurisdiction. *See La Buy v. Howes Leather Co.*, 352 U.S. 249, 265–66 (1957) (Brennan, J., dissenting); *see also Chandler v. Jud. Council of the Tenth Cir.*, 398 U.S. 74, 117 n.15 (1970) (Harlan, J., concurring) (flagging, but not resolving, this issue).

Whether or not Justice Brennan's view is correct, *see, e.g.*, Pfander, *supra*, at 1498 & n.298, there is no basis to conclude that the 1948 revision also circumscribed *this* Court's authority as recognized in *Ex parte United States* and *Ex parte Republic of Peru*. *See generally* Richard H. Fallon Jr., et al., *Hart & Wechsler's The Federal Courts and the Federal System* 269–70 & nn.5–6 (6th ed. 2009) (summarizing these arguments).

Court to issue a writ of mandamus in aid of such appellate jurisdiction.

E. Petitioner's Inability To Directly Appeal the FISA Court's Orders Does Not Divest This Court of the Power To Fashion Relief Under the All Writs Act

Finally, this Court's jurisdiction to issue a writ of mandamus to the FISA Court in aid of its appellate jurisdiction is not undermined by Petitioner's inability to avail itself of the appellate review provided by 50 U.S.C. § 1861(f)(3).[5] As Justice Kennedy explained four years ago, "a court's power to issue any form of relief [under the All Writs Act]—extraordinary or otherwise—is contingent on that court's subject-matter jurisdiction over the *case or controversy*." *United States v. Denedo*, 556 U.S. 904, 911 (2009) (emphasis added).

So understood, the jurisdictional question under the All Writs Act is not whether the party seeking mandamus must also be able to avail itself of the appellate jurisdiction in aid of which mandamus relief is sought; it is whether the court had, has, or will have appellate jurisdiction over the underlying subject matter—regardless of whether a particular party could seek a particular form of appellate

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[5]Under § 1861, a FISA Court decision to affirm, set aside, or modify a production (or related nondisclosure) order may be challenged via a petition for review in the FISA Court of Review only by the government or the recipient of the production order. *See* 50 U.S.C. § 1861(f)(2)(A)(i), (f)(3). Thus, such review was not available to Petitioner in this case.

review at a particular time. *See, e.g.*, *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966) ("The exercise of this power . . . extends to the *potential* jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." (citation omitted; emphasis added)).

This understanding is reflected, *inter alia*, in the long line of decisions in which appellate courts have issued writs of mandamus to lower courts to protect the rights of parties who were not formally part of the proceedings below—and who therefore had no basis for pursuing their own statutory appeal. As one of many examples, mandamus has frequently been used by members of the public and/or press to vindicate the qualified First Amendment right of public access to judicial proceedings that this Court identified in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and its progeny. *See, e.g.*, *In re Application of the United States for an Order Pursuant to 18 U.S.C. § 2703(d)*, 707 F.3d 283, 288–89 (4th Cir. 2013); *In re Boston Herald, Inc.*, 321 F.3d 174, 177 (1st Cir. 2003); *In re Cincinnati Enquirer*, 85 F.3d 255, 256 (6th Cir. 1996); *Oregonian Publ'g Co. v. U.S. Dist. Ct.*, 920 F.2d 1462, 1464–65, 1467–68 (9th Cir. 1990); *Balt. Sun Co. v. Goetz*, 886 F.2d 60, 63 (4th Cir. 1989). In all of these cases, relief was possible under the All Writs Act despite—if not because of—the fact that the party seeking such relief could not have directly appealed the putatively adverse lower-court decision. The same logic holds here.

In short, so long as Petitioner has standing to invoke the All Writs Act (which Petitioner does have, as *amici* address below), this Court has the power to issue a writ of mandamus in aid of its appellate jurisdiction, even though Petitioner cannot directly invoke that appellate jurisdiction.

II. No Other Procedural Obstacle Precludes this Court From Issuing the Relief Petitioner Seeks

A. Petitioner Has Article III Standing to Invoke The All Writs Act

"To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010)). Petitioner easily satisfies each of these three prongs, and therefore has Article III standing to seek a writ of mandamus from this Court.

With regard to the requirement of injury-in-fact, Petitioner has been injured by the actions of the FISA Court. Specifically, by dint of the FISA Court's rulings, Verizon is continually providing the government with Petitioner's telephony metadata—the precise conduct that Petitioner claims the FISA Court lacks the authority to require.[6]

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[6] *See* Siobhan Gorman & Jennifer Valentino-DeVries, *Government Is Tracking Verizon Customers' Records*, Wall St.

These disclosures, combined with the nature of Petitioner's claim, compel the conclusion that this Court's decision earlier this year in *Clapper* does not bear on Petitioner's standing in this case. In *Clapper*, the plaintiffs were challenging potential *future* surveillance (under section 702 of the FISA Amendments Act of 2008, 50 U.S.C. § 1881a), and therefore could "only speculate as to how the Attorney General and the Director of National Intelligence will exercise their discretion in determining which communications to target." 133 S. Ct. at 1149. Thus, the argument for standing there was based upon a "speculative chain of possibilities." *Id.* at 1150; *see also id.* ("[R]espondents can only speculate as to whether [the FISA Court] will authorize such surveillance.").

Here, in contrast, there can be little question either that the FISA Court *has* authorized the conduct Petitioner challenges, or that, because of those rulings, Petitioner's telephony metadata *are* being turned over to the government. Thus, the injury Petitioner alleges is neither speculative nor generalized under *Clapper*.[7]

J., June 6, 2013, at A7 ("The National Security Agency is obtaining a complete set of phone records from all Verizon U.S. customers under a secret court order, according to a published account and former officials.").

[7]This point also helps to explain why *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), is easily distinguishable. In *Perry*, this Court held that the intervenors defending Proposition 8 lacked Article III standing because they had "no 'direct stake' in the outcome of their appeal," *id.* at 2662, and because they were not

Just as the FISA Court's rulings reveal that Petitioner has suffered an injury-in-fact, that injury is also "fairly traceable" to those rulings. Unlike in *Clapper*, *see id.* at 1149, Petitioner is not challenging its amenability to governmental surveillance *writ large*; rather, it is specifically challenging the authority of the FISA Court to issue the underlying orders compelling Verizon to turn over its business customers' telephony metadata to the government under section 215. Even if there were other means pursuant to which the government theoretically could obtain the same information, *see id.* at 1149,[8] Petitioner's challenge to the FISA Court's specific authority under section 215 would still present a live case or controversy.

Finally, because a writ of mandamus confining the FISA Court to the lawful exercise of its

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acting as agents of the State—which *did* have such a stake. *See id.* at 2663–67.

Here, Petitioner is seeking to vindicate *its* rights (in the privacy of its telephony metadata), not the rights of others. And its "direct stake" is obvious; so long as the allegedly *ultra vires* FISA Court orders remain in place, Verizon will continue to turn over Petitioner's telephony metadata to the government. Even in *Perry*, when the Prop. 8 intervenors *did* have a direct stake in preventing the widespread public broadcast of the trial proceedings, this Court issued extraordinary relief to vindicate that interest. *See Hollingsworth v. Perry*, 558 U.S. 183, 190–91 (2010) (per curiam).

[8]In fact, and unlike in *Clapper*, it is not at all clear that the government *has* alternative means of obtaining the telephony metadata of U.S. persons—and certainly not on the scale that the challenged FISA Court orders authorize.

jurisdiction would provide the relief Petitioner seeks, Petitioner also satisfies the redressability prong of this Court's Article III standing jurisprudence. Thus, Petitioner has Article III standing to seek a writ of mandamus from this Court under the All Writs Act.[9]

B. Comparable Relief is Not Available in an Alternative Forum

Notwithstanding the above analysis, it is axiomatic that mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947). To that end, although *amici* have demonstrated that "the writ will be in aid of the Court's appellate jurisdiction," and although Petitioner has explained why "exceptional circumstances warrant the exercise of the Court's discretionary powers," it also bears emphasizing "that adequate relief cannot be obtained in any other form or from any other court." Sup. Ct. R. 20.1; *see also Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380–81 (2004).

First, it appears that Petitioner cannot collaterally attack the authority of the FISA Court to issue the underlying orders in the Article III district courts. Relief under the All Writs Act would be

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[9]Because Petitioner has Article III standing, there is no need to consider whether a party may use a prerogative writ collaterally to attack lower-court proceedings to which they were "strangers." *See, e.g.*, Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 Brook. L. Rev. 1001 (1997).

unavailable insofar as the district courts have no appellate jurisdiction over the FISA Court; and the original mandamus statute, 28 U.S.C. § 1361, cannot be used to confine *other* courts to the lawful exercise of their discretion. *See, e.g.*, *Dickner v. Governor of N.H.*, No. 07-cv-120, 2007 WL 2898712, at *3 n.3 (D.N.H. Sept. 28, 2007), *report and recommendation approved by*, 2007 WL 3124625 (D.N.H. Oct. 24, 2007).

Moreover, FISA itself invests the recipients of orders under section 215 with immunity from civil liability, *see* 50 U.S.C. § 1861(e), which would likely prevent Petitioner from collaterally attacking the FISA Court's orders through a suit against Verizon for its compliance with—or refusal to challenge—the FISA Court's orders. Thus, unlike the constitutional claims that are presented in suits such as *ACLU v. Clapper*, No. 13-civ-3994 (S.D.N.Y. filed June 11, 2013), it is unlikely that Petitioner could raise its statutory challenge to the FISA Court's authority in a collateral action.

Second, even if the recipient of a section 215 production order sought to challenge that order, *but see* Letter from Hon. Reggie B. Walton, Presiding Judge, FISA Court, to Hon. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary, at 8 (July 29, 2013) ("To date, no recipient of a production order has opted to invoke [the judicial review provisions] of the statute."), *available at* http://www.scribd.com/doc/156993381/FISC-letter-to-Leahy, it hardly follows that the possibility of relief to *another* party—especially one with potentially

divergent interests—could constitute the "adequate relief" that Rule 20 contemplates.

Third, although the FISA Court of Review is a "court[] established by Act of Congress" for purposes of the All Writs Act, it is unlikely—at best—that it has the capacity to entertain applications for extraordinary writs under 28 U.S.C. § 1651. Although *this* Court's appellate jurisdiction vis-à-vis the lower federal courts is plenary, *see, e.g.*, *Hohn v. United States*, 524 U.S. 236, 247–48 (1998); *cf. Hertz Corp. v. Friend*, 559 U.S. 77, 83–84 (2010) (noting that the historical lineage of 28 U.S.C. § 1254 "provides particularly strong reasons not to read [another statute's] silence or ambiguous language as modifying or limiting [this Court's] pre-existing jurisdiction"), the same cannot be said for the FISA Court of Review's appellate jurisdiction vis-à-vis the FISA Court.

As relevant here, the FISA Court of Review does not have appellate jurisdiction over the FISA Court's original section 215 production or nondisclosure orders, but only over a subsequent decision "to affirm, modify, or set aside" a specific order. 50 U.S.C. § 1861(f)(3). This is more than just a technicality, for it means that the FISA Court of Review lacks appellate jurisdiction to review the very orders Petitioner is seeking to contest via mandamus—the original production orders. *Cf. Ctr. for Constitutional Rights v. United States*, 72 M.J. 126 (C.A.A.F. 2013) (holding that the Court of Appeals for the Armed Forces lacked the power to issue a writ of mandamus under the All Writs Act

because of unique statutory limits on its appellate jurisdiction).

In addition to the formal limits on its appellate review, the FISA Court of Review also lacks apparent authority to issue writs of mandamus to the FISA Court. To be sure, the fact that the FISA Court of Review has "potential" appellate jurisdiction (should the recipient of a production order seek review of the FISA Court's refusal to modify or set aside that order) should mean that the FISA Court of Review may nevertheless issue writs of mandamus in aid of that jurisdiction under the All Writs Act. But the FISA Court of Review is unique among this nation's appellate courts—in its 35 years of existence, it has issued only two public opinions; it does not appear to have permanent staff, to say nothing of publicly available rules of procedure. It is therefore difficult—if not impossible—to ascertain how a litigant who is not a party to the proceedings below could even begin to pursue relief before that tribunal. *Cf. McCarthy v. Madigan*, 503 U.S. 140, 147–49 (1992) (surveying cases holding that parties should not be required to exhaust futile review mechanisms), *superseded by statute on other grounds*, Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-71.

Thus, although mandamus relief is theoretically available from the FISA Court of Review, pursuit of such relief is logistically—if not substantively—futile. As Chief Justice Stone wrote almost seventy years ago, "where, as here, sole appellate jurisdiction lies in this Court, application for a common law writ

in aid of appellate jurisdiction must be to this Court." *U.S. Alkali Export Ass'n v. United States*, 325 U.S. 196, 202 (1945).[10]

CONCLUSION

For the foregoing reasons, *amici* respectfully suggest that there are no jurisdictional or procedural obstacles to the extraordinary relief Petitioner seeks. If this Court agrees with Petitioner that "exceptional circumstances warrant the exercise of the Court's discretionary powers," then *amici* respectfully suggest that the Petition should be granted—or, at the very least, set for full briefing and argument on the merits.

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[10]Similar logic compels the conclusion that relief under the All Writs Act is unavailable from the FISA Court itself. Although that court, unlike the Court of Review, *does* have public rules of procedure, *see* Rules of Procedure for the Foreign Intelligence Surveillance Court (Nov. 1, 2010), *available at* http://www.uscourts.gov/uscourts/rules/FISC2010.pdf, there is no mechanism pursuant to which parties such as Petitioner may pursue any relief—let alone extraordinary relief along the lines sought here.

Respectfully submitted,

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