

## QUESTIONS PRESENTED

- (1) Does the USA PATRIOT Act (“Patriot Act”), Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001), authorize the government to conduct surveillance under the Foreign Intelligence Surveillance Act (“FISA”), 50 U.S.C. § 1801 *et seq.*, even where the government’s primary purpose is law enforcement rather than foreign intelligence?
- (2) If the Patriot Act authorizes the government to conduct surveillance under FISA even where the government’s primary purpose is law enforcement, does FISA as amended by the Patriot Act contravene the First or Fourth Amendment of the United States Constitution?

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioners respectfully petition for a writ of *certiorari* to review the judgment of the Foreign Intelligence Surveillance Court of Review in this case.

### INTRODUCTION

Petitioners seek this Court's review of the first-ever decision of the Foreign Intelligence Surveillance Court of Review ("Court of Review"), a decision that seriously compromises the privacy and free-speech rights of people living in the United States. In an extraordinary and far-reaching ruling that conflicts with decisions of this Court and a number of lower courts, the Court of Review construed provisions of the USA Patriot Act ("Patriot Act") to allow the government vastly to expand its surveillance of Americans by using the Foreign Intelligence Surveillance Act ("FISA") even in investigations whose primary purpose is law enforcement rather than foreign intelligence. The Court of Review's decision effectively overturned a decision of the Foreign Intelligence Surveillance Court ("FISA Court") that had avoided the constitutional question by interpreting the amended FISA more narrowly, though the Court of Review acknowledged that "the constitutional question presented in this case . . . has no definitive jurisprudential answer." App. 52a. Petitioners urge this Court to grant review in order to clarify that the government cannot constitutionally conduct surveillance under lower foreign-intelligence standards where its primary purpose is law enforcement rather than foreign intelligence.

### OPINIONS BELOW

The opinion of the Foreign Intelligence Surveillance Court of Review in *In re: Sealed Case No. 02-001* is reprinted as Appendix A hereto. See App. 1a-53a. The

opinion of the Foreign Intelligence Surveillance Court is reprinted as Appendix B hereto. *See* App. 54a-86a.

### **JURISDICTION**

The judgment of the Court of Review was entered on November 18, 2002. This Court has jurisdiction under 50 U.S.C. § 1803(b), under 28 U.S.C. § 1254(1), and under the All Writs Act, 28 U.S.C. § 1651(a).

Section 1803(b) of Title 50 creates jurisdiction in this Court to review, on petition of the government for a writ of *certiorari*, any Court of Review decision upholding the denial of a government surveillance application.<sup>1</sup> The statute is silent as to whether a party *other* than the government may petition for a writ of *certiorari* where the government *prevails* in the Court of Review. Petitioners urge the Court to construe the statute generously. A reading that would disallow parties other than the government from petitioning for a writ of *certiorari* would effectively foreclose this Court from reviewing any decision by the Court of Review in favor of the government. Yet nothing in the statute suggests that Congress intended that result. On the contrary, the apparent intent of the statute is to ensure that this Court will be able to correct the Court of Review when necessary. Congress's failure specifically to authorize parties other than the government to seek this Court's review is easily explained by the fact that, in litigation originating in the FISA Court, the government is ordinarily the only party. If Congress had intended that in certain cases the Court of Review rather than this Court would be the final arbiter of difficult constitutional

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<sup>1</sup> Section 1803(b) provides, in relevant part, "If [the Court of Review] determines that the application was properly denied, the court shall immediately provide for the record a written statement of each reason for its decision and, on petition of the United States for a writ of *certiorari*, the record shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision."

questions, it would surely have manifested its intent in clear language.

This Court also has jurisdiction under 28 U.S.C. § 1254, which provides that “[c]ases in the courts of appeals may be reviewed by the Supreme Court . . . [b]y writ of *certiorari* granted upon the petition of any party to any civil or criminal case . . . .” The Court of Review is a “court[] of appeals” within the meaning of this provision. *See Tully v. Mobil Oil Corp.*, 455 U.S. 245 (1982) (per curiam) (holding that the Temporary Emergency Court of Appeals was a ‘court of appeals’ for purposes of § 1254(2)).

Finally, if neither of the provisions cited above provides jurisdiction, this Court has jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a), which provides that “[t]he 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.” In *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 43 (1985), this Court stated that “[w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.” It also stated, however, that the All Writs Act “fill[s] the interstices of federal judicial power when those gaps threate[n] to thwart the otherwise proper exercise of federal courts’ jurisdiction.” *Id.* at 41.

Petitioners submit that the All Writs Act provides jurisdiction here. First, FISA does not “specifically address[]” the question whether a party other than the government may petition for a writ of *certiorari*. Second, if jurisdiction did not exist under the All Writs Act, this Court’s authority to review a decision of the Court of Review would depend on whether the decision was favorable or unfavorable to the government. Finally, jurisdiction under the All Writs Act is appropriate in this extraordinary case for a number of other reasons. The FISA Court, sitting *en banc* for the first

time in its history, ruled unanimously against the government. The Court of Review, which ultimately reversed the FISA Court, convened for the first time to hear the government's appeal. Both the lower court and the Court of Review recognized the broad impact of their rulings and published their decisions. Though some of petitioners here were permitted to file briefs *amicus curiae* in the lower court proceedings, the government was the only party. The litigation clearly involves important constitutional issues concerning FISA itself and not simply the legal sufficiency of a particular surveillance application.

### **CONSTITUTIONAL AND STATUTORY PROVISIONS**

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." The Fourth Amendment provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The pertinent provisions of FISA, as amended by the Patriot Act, are reprinted in Appendix C hereto. *See* App. 87a-105a.

### **STATEMENT OF THE CASE**

This case involves the meaning and constitutionality of certain amendments made by the Patriot Act to FISA. The Court of Review held that the Patriot Act constitutionally authorizes the government to rely on FISA even when the primary purpose of an investigation is law enforcement rather than foreign intelligence.

FISA was enacted in 1978 to govern surveillance of foreign powers and their agents inside the United States. The statute created the FISA Court, a court composed of seven (now eleven) federal district court judges, and empowered

the FISA Court to grant or deny government applications for surveillance orders.<sup>2</sup> FISA also set out the conditions that the government is required to satisfy before the FISA Court will issue a surveillance order. These standards are substantially less stringent than those that the Fourth Amendment ordinarily requires. In order to obtain a FISA surveillance warrant, the government must show probable cause to believe that the prospective surveillance target is a “foreign power” or an “agent of a foreign power,” 50 U.S.C. § 1804(a)(4)(A), and it must certify, among other things, that “the purpose” (now, “significant purpose”) of the surveillance is to obtain “foreign intelligence information,” *id.* § 1804(a)(7)(B). The government is *not* required, however, to articulate any suspicion that the target is engaged in criminal activity. It is not required to show (or even to certify) that the facilities to be targeted are being used for the kinds of communications that are sought to be intercepted. It is not required to provide the target with even delayed notice that her privacy has been compromised – even if the target is ultimately determined to have been inappropriately or illegally targeted. In essence, FISA allows the government to conduct electronic surveillance and physical searches without complying with the ordinary requirements of the Fourth Amendment.

According to the government, the Patriot Act dramatically expanded the class of investigations in which FISA is available. Prior to the Patriot Act, the government could invoke FISA only by certifying that “the purpose” of the surveillance was to obtain foreign intelligence information. The Patriot Act replaced “the purpose” with “a significant purpose.” 115 Stat. 272, § 218 (amending 50

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<sup>2</sup> In its current form, FISA comprises four Subchapters. The first and second address electronic surveillance and physical searches, respectively. The third addresses “pen register” and “trap and trace” devices. The fourth addresses government access to certain business records and other tangible things. Only the first and second of FISA’s Subchapters are at issue in this litigation.

U.S.C. §§ 1804(a)(7)(B) and 1823(a)(7)(B)). On the government's theory, that change allows it to obtain surveillance warrants under FISA's undemanding standards even where its primary purpose is law enforcement rather than foreign intelligence.

In March of last year, the Attorney General requested that the FISA Court adopt a new set of procedures (the "2002 Procedures") for all FISA investigations concerning United States persons.<sup>3</sup> The 2002 Procedures were to supersede procedures that had been in place since 1995 (the "1995 Procedures"). Although styled as "Intelligence Sharing Procedures for Foreign Intelligence and Foreign Counterintelligence Investigations Conducted by the FBI," the 2002 Procedures in fact sought to implement the Attorney General's expansive interpretation of the Patriot Act's amendments to FISA. Most relevant to this litigation, the 2002 Procedures endorsed the use of FISA in investigations whose primary purpose is law enforcement rather than foreign intelligence. They also stated that FISA surveillance could now be initiated, directed, and controlled by law enforcement rather than intelligence officials.

In a decision dated May 17, 2002, the FISA Court rejected the 2002 Procedures. *See* App. 54a-86a. The court noted that, while the 1995 Procedures "permit[ted] substantial consultation and coordination" between the intelligence and criminal officials, the court had closely supervised such consultation and coordination to ensure that FISA was "not being used *sub rosa* for criminal investigations." *Id.* 68a. Notwithstanding this close supervision, the government had abused its FISA authority in "an alarming number of instances." *Id.*<sup>4</sup> The Court found

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<sup>3</sup> "United States person" is defined in 50 U.S.C. § 1801(i). *See* App. 91a.

<sup>4</sup> For example, the government came forward in September 2000 "to confess error in some 75 applications related to major terrorist attacks

that the 2002 Procedures, far from addressing the government's history of abuse, would eliminate altogether the safeguards that prevented the government from using FISA as a means of evading ordinary Fourth Amendment requirements in routine criminal investigations. *See id.* 72a. The March 2002 Procedures, the Court wrote,

mean[] that criminal prosecutors will tell the FBI when to use FISA (perhaps when they lack probable cause for a Title III electronic surveillance), what techniques to use, what information to look for, what information to keep as evidence and when use of FISA can cease because there is enough evidence to arrest and prosecute.

*Id.* 76a. Rather than denying the Attorney General's motion, however, the Court modified the proposed procedures, first by requiring that consultations between criminal and intelligence investigators be monitored by officials of the Office of Intelligence Policy Review, and second by adding a proviso that prohibited law enforcement officials from "directing or controlling the investigation using FISA searches and surveillances toward law enforcement objectives." *Id.* 77a.

The Attorney General appealed the FISA Court's decision to the Court of Review, which convened for the first

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directed [against] the United States." App. 69a. In November 2000, after "a special meeting to consider the troubling number of inaccurate FBI affidavits in so many FISA applications," the FISA Court barred one FBI agent from appearing before it as a FISA affiant. *Id.* In March 2001, the government reported further abuses in a different series of applications. "In virtually every instance," the Court noted, "the government's misstatements and omissions in FISA applications and violations of the Court's orders involved information sharing and unauthorized disseminations to criminal investigators and prosecutors." *Id.* 70a.

time in order to hear the appeal.<sup>5</sup> On appeal, the government advanced two arguments. The first of these, which the government had not presented to the FISA Court (and indeed had never before advanced before Congress or any court), was that there had never been any statutory basis for the view – adopted by the Fourth Circuit in *United States v. Truong*, 629 F.2d 908 (4<sup>th</sup> Cir. 1980), and then by several other courts – that FISA is available only where the government’s primary purpose is foreign intelligence. After examining the relevant FISA provisions as they existed before the Patriot Act, the Court of Review agreed. In the Court’s view, FISA as originally enacted did not envision a dichotomy between law enforcement and foreign intelligence. Indeed, the Court noted, “[t]he definition of an agent of a foreign power, if it pertains to a U.S. person (which is the only category relevant to this case), is closely tied to criminal activity.” App. 8a. Thus, the Court accepted the government’s view that the primary-purpose restriction did not have a statutory basis before the Patriot Act. It proceeded to find, however, that the Patriot Act’s “significant purpose” amendment had endorsed the relevance of a judicial inquiry into the government’s purpose:

[E]ven though we agree that the original FISA did not contemplate the “false dichotomy” [between foreign intelligence and law enforcement], the Patriot Act actually did – which makes it no

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<sup>5</sup> The Attorney General did not appeal the FISA Court May 17 order directly, presumably because that decision did not pertain to a specific surveillance order. Instead, the Attorney General submitted a surveillance application on July 19, proposing the 2002 Procedures without modification. The FISA judge hearing that application granted the order but modified the proposed procedures in accordance with the FISA Court’s May 17 order. The Attorney General then appealed the July 19 order, along with an October 17 order granting, with modifications, the government’s application for renewal of the July 19 surveillance order. *See* App. 22a.

longer false. . . . [I]n light of the significant purpose amendment . . . it seems section 1805 must be interpreted as giving the FISA court the authority to review the government's purpose in seeking the information.

*Id.* 32a.

Having concluded that the “significant purpose” amendment had endorsed the dichotomy between foreign intelligence and law enforcement, the Court could not accept the government’s principal argument. It was sympathetic, however, to the government’s alternative argument – that the “significant purpose” amendment had been intended to “eliminate[] any justification for the FISA court to balance the relative weight the government places on criminal prosecution as compared to other counterintelligence responses.” *Id.* 33a. After the Patriot Act, the Court reasoned, the government meets its statutory obligation as long as “the certification of the application’s purpose articulates a broader objective than criminal prosecution . . . and includes other non-prosecutorial responses.” *Id.* “So long as the government entertains a realistic option of dealing with the agent other than through criminal prosecution, it satisfies the significant purpose test.” *Id.* 32a.

The Court thus made clear its view that the Patriot Act amendments license the use of FISA even if the government’s primary purpose is law enforcement. Indeed, the Court reasoned that the government may use FISA even for the primary purpose of prosecuting ordinary, *non*-“foreign-intelligence crimes,” so long as the crime is not “wholly unrelated” to foreign intelligence. *Id.* 34a.

The Court dedicated the remainder of its opinion to addressing the constitutionality of the Patriot Act

amendments.<sup>6</sup> The Court acknowledged the significant differences between FISA’s procedural requirements and those of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (“Title III”), Pub. L. 90-351, tit. III, 82 Stat. 211, the statute that governs electronic surveillance in criminal investigations. The Court wrote, “to the extent the two statutes diverge in constitutionally relevant areas . . . a FISA order may not be a ‘warrant’ contemplated by the Fourth Amendment,” *id.* 44a, but declined to decide the issue. Instead, it proceeded directly to the question whether FISA searches are reasonable.

The Court expressly rejected *Truong* and other Court of Appeals cases holding that the government cannot constitutionally invoke any foreign-intelligence exception to the Fourth Amendment’s usual requirements where its primary purpose is law enforcement. The Court of Review held that these cases were misguided because “criminal prosecutions can be, and usually are, interrelated with other techniques used to frustrate a foreign power’s efforts.” *Id.* 46a. The Court also rejected *amici*’s reliance on this Court’s “special needs” cases. *See id.* 50a-51a. The Court held that these cases were inapposite because, whatever the purpose of any particular FISA investigation, FISA is a statute whose “programmatic purpose” is not law enforcement but foreign intelligence. *Id.* 52a. The Court concluded:

[W]e think the procedures and government showings required under FISA, if they do not meet the minimum Fourth Amendment warrant

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<sup>6</sup> The Court recognized at the outset that “some of the very senators who fashioned the Patriot Act amendments” had expressed concern that the “significant purpose” amendment would give rise to serious constitutional questions. App. 35a. For example, Senator Leahy stated that “[n]o matter what statutory change is made . . . the court may impose a constitutional requirement of ‘primary purpose’ based on the appellate court decisions upholding FISA against constitutional challenges over the past 20 years.” *Id.* (internal quotation marks omitted).

standards, certainly come close. We, therefore, believe firmly . . . that FISA as amended is constitutional because the surveillance it authorizes are reasonable.

*Id.* 53a.

### **REASONS FOR GRANTING THE WRIT**

Although FISA was enacted in 1978, this Court has never considered the statute's constitutionality. The question has become extraordinarily important in light of the Court of Review's interpretation of the Patriot Act. This Court should accept review in order to make clear that the government may not constitutionally rely on any foreign-intelligence exception to the Fourth Amendment's usual requirements in investigations whose primary purpose is law enforcement rather than foreign intelligence.

The Court of Review's decision, which upheld the constitutionality of the relevant Patriot Act amendment, need not have addressed the constitutional question at all, because the statute supports a narrower construction that would avoid the constitutional question altogether. In any event, the Court of Review's answer to the constitutional question was incorrect. The decision conflicts with the clear rulings of this Court by sanctioning warrantless and unreasonable searches in routine criminal investigations, by allowing the government to conduct searches for law enforcement purposes without providing notice or establishing criminal probable cause, and by foreclosing meaningful judicial review of FISA surveillance applications. It also conflicts with decisions of numerous lower federal courts that limited any foreign-intelligence exception to investigations whose primary purpose is foreign intelligence. Finally, it contravenes this Court's jurisprudence by undermining Fourth Amendment safeguards that previously inhibited the government from infringing First Amendment rights.

For these reasons, petitioners urge the Court to grant review in this case.

**I. THE COURT OF REVIEW'S DECISION PRESENTS AN IMPORTANT STATUTORY AND CONSTITUTIONAL QUESTION CONCERNING THE SCOPE OF ANY FOREIGN-INTELLIGENCE EXCEPTION TO THE FOURTH AMENDMENT'S USUAL REQUIREMENTS**

FISA was enacted to establish a framework within which the Executive Branch may conduct intelligence surveillance of foreign powers and their agents inside the United States. The statute allows the government to conduct surveillance on less demanding standards than are ordinarily required by the Fourth Amendment. Although FISA has now governed foreign-intelligence surveillance for twenty-five years, this Court has never before reviewed the statute's constitutionality.

FISA was enacted in response to rampant abuse of executive surveillance powers. During the Cold War and the McCarthy era, the FBI routinely installed electronic surveillance devices on private property in order to monitor the conversations of suspected communists. *See* S. Rep. 95-604, at 11 (1977). The FBI's COINTELPRO, authorized by President Nixon in the 1970s, wiretapped Martin Luther King, Jr. and other dissidents and anti-war protesters solely because of their political beliefs. *See generally* 2 Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, Intelligence Activities and the Rights of Americans, Final Report ("Church Committee Report"), S. Rep. 94-755 (1976). The CIA illegally surveilled as many as seven thousand Americans in Operation CHAOS, including individuals involved in the peace movement, student activists, and black nationalists. *See generally Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982). The Church Committee Report, issued in 1976,

concluded that “[u]nless new and tighter controls are established by legislation, domestic intelligence activities threaten to undermine our democratic society and fundamentally alter its nature.” Church Committee Report, at 2.

While FISA was enacted in part as a response to such abuse, the standards that govern FISA surveillance have always been substantially less stringent than the Fourth Amendment requires in criminal investigations. When FISA was first enacted, however, it applied only to a relatively narrow and strictly delineated class of investigations. This is no longer the case. Since 1978, Congress has amended FISA on numerous occasions, each time adding new surveillance tools to the executive’s foreign-intelligence toolbox.<sup>7</sup> As a result, FISA as it exists now bears little resemblance to the statute that Congress enacted in 1978.

The Patriot Act amendments at issue in this case are the most recent in the long list of amendments to FISA, and they are also the most significant changes to FISA since the statute’s enactment. While most previous amendments have added to the tools available to the government in FISA investigations, the Patriot Act amendments dramatically expand the *class* of investigations in which FISA is available. Previously, FISA’s significance was limited to investigations whose primary purpose was foreign intelligence. The Patriot Act amendments – on the Court of Review’s theory, at least –

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<sup>7</sup> For example, the statute was amended in 1995 to allow the government to obtain FISA orders for physical searches as well as electronic surveillance. *See* 50 U.S.C. §§ 1821-29. The statute was amended again in 1998 to allow the government to install “pen registers” and “trap and trace” devices, *see id.* §§ 1841-46, and to allow the government access to certain business records of private individuals and organizations, *see id.* §§ 1861-62. The statute was amended yet again in 1999 to expand the definition of “agent of a foreign power.” *See id.* § 1801(b)(2)(D). The Patriot Act made numerous amendments to FISA in addition to those at issue in this case.

extend FISA's significance even to investigations whose primary purpose is law enforcement. If the Court of Review's theory is correct, the government may now use FISA as a law-enforcement tool in a broad category of criminal investigations.

While FISA as originally enacted raised constitutional questions, the extension of FISA to investigations whose purpose is not primarily foreign intelligence raises constitutional concerns of an entirely different magnitude. What began as a relatively narrow and well-defined exception to the Fourth Amendment's ordinary strictures has now become a license for the executive to ignore the Fourth Amendment altogether in a broad class of criminal investigations.<sup>8</sup> This vast expansion in the foreign-intelligence exception has occurred even though, as indicated above, this Court has never sanctioned even the comparatively narrow exception contemplated by FISA as originally enacted.

This Court should accept review in order to make clear that any foreign-intelligence exception cannot constitutionally apply in investigations whose primary purpose is law enforcement.

## **II. THE COURT OF REVIEW DISREGARDED THE CANON OF CONSTITUTIONAL AVOIDANCE BY REACHING DIFFICULT CONSTITUTIONAL QUESTIONS UNNECESSARILY**

Under the canon of constitutional avoidance, when a "statute [is] susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid," a court's "plain duty is to adopt that construction which will

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<sup>8</sup> A recent proposal would broaden this class even further by removing the "foreign power or agent of a foreign power" requirement in investigations not involving United States persons. *See* s. 113, 108<sup>th</sup> Cong. (2002).

save the statute from constitutional infirmity.” *United States ex rel. Attorney General v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909). The Court of Review disregarded this canon by adopting the constitutionally problematic theory that FISA is available even when the government’s primary purpose is law enforcement.

Through the enactment of Title III and FISA, Congress created two distinct authorization schemes for government surveillance.<sup>9</sup> Title III, enacted in 1968, governs electronic surveillance in criminal investigations. FISA, enacted in 1978, governs electronic surveillance for foreign-intelligence purposes. Criminal investigations relating to national security crimes have always been governed by Title III. Thus, Title III as originally enacted included espionage, sabotage, and treason as predicate offenses. The Senate referred to these as “the offenses that fall within the national security category.” S. Rep. 90-1097, at 67 (1968). These national-security crimes remain predicate offenses under Title III today.<sup>10</sup>

Congress’s decision to retain the national-security crimes as predicate offenses to Title III makes clear that Congress did not intend to make FISA available in criminal investigations. As discussed above, the standards that govern FISA surveillance are substantially less demanding than those that govern surveillance under Title III. Congress

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<sup>9</sup> The focus in this discussion is on the differences between FISA’s electronic surveillance provisions and those of Title III. However, there are similar differences between FISA’s physical search provisions, *see* 50 U.S.C. §§ 1821-29, and those that govern physical searches conducted in the course of ordinary law enforcement investigations, *see* Fed. R. Crim. P. 41.

<sup>10</sup> Section 201 of the Patriot Act added “any criminal violation of section 229 [of title 18] (relating to chemical weapons); or sections 2332, 2332a, 2332b, 2332d, 2339A, or 2339B of this title (relating to terrorism).” 115 Stat. 272, § 201.

cannot have thought that the government would continue to rely on Title III if the less demanding requirements of FISA were also available. The Court of Review inappropriately disregarded a narrow construction of the Patriot Act's amendments in favor of a broader construction that raises difficult constitutional questions.

### **III. THE COURT OF REVIEW'S DECISION CONFLICTS WITH THIS COURT'S FOURTH AMENDMENT JURISPRUDENCE**

The Court of Review's decision contravenes this Court's Fourth Amendment jurisprudence by holding that the government may constitutionally rely on FISA in investigations whose primary purpose is law enforcement. FISA orders are not warrants within the meaning of the Fourth Amendment, and searches conducted on the basis of FISA orders are presumptively unconstitutional. The Court of Review erred in failing to recognize that FISA orders are not warrants in the constitutional sense, and also erred in finding that FISA surveillance is reasonable. First, FISA searches are not based on criminal probable cause and FISA orders do not meet the Fourth Amendment's particularity requirement. Second, FISA targets do not receive notice – even delayed notice – that their privacy has been compromised. Finally, the applications for FISA searches are not subject to meaningful judicial scrutiny.

Even if the statute's procedures are constitutionally adequate with respect to surveillance whose primary purpose is foreign intelligence, the Court of Review erred in finding those procedures constitutional in investigations whose primary purpose is law enforcement. This Court's jurisprudence is clear: surveillance whose primary purpose is law enforcement must be conducted in conformity with the usual requirements of the Fourth Amendment.

**A. The Court of Review’s Decision Disregards the Fourth Amendment By Endorsing Warrantless and Unreasonable Searches in Criminal Investigations**

Although the Court of Review acknowledged that a FISA order “may not be” a warrant within the meaning of the Fourth Amendment, App. 44a, it did not actually decide the issue. The Court of Review erred in failing to recognize that FISA orders are not warrants within the meaning of the Fourth Amendment, and it erred in upholding the reasonableness of FISA searches conducted in investigations whose primary purpose is law enforcement.

FISA orders are not warrants within the meaning of the Fourth Amendment. In order to be constitutionally adequate, a warrant must (i) be issued by a neutral, disinterested magistrate; (ii) must be based on a demonstration of probable cause to believe that “the evidence sought will aid in a particular apprehension or conviction for a particular offense”; and (iii) must particularly describe the things to be seized as well as the place to be searched. *Dalia v. United States*, 441 U.S. 238, 255 (1979) (internal quotation marks omitted). FISA orders do not satisfy two of these three independent requirements.

FISA orders do not require the government to show probable cause that the target is committing, has committed, or is about to commit a particular criminal offense. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 113-14 (1975). Rather, the government need only show probable cause to believe that the surveillance target is a foreign power or agent of a foreign power. *See* 50 U.S.C. § 1805(a)(3)(A). The Court of Review understated the differences between FISA’s probable-cause requirement and ordinary criminal probable cause. Yet the government itself has frankly acknowledged the significant distance between the two standards. In response to a Freedom of Information Act request filed by

Petitioner ACLU and others on August 21, 2002, the FBI released, among other things, a document from the FBI's National Security Law Unit entitled, "What do I have to do to get a FISA?" It states, in relevant part,

Probable cause in the FISA context is similar to, but not the same as, probable cause in criminal cases. Where a U.S. person is believed to be an agent of a foreign power, there must be probable cause to believe that he is engaged in certain activities, for or on behalf of a foreign power, which activities involve or may involve a violation of U.S. criminal law. The phrase "involve or may involve" indicates that the showing of [nexus to] criminality does not apply to FISA applications in the same way it does to ordinary criminal cases. *As a result, there is no showing or finding that a crime has been or is being committed, as in the case of a search or seizure for law enforcement purposes.* The activity identified by the government in the FISA context may not yet involve criminality, but if a reasonable person would believe that such activity is likely to lead to illegal activities, that would suffice. *In addition, and with respect to the nexus to criminality required by the definitions of "agent of a foreign power," the government need not show probable cause as to each and every element of the crime involved or about to be involved.*

"What do I have to do to get a FISA?," at 2 (Document released by FBI in response to August 21 Freedom of Information Act request submitted by ACLU et al.) (emphases added).

With respect to the particularity requirement, *see, e.g., Berger v. New York*, 388 U.S. 41, 55-56 (1967), FISA orders

do not require the government to have reason to believe that the surveillance will yield information about a particular offense. Rather, the government need only certify that the information sought is foreign intelligence information. *See* 50 U.S.C. § 1804(a)(7)(A). Nor do FISA orders require that the government show probable cause to believe that the facilities to be surveilled will be used in connection with a particular offense, or even that they will be used to communicate foreign intelligence information. Instead, the government need only show probable cause to believe that the facilities are being used or likely to be used by the surveillance target. *See* 50 U.S.C. § 1805(a)(3)(B).

Indeed, FISA orders also fail to meet the standards set out under Title III, the statute that governs electronic surveillance in criminal investigations. *See* 18 U.S.C. § 2518(3)(a) (requiring government to show probable cause that target is engaged in criminal activity); *id.* § 2518(3)(b) (requiring government to show probable cause that surveillance will yield information about particular offense); *id.* § 2518(3)(d) (requiring government to show probable cause that facilities to be monitored are being used in connection with particular offense); *id.* § 2518(5) (limiting term of surveillance orders to 30 days). Nor do FISA orders meet the standards set out under Rule 41 of the Federal Rules of Criminal Procedure, the rule that governs physical searches in criminal investigations. *See, e.g.*, Fed. R. Crim. P. 41(d)(1) (requiring criminal probable cause); Fed. R. Crim. P. 41(e)(2)(A) (requiring that warrant be executed “within a specified time not longer than 10 days”).

Because FISA orders are not warrants within the meaning of the Fourth Amendment, searches conducted under FISA are presumptively unconstitutional. *See, e.g., Payton v. New York*, 445 U.S. 573, 586 (1980); *Chimel v. California*, 395 U.S. 752, 762-763 (1969). This Court has repeatedly emphasized that the failure of government agents to obtain a warrant before conducting a search is not “an inconvenience

to be somehow weighed against the claims of [government] efficiency.” *United States v. United States District Court (“Keith”)*, 407 U.S. 297, 315 (1972) (internal quotation marks omitted). Rather, the warrant clause “is an important working part of our machinery of government, operating as a matter of course to check the well-intentioned but mistakenly over-zealous executive officers who are a party of any system of law enforcement.” *Id.* at 316 (internal quotation marks omitted).

**B. The Court of Review’s Decision Disregards the Fourth Amendment By Allowing the Government to Conduct Searches for Law Enforcement Purposes Without Providing Notice**

The Fourth Amendment generally requires that the subject of a search be provided notice that the search has taken place. *See Wilson v. Arkansas*, 514 U.S. 927 (1995) (holding that common-law “knock-and-announce” principle informs Fourth Amendment reasonableness inquiry); *Miller v. United States*, 357 U.S. 301, 313 (1958) (“The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application.”). While notice need not necessarily be contemporaneous with the search, *see United States v. Donovan*, 429 U.S. 413, 429 n.19 (1977) (holding that delayed-notice provisions of Title III supply a constitutionally adequate substitute for contemporaneous notice), this Court has never upheld a statute that, like FISA, authorizes the government to search a person’s home or intercept his communications without *ever* informing him that his privacy has been compromised.

The non-provision of notice in FISA investigations is particularly problematic because notice is withheld as a categorical rule, and not upon an individualized showing of necessity. *See Richards v. Wisconsin*, 520 U.S. 385, 393-94 (1997) (rejecting categorical exception to knock-and-

announce principle for searches executed in connection with felony drug investigations); *Franks v. Delaware*, 438 U.S. 154, 168-72 (1978) (holding that subject of an allegedly illegal search must be afforded an opportunity to challenge the propriety of the search in a proceeding that is both public and adversarial). Except in the few cases that end in prosecutions,<sup>11</sup> FISA targets never learn that their homes or offices have been searched or that their communications have been intercepted. Most FISA targets have no way of challenging the legality of the surveillance or obtaining any remedy for violations of their constitutional rights.

### **C. The Court of Review's Decision Disregards the Fourth Amendment By Foreclosing Meaningful Judicial Review of FISA Applications**

Even if FISA's substantive requirements are constitutional, and petitioners believe they are not, the low level of scrutiny that the FISA Court applies with respect to those requirements is constitutionally inadequate in the context of investigations whose primary purpose is law enforcement. The government satisfies most of FISA's requirements simply by certifying that the requirements are met. *See* 50 U.S.C. § 1804(a)(7) (enumerating necessary

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<sup>11</sup> Not even FISA targets who are prosecuted are afforded a meaningful opportunity to challenge the surveillance's legality. When a defendant contests the legality of FISA surveillance, the Attorney General may file an affidavit in the district court stating that "disclosure or an adversary hearing would harm the national security of the United States." 50 U.S.C. § 1806(f). The district court must then review the surveillance application and order *ex parte* and *in camera*, unless disclosure is "necessary to make an accurate determination of the legality of the surveillance." *Id.* In practice, the Attorney General files such affidavits as a matter of course. *See United States v. Nicholson*, 955 F.Supp. 588, 592 (E.D.Va. 1997) ("[T]his Court knows of no instance in which a court has required an adversary hearing or disclosure in determining the legality of a FISA surveillance. To the contrary, every court examining FISA-obtained evidence has conducted its review *in camera* and *ex parte*").

certifications); *see also* App. 34a (“the government’s purpose as set forth in a section 1804(a)(7)(B) certification is to be judged by the national security official’s articulation and not by a FISA court inquiry into the origins of an investigation nor an examination of the personnel involved”); *United States v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984) (noting that government’s “primary purpose” certification is “subjected to only minimal scrutiny by the courts”); *id.* (“The FISA judge . . . is not to second-guess the executive branch official’s certification that the objective of the surveillance is foreign intelligence information.”).

While certain (but not all) of these certifications must be accompanied by “a statement of the basis for the certification,” 50 U.S.C. § 1804(a)(7)(E), the statute makes clear that the FISA Court is not to scrutinize such statements carefully, but rather is to defer to the government’s certification unless it is “clearly erroneous on the basis of the statement made under § 1804(a)(7)(E),” *id.* § 1805(a)(5). As the Court of Review acknowledged, “this standard of review is not, of course, comparable to a probable cause finding by the judge.” App. 40a (internal quotation marks omitted).

Judicial oversight under Title III is substantially more robust. To obtain a surveillance order under Title III, the government must provide the court with “a full and complete statement of the facts and circumstances relied upon by the applicant[] to justify his belief that an order should be issued.” 18 U.S.C. § 2518(1)(b). The court may “require the applicant to furnish additional testimony or documentary evidence in support of the application.” *Id.* § 2518(2). The government cannot meet any of the statute’s substantive requirements merely by certifying that it has met them. On the contrary, with respect to most of the statute’s substantive requirements, the statute requires the court to find probable cause to believe that they are satisfied. *See id.* § 2518(3).

In fact, FISA so limits the FISA Court's review of government surveillance applications that the FISA Court is severely inhibited in fulfilling its Article III obligation to serve as a meaningful check against unconstitutional actions by the executive branch. By requiring the FISA Court to defer to executive certifications, the statute forecloses the FISA Court from determining whether the substantive requirements have in fact been satisfied. The Constitution prohibits Congress from restricting federal courts' authority in this way. *See United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

Ironically, the Court of Review suggested that the lower FISA court, in exercising its limited oversight under the statute, "may well have *exceeded* the constitutional bounds that restrict an Article III court." App. 25a (emphasis added); *see also id.* 47a (characterizing the FISA Court's ruling as "quite intrusive"). The accusation is remarkable because the FISA Court has *never* turned down a surveillance application. Indeed, according to the Attorney General's own reports, between 1996 and 2001 the FISA Court approved without modification 5207 of 5209 applications, or 99.96% of the total.<sup>12</sup> At least with respect to searches whose primary purpose is law enforcement, the review contemplated by the statute is constitutionally inadequate.

#### **D. The Court of Review's Decision Conflicts With This Court's "Special Needs" Jurisprudence**

The Court of Review upheld the constitutionality of the Patriot Act's amendments in part by reference to this Court's "special needs" cases. Yet the "special needs" doctrine simply has no application to searches whose primary purpose is law enforcement. On the contrary, those cases stand for the proposition that "[a] search unsupported by probable

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<sup>12</sup> The Attorney General's annual reports to Congress regarding the Foreign Intelligence Surveillance Act are available at [http://www.usdoj.gov/04foia/readingrooms/oipr\\_records.htm](http://www.usdoj.gov/04foia/readingrooms/oipr_records.htm).

cause can be constitutional . . . when special needs, *beyond the normal need for law enforcement*, make the warrant and probable-cause requirement impracticable.” *Vernonia School District 47J v. Acton*, 515 U.S. 646, 653 (1995) (internal quotation marks omitted and emphasis added).

This Court recently reaffirmed this well-settled rule in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). That case involved a public hospital’s policy of testing pregnant patients for drug use and employing the threat of criminal prosecution as a means of coercing patients into substance-abuse treatment. The Court invalidated the policy. “In other special needs cases,” the Court wrote, “we . . . tolerated suspension of the Fourth Amendment’s warrant or probable cause requirement in part because there was no law enforcement purpose behind the searches in those cases, and there was little, if any, entanglement with law enforcement.” *Id.* at 79 n.15; *see also id.* at 88 (Kennedy, J., concurring) In *Ferguson*, however, “the central and indispensable feature of the policy from its inception was the use of law enforcement.” *Id.* at 80.

This Court’s decision in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), is to the same effect. *Edmond* involved vehicle checkpoints instituted in an effort to interdict illegal drugs. The government asserted that the drug crimes were a “severe and intractable” problem, and the Court agreed that “traffic in illegal narcotics creates social harms of the first magnitude.” *Id.* at 42. Notwithstanding the seriousness of the law-enforcement interest with respect to the particular crimes at issue, however, the Court invalidated the checkpoint policy. “[T]he gravity of the threat alone,” Justice O’Connor wrote, “cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose.” *Id.* Where the government’s “primary purpose [is] to detect evidence of ordinary criminal wrongdoing,” *id.* at 38, the Fourth

Amendment forecloses the government from conducting searches except based on probable cause.

The Court of Review acknowledged that the special needs cases apply only where the government's primary purpose is not law enforcement, but it contended that in the present case the relevant purpose is FISA's "programmatically purpose." App. 52a. This Court has made abundantly clear, however, that Fourth Amendment requirements do not turn on a criminal investigation's programmatic or ultimate purpose. In *Ferguson*, for example, the government argued that the ultimate purpose of the hospital's policy was not law enforcement but public health. The Court rejected that argument's relevance, writing:

The threat of law enforcement may ultimately have been intended as a means to an end, but the direct and primary purpose . . . was to ensure the use of those means. In our opinion, the distinction is critical. Because law enforcement involvement always serves some broader social purpose or objective, under respondents' view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose.

532 U.S. at 83-84.<sup>13</sup> The Court of Review's decision thus directly conflicts with this Court's special-needs cases.

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<sup>13</sup> The Court of Review, App. 51a, also relied on the following dictum from *Edmond*: "The Fourth Amendment would almost certainly permit an appropriately tailored road block set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route." *City of Indianapolis v. Edmond*, 531 U.S. at 44. This Court specifically recognized, however, that such exigencies are "far removed" from ordinary criminal investigation. App. 51a. Here, the government makes no showing of exigency. Indeed, FISA surveillance

**IV. THE COURT OF REVIEW'S DECISION  
CONFLICTS WITH THE DECISIONS OF  
NUMEROUS LOWER FEDERAL COURTS  
WHICH HAVE HELD THAT ANY FOREIGN-  
INTELLIGENCE EXCEPTION MUST BE  
LIMITED TO INVESTIGATIONS WHOSE  
PRIMARY PURPOSE IS FOREIGN  
INTELLIGENCE**

The Court of Review's ruling rejected the well-settled consensus that any foreign-intelligence exception must be limited to investigations whose primary purpose is foreign intelligence. *See, e.g., United States v. Johnson*, 952 F.2d 565, 572 (1<sup>st</sup> Cir. 1991), *cert. denied*, 506 U.S. 816 (1992) (stating that FISA may "not be used as an end-run around the Fourth Amendment's prohibition of warrantless searches"); *United States v. Pelton*, 835 F.2d 1067 (4<sup>th</sup> Cir. 1987), *cert. denied* 486 U.S. 1010 (1988); *United States v. Duggan*, 743 F.2d at 77.

Neither this Court nor any other court until now has ever held that the government can waive the usual Fourth Amendment standards when its purpose is criminal investigation. Indeed, it was accepted even before FISA was enacted – that is, even before there was a statutory basis for the primary-purpose limitation – that any intelligence exception had to be restricted to investigations whose primary purpose was foreign intelligence. Thus in *Keith* the government argued for a domestic-intelligence exception to the warrant requirement by assuring the Court that it would not rely on the exception as a means of evading Fourth Amendment requirements in criminal investigations. *Keith*, 407 U.S. at 318-19. Lower courts that addressed the permissibility of a *foreign*-intelligence exception similarly emphasized that any such exception could not

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intended to bring a criminal prosecution would make no sense in the face of an imminent terrorist threat.

constitutionally be used in law enforcement investigations. For example, the Fourth Circuit in *Truong* recognized a foreign-intelligence exception to the warrant requirement but limited the exception to cases in which “the surveillance is conducted primarily for foreign intelligence reasons.” *See Truong*, 629 F.2d at 915 (internal quotation marks omitted). The court emphasized that this requirement stemmed from the Fourth Amendment:

[O]nce surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and . . . importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.

*Id.* Other pre-FISA cases affirmed the same principle. *See, e.g., United States v. Butenko*, 494 F.2d 593, 606 (3d Cir. 1974) (“Since the primary purpose of these searches is to secure foreign intelligence information, a judge, when reviewing a particular search must, above all, be assured that this was in fact its primary purpose and that the accumulation of evidence of criminal activity was incidental.”), *cert. denied*, 419 U.S. 881 (1974); *United States v. Brown*, 484 F.2d 418, 426 (5<sup>th</sup> Cir. 1973); *id.* at 427 (Goldberg, J., concurring).

The Court of Review disregarded these cases and disagreed with *Truong’s* assumption that “foreign policy concerns recede” when the government’s principal intent is to prosecute. App. 46a. It then rejected the primary-purpose limitation entirely, reasoning that the limitation inhibits or even forecloses the government from using criminal prosecution as a tool to protect national security. *See id.* 46a-50a. In fact, the primary-purpose limitation has *never* prevented the government from using criminal prosecution as

a tool to protect national security. Its only effect is to dictate which standards the government must meet in order to engage in surveillance whose profound intrusiveness even the government does not dispute. *See Berger v. New York*, 388 U.S. at 63 (“It is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one’s home or office are invaded”). The government is always entitled to engage in such surveillance if it can meet the requirements of the Fourth Amendment, and the primary-purpose limitation does not compromise this authority. The Court of Review erred in discounting without discussion the other side of the *Truong* court’s reasoning – the principle that privacy concerns come to the fore when the government’s intent is to prosecute. *See, e.g., Weeks v. United States*, 232 U.S. 383, 393 (1914) (stating that exclusionary rule is necessary because “[i]f letters and documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment . . . is of no value”).

In summary, the Court of Review’s conclusion that FISA searches and surveillance are reasonable when used primarily for criminal investigation finds no support in this Court’s or appellate court rulings.

**V. THE COURT OF REVIEW’S DECISION  
JEOPARDIZES FIRST AMENDMENT FREEDOMS  
BY ELIMINATING FOURTH AMENDMENT  
SAFEGUARDS**

Traditionally, the warrant and probable cause requirements have served as important safeguards of First Amendment interests by preventing the government from intruding into an individual’s protected sphere merely because of that individual’s exercise of First Amendment rights. Expanding the circumstances in which the government may conduct searches without conforming to

those requirements presents the danger that the government's surveillance power will chill activity that is protected under the First Amendment.

This Court has recognized the importance of the Fourth Amendment in protecting First Amendment rights:

National security cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime. . . . History abundantly documents the tendency of Government – however benevolent and benign its motives – to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs.

*Keith*, 407 U.S. at 313-14; *see also id.* at 314 (“The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.”). The D.C. Circuit made the same point in *Zweibon v. Mitchell*, 516 F.2d. 594 (D.C. Cir. 1975), a case that rejected the constitutionality of a warrantless wiretap of the Jewish Defense League:

Prior judicial review is important not only to protect the privacy interests of those whose conversations the government seeks to overhear, but also to protect free and robust exercise of the First Amendment rights of speech and association by those who might otherwise be chilled by the fear of unsupervised and unlimited Executive power to institute electronic surveillances.

*Id.* at 633.

The Court of Review's decision endorses a dramatic expansion of the foreign-intelligence exception, and opens the door to surveillance abuses that seriously threatened our democracy in the past. To protect robust and uninhibited debate by petitioners and all Americans, this Court should accept review and strictly limit surveillance that undermines First Amendment freedoms.

### CONCLUSION

For the reasons stated above, petitioners urge this Court to grant review in this case.

Respectfully submitted.

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