No. 25-705

IN THE
Supreme Court of the United States

CARTER PAGE,

Petitioner,

v.

JAMES COMEY, ET AL.,

Respondents.

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

Brief of the Liberty Justice Center as Amicus Curiae Supporting Petitioner

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Question Presented

If the Federal Bureau of Investigation (FBI) abuses its authority under the Foreign Intelligence Surveillance Act (FISA) to secretly surveil an American, when must he bring a case to vindicate his rights?

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Interest of the Amicus Curiae

Liberty Justice Center (LJC) is a nonprofit, nonpartisan public-interest litigation firm that pursues strategic, precedent-setting litigation aimed at revitalizing constitutional restraints on government power and protecting individual rights.[1]

LJC is interested in this case because it frequently litigates important cases against government overreach and violations of Americans Fourth Amendment rights. For example, in *Scholl v. Ill. State Police*, 776 F. Supp. 3d 701 (N.D. Ill. 2025), LJC has argued that warrantless dragnet surveillance of every citizen that drives by automated license plate readers (ALPRs) constitutes an unreasonable search.

LJC also files amicus briefs on similar issues, such as its brief in *Greater Las Vegas Short Term Rental Ass'n v. Clark Cty.*, 555 P.3d 265 (Nev. 2024), which argued that forcing property-owners to consent to warrantless searches of short-term rental properties was an unconstitutional condition.

Summary of Argument

This Court has held that cases cannot be brought based on pure speculation—there must be a known factual basis to support a claim. Petitioner brought his case after a government report declassified information that proved the FBI violated his rights.

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than Amicus funded its preparation or submission. All parties received timely notice of Amicus's intent to file this brief.

But the court below held that anonymously sourced news articles years earlier had started the clock to bring his case, so his claims were untimely. If the court below is correct, every claim for FISA abuse is a sort of Schrödinger's case—both too early and too late at the same time.

If courts cannot hear these cases, the FBI will continue to abuse the FISA program to violate the Fourth Amendment rights of Americans. The Foreign Intelligence Surveillance Court (FISC) found the FBI abused their power because the Department of Justice (DOJ) admitted that it abused its power in this very case. And the FISC has expressed concern that future abuses cannot be prevented by court oversight. The only remedy is to bring cases after abuse occurs to vindicate Americans' rights. But if cases like this can be time barred by anonymous, unconfirmed media speculation, the FBI will continue to violate Americans' rights with no consequences.

This Court should grant review to clarify that a limitations period does not begin to run based on unconfirmed rumors, and make clear that the FBI cannot evade judicial review of its abuse of the FISA program and violate the Fourth Amendment rights of Americans with impunity.

Argument

I. This Court should grant the petition to uphold the Fourth Amendment and ensure FBI FISA abuse cannot continue without consequences.

If courts cannot address abuses of the FISA program after they occur, the FBI can violate Americans' rights with impunity. Under the decision below, it is almost impossible to bring a case challenging illegal FISA surveillance. This Court has held that citizens who believe themselves to be victims of illegal FISA surveillance *do not* have standing to challenge that surveillance based on rumor and speculation that such has occurred without concrete evidence. *See Clapper v. Amnesty International USA*, 568 U.S. 398 (2013). But in this case, the court below held that Petitioner was required to file his case based on exactly that sort of speculation and once that speculation was public, the limitations period to file that case began to run.

This Court should grant review and clarify cases can be brought after proof of government overreach is released to ensure FBI abuse of the FISA program receives judicial review and those responsible face consequences for violating the constitutional rights of Americans.

A. The government has repeatedly abused the FISA program to violate Americans' Fourth Amendment rights.

The federal government, including the FBI, has repeatedly abused the FISA program and violated the Fourth Amendment rights of Americans.

For example, in 2011 the FISC found that the FISA program was used to collect "thousands of wholly domestic communications" by United States persons that were "retained by [the National Security Agency] for at least five years, despite the fact" that they were "unlikely to contain foreign intelligence information." *Redacted*, 2011 U.S. Dist. LEXIS 157706, Mem. Op., at 60–61 (F.I.S.C. Oct. 3, 2011). Because of this, the FISC found aspects of the FISA program violated the law and the Fourth Amendment. *See id.* at 29.

In 2018, the FISC found the FBI's "repeated non-compliant queries" of information collected under section 702 of the FISA program violated the law and the Fourth Amendment. *In re DNI/AG 702(h) Certifications 2018-A, 2018-B, and 2018-C, and Predecessor Certifications*, Nos. 702(j)-18-01, 702(j)-18-02, 702(j)-18-03, and predecessor dockets, Mem. Op. and Order, at 62 (F.I.S.C. Oct. 18, 2018). Despite these findings, the FBI continued to have "substantial and persistent" compliance issues three years later that would "call into question" whether aspects of the FISA program were "consistent with statutory and Fourth Amendment requirements." *In re DNI/AG 702(h) Certifications 2020-A, 2020-B, and 2020-C, and Predecessor Certifications*, Nos. 702(j)-20-01, 702(j)-20-02, 702(j)-20-03, and predecessor dockets, Order in

Resp. to Querying Violations, at 13 (F.I.S.C. Sept. 2, 2021).

The repeated abuse of FISA authorities by the federal government, including the FBI, demonstrates the grave risks the program can pose to the rights of Americans.

B. The constitutionality of the current FISA program relies on the government providing the FISC with accurate information.

The government's engagement in surveillance pursuant to FISA is subject to the Fourth Amendment. "The touchstone of the Fourth Amendment is reasonableness." *In re Certified Question of L.*, 858 F.3d 591, 604 (F.I.S.C.R. 2016) (per curiam) (quoting *Wyoming v. Houghton,* 526 U.S. 295, 300 (1999)). The Foreign Intelligence Surveillance Court of Review (FISCR) has explained its process for assessing the reasonableness of the FISA program: it must consider both "the degree to which it intrudes upon an individual's privacy and . . . the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* at 604–05 (quoting *Houghton,* 526 U.S. at 300). This is a "totality of the circumstances" balancing process. *In re Directives Pursuant to Section 105b of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1012 (F.I.S.C.R. 2008). If "the protections that are in place for individual privacy interests are . . . insufficient to alleviate the risks of government error and abuse, the scales will tip toward a finding of unconstitutionally." *Id.* at 1015.

Fourth Amendment rights of Americans in relation to FISA are protected by the program's "pre-surveillance judicial warrant procedure," "particularly the judge's probable cause findings." *In re Accuracy Concerns Regarding FBI Matters Submitted to FISC*, 411 F. Supp. 3d 333, 336 (F.I.S.C. 2019) (quoting previous orders and opinions from the FISC).

The FISC has warned, though, that its "assessment of probable cause can serve those purposes effectively only if the applicant agency fully and accurately provides information in its possession that is material to whether probable cause exists." *Id.* at 336–37. Without such information the FISC "cannot properly ensure the government" is using its FISA authorities "only when there is a sufficient factual basis." *Id.* at 337. So "only when the government fully and accurately provides all information in its possession that is material to whether probable cause exists can the Court's review effectively serve as a check on Executive Branch decisions to conduct surveillance." *In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*, No. Misc. 19-02, Corrected Op. and Order, at 8 (F.I.S.C. Mar. 5, 2020).

The FISC makes its decisions about the FISA program based on the procedures in place to protect Americans' privacy interests and the information the government provides about probable cause. If that information is incomplete or incorrect, the court's decisions will often be flawed as well. The FISC may not have a full or accurate understanding of the "totality of the circumstances." This can result in their Fourth Amendment reasonableness analyses being

flawed, and the constitutional rights of Americans being violated, like they were in this case.

C. The FBI has not provided the FISC with accurate information.

The FISC cannot ensure the FISA program stays within Fourth Amendment boundaries unless the FBI provides it with accurate information. But the DOJ has admitted it failed to do so in this case, and the FISC agrees.

The DOJ itself has admitted the FBI has not provided the FISC with the information needed to ensure Americans' constitutional rights are respected. In reviewing the actions of the FBI in this specific case, the DOJ Office of Inspector General (OIG) found "at least 17 significant errors or omissions," which "taken together resulted in FISA applications that made it appear that the information supporting probable cause was stronger than was actually the case." DOJ OIG, OVERSIGHT AND REVIEW DIVISION 20-012, REVIEW OF FOUR FISA APPLICATIONS AND OTHER ASPECTS OF THE FBI'S CROSSFIRE HURRICANE INVESTIGATION, at xiv and vii (Dec. 2019, Revised). These "extensive compliance errors" occurred even though the FBI's work "received more attention and scrutiny than a typical FISA application in terms of the additional layers of review and number of high-level officials who read the application before it was signed." *Id.* at xiv and vii. The DOJ OIG expressed major concerns because "so many basic and fundamental errors were made by three separate, hand-picked teams on one of the most sensitive FBI investigations that was briefed to the highest levels

within the FBI, and that FBI officials expected would eventually be subjected to close scrutiny." *Id.* at xiv.

The FISC agreed that the FBI abused its power in this case. "There is thus little doubt that the government breached its duty of candor to the Court . . ." *In re Accuracy Concerns*, Corrected Op. and Order, at 1. "[T]he most prevalent and among the most serious problems" in this case were "[o]missions of material fact." *Id.* at 4.

The FISC expressed further concern that the FBI may be abusing its power in the FISA program to violate the rights of other Americans. "The frequency and seriousness of these errors in a case that, given its sensitive nature, had an unusually high level of review at both DOJ and the [FBI] have called into question the reliability of the information proffered in other FBI [FISA] applications." *Id.* at 1.

This concern seems justified, given that over a year later the OIG within the DOJ stated it believed "additional action [was] necessary to ensure rigorous supervisory review and to further strengthen [internal] oversight to reduce the risk of erroneous information being included in FISA applications, which can lead to faulty probable cause determinations and infringement of U.S. persons' civil liberties." DOJ OIG, 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 i (Sep. 2021).

The procedures in place in the FISA program have not protected Americans' privacy interests. And the information provided by the FBI purporting to

demonstrate probable cause has also been inaccurate. This information led the FISC to approve FISA warrant applications when it shouldn't have. Which in turn has allowed the FBI to violate Americans' constitutional rights.

The FBI's repeated failures to provide the FISC with the information it needs to protect Americans' rights, by all levels of management and even when they could expect to have their actions reviewed, show the gravity of the risk the FISA program poses to the constitutional rights of Americans. And yet, if the decision of the court below stands, those responsible will get away with it. This Court must intervene to ensure there will be consequences for violating Americans' rights and the FBI will not have reason to believe it is above the law and can continue to act with impunity.

D. The FISC cannot prevent FISA abuse if the FBI continues to withhold material information.

Without accountability, the FISC will not be able to prevent similar FISA abuse in the future.

The FISC has indicated it does not believe procedural or structural changes will fix the problem. "[T]he errors . . . cannot be solved through procedures alone. DOJ and the FBI, including all personnel involved in the FISA process, must fully understand and embrace the heightened duties of probity and transparency that apply in *ex parte* proceedings." *In re Accuracy Concerns*, Corrected Op. and Order at 2. "While more rigorous procedures for preparing FISA applications should prove helpful, the Court is also

mindful that changes in culture will require more than checklists." *Id.* at 13.

And it is clear the FBI cannot be trusted to provide the information needed for courts to provide the required oversight. As the FISC noted in this case, there were "prevalent" "[o]missions of material fact" by the FBI. *Id.* at 4. And the FBI's actions "have called into question the reliability of the information proffered in other FBI [FISA] applications." *Id.* at 1.

And "[w]ithout facts that are both accurate and complete, the Court is necessarily hamstrung in its ability to balance the interests of national security with those of personal privacy," which is required to determine if the Fourth Amendment's protections are actually being provided. *Id.* at 8.

Courts do not have the facts necessary to determine whether the FISA program respects the Fourth Amendment, there is reason to believe they will not have that information moving forward, and additional procedures cannot fix the problem. The Fourth Amendment rights of Americans must receive greater respect.

E. Without judicial review of FISA abuse after it occurs, the FBI can violate Americans' constitutional rights without consequences.

Because the procedures and required factual predicates intended to prevent FISA abuse have not been working, and there is no reason to be confident they will in the future, the only recourse is to allow cases to be brought after FBI abuse occurs to hold

those responsible accountable. But given the decision below, that option does not seem exist.

This Court has explained that claims do not accrue "until the plaintiff can file suit and obtain relief." *Corner Post, Inc. v. Board of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 810 (2024) (quoting *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U. S. 192, 201 (1997)). And suspicion is not enough to file suit. "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

But the court below found that because the petitioner read two anonymously sourced newspaper articles and "knew he was the subject of *alleged* illegal government surveillance," he "had sufficient notice . . . to bring FISA claims." *Page v. Comey*, 137 F.4th 806, 817 (D.C. Cir. 2025) (emphasis added). That petitioner "*suspected* that the allegations, and the ensuing warrants, were baseless" was apparently enough. *Id.* at 815 (quoting *Page v. Comey*, 628 F. Supp. 3d 103, 118 (D.D.C. 2022)) (emphasis added).

If suspicion is enough to start the clock, but speculation is not enough to file suit, there is little to no hope of Americans being able to bring cases to vindicate their rights. FISA warrants are classified, so the details will almost certainly not be available to Americans to support their suspicions. But without those facts, the clock continues ticking until Americans run out of time and the FBI is saved by bell, evading review of any FISA abuse it engages in.

Without judicial review of FISA abuses after they occur, Americans' constitutional rights will continue

to be violated without any consequences for the FBI. That cannot be. This Court should grant the petition and hold cases can be brought after proof of government abuse is released to ensure Americans' constitutional rights receive protection and the FBI is not allowed to act with impunity.

Conclusion

There is no question the FBI has abused its FISA authority—it admittedly did so in this very case. And there is no reason to believe it will stop in the future. The only option is to hold it accountable after it violates Americans' rights.

The question is, will anyone be held responsible—in this case or in the future—for violations of Americans' constitutional rights?

If the decision below is left in place, the answer is no. It effectively prevents any judicial review of the FBI's abuse of FISA authorities after the fact, in addition to the inadequate review provided before it occurs. If a case is brought when there are suspicions of secret abuse, it will be dismissed as too early. If it is brought after actual evidence of abuse is released, it will be dismissed as too late. Heads the FBI wins, tails Americans lose.

The FBI must be not allowed to continue to run roughshod over the Fourth Amendment rights of Americans with no consequences. This Court should grant the petition to make clear when a case must be brought so judicial review of FISA abuse can occur and the FBI can finally be held accountable.

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