No. 19-2211

In the United States Court of Appeals for the Federal Circuit

BRUCE R. TAYLOR,
Claimant–Appellant,
v.
DENNIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent–Appellee.

Appeal from the United States Court of Appeals for Veterans Claims in Vet. App. No. 17-2390, Judge William S. Greenberg, Judge Amanda L. Meredith, and Judge Joseph L. Falvey, Jr.

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF THE DISTRICT OF COLUMBIA IN SUPPORT OF CLAIMANT–APPELLANT BRUCE R. TAYLOR

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**application pending*

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 19-2211

Short Case Caption Taylor v. McDonough

Filing Party/Entity American Civil Liberties Union

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 10/04/2021

Signature: Brett Max Kaufman

Name: 

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Amicus Curiae American Civil Liberties Union		
Amicus Curiae American Civil Liberties Union of the District of Columbia		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

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INTERESTS OF AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan, non-profit organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of the District of Columbia ("ACLU of DC") is an affiliate of the national ACLU. The ACLU and ACLU of DC regularly appear in the federal courts in cases involving the violation of constitutional rights.

The ACLU was founded in 1920, largely in response to the curtailment of liberties that accompanied America's entry into World War I. In the hundred years since, the ACLU has frequently appeared before the federal courts when concerns about security have been used by the government as a justification for abridging fundamental rights and access to the courts. *See, e.g.*, *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (as amicus); *Fazaga v. FBI*, 965 F.3d 1015 (9th Cir. 2020), *cert. granted*, No. 20-828 (June 7, 2021); *Mohamed v. Jeppesen Dataplan*, Inc., 614 F.3d 1070 (9th Cir. 2010) (en banc); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

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* Amici file this brief in response to the Court's invitation. Pursuant to Federal Rule of Appellate Procedure Rule 29(c), amici certify that no person or entity, other than amici curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part.

INTRODUCTION

Amici file this brief in response to the Court's invitation of the views of amici curiae. *Taylor v. McDonough*, 4 F.4th 1381, 1383 (Fed. Cir. 2021) (en banc). Amici specifically address the Court's questions as to whether the plaintiff, Bruce Taylor, has a claim for denial of a constitutional right of access to United States Department of Veterans Affairs ("VA") processes for securing disability benefits, what the test for such a violation is, and whether that right was violated here. *See id.* at 1382.

In 1969, seventeen-year-old Mr. Taylor enlisted in the army and volunteered for a secret weapons testing program in Edgewood Arsenal, Maryland. At Edgewood, the military used Mr. Taylor as a human test subject in experiments with hazardous chemical weapons. Due to the trauma of this experience, Mr. Taylor has suffered from a lifelong, disabling mental health condition.

According to congressional design, a disabled veteran may apply for benefits from the VA and receive funds apportioned by Congress to compensate soldiers injured in the line of duty. However, for thirty-five years, Mr. Taylor could not access the administrative and judicial processes necessary to apply for and receive those benefits—because he was bound by a secrecy agreement that required his absolute silence, under threat of criminal prosecution, regarding his experience at Edgewood. For those thirty-five years, the government left in place its threat of

punishment for any violation of the agreement, and provided no process by which Mr. Taylor could exercise his right to seek the benefits and treatment Congress had provided for our nation's veterans.

Like all Americans, Mr. Taylor has a fundamental constitutional right to access the courts. His right was violated here. Neither the secrecy agreement he signed, nor any asserted government interest in secrecy regarding human experimentation, can justify wholly shutting Mr. Taylor out of court.

ARGUMENT

I. Access to the courts is a fundamental constitutional right.

The right of every American to access our courts is a foundational principle of our system of government. "Indeed, all other legal rights would be illusory without it." *Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982) (citing *Adams v. Carlson*, 488 F.2d 619, 630 (7th Cir. 1973)). The "fundamental right of access to the courts," *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004); *see Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 1979), is inherent in the protections of several constitutional provisions, particularly: (1) the Petition Clause of the First Amendment, (2) the Due Process Clauses of the Fifth and Fourteenth Amendments, (3) the Equal Protection Clause of the Fifth and Fourteenth Amendment, and (4) the Privileges and Immunities Clause of Article IV, Section 2. *See Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002).

A. The First Amendment protects the right to petition all departments of the government.

Alongside its guarantees of the rights to freedom of speech, the press, and assembly, the First Amendment protects "the right . . . to petition the Government for a redress of grievances." U.S. Const. amend. I. As the Supreme Court has explained, "the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011).

The right to petition the government, "among the most precious of the liberties safeguarded by the Bill of Rights," *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967), "traces its origins to the Magna Carta," which was itself an answer to a petition of grievances. *Guarnieri*, 564 U.S. at 395. In colonial America, legislatures heard petitions from individuals "on a wide range of subjects, including matters of both private and public concern," such as "debt actions, estate distributions, divorce proceedings, and requests for modification of a criminal sentence." *Id.* at 394. The right to petition draws from that strong common law tradition and ensures access to "the channels and procedures of state and federal agencies and courts to advocate . . . causes and points of view respecting resolution of . . . interests." *Cal. Motor Transport Co. v. Trucking Unltd.*, 404 U.S. 508, 511 (1972).

Importantly, "the right to petition extends to all departments of the Government," including "administrative agencies, which are both creatures of the legislature, and arms of the executive." *Id* at 510.

B. Due Process protects a meaningful opportunity to be heard, including in court.

Further, due process protects "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). This opportunity to be heard is often offered exclusively through the "courts, or other quasi-judicial official bodies, that we ultimately look [to] for the implementation of a regularized, orderly process of dispute settlement." *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971). Therefore, if a certain judicial or administrative process is the "sole means" for pursuing a legal claim, due process generally requires "a meaningful opportunity to be heard" in that forum. *Id.* at 377.

C. The Equal Protection Clause prohibits irrational bars to access to court.

Access to court also implicates the Equal Protection Clause because of the utmost importance of "providing equal justice for poor and rich, weak and powerful alike." *Griffin v. Illinois*, 351 U.S. 12, 16 (1956). It is "fundamental" that avenues to judicial review "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *M.L.B. v. S.L.J.*, 519 U.S. 102,

111 (1996) (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966)). Thus, for example, a party's indigency may be an irrational basis for barring access to court, and the government is obligated to affirmatively ensure that indigent persons have equal access. *Id.*; *see also, e.g.*, *Little v. Streater*, 452 U.S. 1, 14 n.10, 16–17 (1981).

D. Court access is protected as a privilege and immunity of citizenship.

Finally, as the Supreme Court has recognized for more than a century, the individual right "to institute and maintain actions of any kind in the courts of [any] state," *Blake v. McClung*, 172 U.S. 239, 249 (1898) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823)), is "one of the highest and most essential privileges of citizenship," *Chambers v. Baltimore*, 207 U.S. 142, 148 (1907). It is one of the privileges and immunities of citizenship protected by Article IV, Section 2, which encompasses rights "which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have at all times been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign." *Blake*, 172 U.S. at 249 (quoting *Corfield*, 6 F. Cas. at 551).

In practice, this right permits any citizen "to come to the seat of government to assert any claim he may have upon that government [and] a right to . . . the courts of justice in the several States." *Crandall v. Nevada*, 73 U.S. 35, 44 (1867).

As the Court has explained, unimpeded access to "the courts is the alternative of force," and thus, "in an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers*, 207 U.S. at 148.

II. Threatening a person with punishment for accessing the courts, erecting insurmountable barriers, or covering up evidence all violate the right to access courts.

As the Supreme Court has explained, the government violates the fundamental right of access to court where "systemic official action frustrates a plaintiff or plaintiff class in preparing and filing suits" in which the underlying claim is "nonfrivolous" and "arguable." *Harbury*, 536 U.S. at 415–16 (quoting *Lewis v. Casey*, 518 U.S. 343, 353 & n.3 (1996)).

Though many access-to-court cases involve incarcerated persons, *see, e.g.*, *Bounds v. Smith*, 430 U.S. 817, 821 (1977), as noted above, *see supra* § I, "recognition of the constitutional right of access to the courts . . . long precedes *Bounds*, and has from its inception been applied to civil as well as constitutional claims." *Jackson v. Procunier*, 789 F.2d 307, 311 (5th Cir. 1986). At bottom, "the right of access to the courts is the right of an individual, whether free or incarcerated, to obtain access to the courts without undue interference." *Snyder v. Nolen*, 380 F.3d 279, 291 (7th Cir. 2004). Government action constitutes "undue interference" when it leaves a person without an "adequate, effective and

meaningful" opportunity to seek redress in the courts. *Bounds*, 430 U.S. at 822.[1] As described below, courts have found a range of obstacles to access to constitute a violation of the right of access, several of which are directly analogous to the government's conduct towards Mr. Taylor in this case.

While this Court has not addressed a right-of-access claim, other circuits have addressed the same concept in a variety of circumstances. In addressing these circumstances, courts have used differing language to describe the test they are applying. *See, e.g.*, *Silva v. Di Vittorio*, 658 F.3d 1090, 1103 (9th Cir. 2011) ("active interference"); *Snyder*, 380 F.3d at 291 ("undue interference"); *Vasquez v. Hernandez*, 60 F.3d 325, 328 (7th Cir. 1995) ("efforts by state actors to impede an individual's access to courts or administrative agencies"); *Jackson*, 789 F.2d at 311 ("deliberate impediment to access"); *John L. v. Adams*, 969 F.2d 228, 235 (6th Cir. 1992) ("erect[ing] barriers that impede the right of access"). Under any of these various permutations of the test, threatening Mr. Taylor with punishment for the

[1] While *Lewis* clarified that, to assert a violation of the right of access, a person must show an "actual injury," 518 U.S. at 351, it affirmed *Bounds*' holding that the right of access must be "adequate, effective, and meaningful." *See id.* ("Insofar as the right vindicated by *Bounds* is concerned, 'meaningful access to the courts is the touchstone.'" (quoting *Bounds*, 430 U.S. at 823)). Circuit courts continue to routinely rely on "adequate, effective, and meaningful" language from *Bounds* as part of the access to courts standard. *See*, *e.g.*, *Terry v. Hubert*, 609 F.3d 757, 761 (5th Cir. 2010); *Cunningham v. Dist. Attorney's Off. for Escambia Cty.*, 592 F.3d 1237, 1271 (11th Cir. 2010); *Swekel v. City of River Rouge*, 119 F.3d 1259, 1262 (6th Cir. 1997).

very act of seeking the benefits to which he was entitled violated Mr. Taylor's right of access.

Because the right to meaningful court access goes far beyond the "right to physically enter the courthouse halls," *Swekel v. City of River Rouge*, 119 F.3d 1259, 1262 (6th Cir. 1997) or a "mere formal right of access to the courts," *Ryland v. Shapiro*, 708 F.2d 967, 972 (5th Cir. 1983), the government need not "literally bar the courthouse door" in order to violate the right. *Bell v. City of Milwaukee*, 746 F.2d 1205, 1261 (7th Cir. 1984), *overruled on other grounds by Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005). Rather, courts have recognized that the government may impermissibly interfere with the right in myriad ways.

For example, the government unconstitutionally frustrates court access when it directly threatens an individual with punishment for attempting to seek redress for a claim. *See, e.g.*, *Hudspeth v. Figgins*, 584 F.2d 1345, 1348 (4th Cir. 1978) (threats by correctional officers to physically harm prisoner); *Silver v. Cormier*, 529 F.2d 161, 163 (10th Cir. 1976) (threat by public official to withhold monies owed to plaintiff). In addition, the government violates the right when it unlawfully stymies a person's attempts to file a lawsuit, for example, by interfering with a prisoner's case-related mail. *See, e.g.*, *Jackson*, 789 F.2d at 308–09. The government also unconstitutionally interferes with the right to access court when it covers up key facts that would form the basis of a reasonable legal claim. *See, e.g.*,

Bell, 746 F.2d at 1261; *Delew v. Wagner*, 143 F.3d 1219, 1222 (9th Cir. 1998); *Ryland*, 708 F.2d at 973; *Vasquez*, 60 F.3d at 328. And the existence of structural barriers which unduly burden meaningful access can also constitute unconstitutional government interference with the right of access. *See, e.g.*, *Boddie*, 401 U.S. at 371 (prohibitive court fees).

The government's conduct with respect to Mr. Taylor is directly analogous to several of these recognized violations of the right to court access. "[T]he Government . . . affirmatively and intentionally prevented . . . Mr. Taylor from . . . applying for disability benefits . . . under threat of criminal prosecution and loss of the very benefits sought." *Taylor*, 3 F.4th at 1371 (citing S. Rep. No. 94-755, at 418 (providing that breach of the Edgewood Arsenal secrecy agreement would leave subjects "liable to punishment under the [UCMJ]"); 18 U.S.C. § 793 (UCMJ, providing that "[g]athering, transmitting or losing defense information" may result in fines, ten years imprisonment, or both); 10 U.S.C. § 892 (UCMJ, providing that "violat[ion] or fail[ure] to obey any lawful general order or regulation ... shall be punished as a court-martial may direct")). The government made it impossible for Mr. Taylor to plead the facts necessary to support his claim to benefits that Congress had appropriated for veterans like him. *See id.* at 1374 n.17 (discussing DOD memorandum acknowledging that secrecy agreements had "inhibited" veterans from seeking benefits) (citing *Viet. Veterans of Am.*, 2013 WL 6092031,

at *6). And the government failed to set up any alternative process by which Mr. Taylor could disclose the basis for his claim to a neutral decisionmaker, free from the threat of punishment—thereby erecting an insurmountable barrier to his ability to meaningfully seek relief.

With those cases as guideposts, this Court should conclude that the government's comprehensive restriction of Mr. Taylor's right to pursue his claim for benefits violated his right of access. Whether located under the First Amendment, the Fifth Amendment, or the inherent privileges of citizenship as recognized in the Privileges and Immunities Clause, the right of access requires that the government not bar veterans from the adjudicatory process established to claim the benefits Congress provided for them.

III. Neither the secrecy agreement nor any asserted government interest in keeping human experimentation secret justifies overriding Mr. Taylor's right of access.

The government may argue that, even if the secrecy agreement interfered with Mr. Taylor's right of access to the courts, the agreement itself constituted a waiver of that right. That argument would fail.

As an initial matter, there is no evidence that the secrecy agreement Mr. Taylor signed waived his right to access to court, as it contained no clear statement of waiver. *See Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) (holding that the waiver of a constitutional right must be "clear . . . on its face[.]"). Mr. Taylor's secrecy

agreement committed him to "not divulge or make available any information related to U.S. Army Intelligence Center interest or participation in the Army Medical Research Volunteer Program to any individual, nation, organization, business, association, or other group or entity, not officially authorized to receive such information." *Taylor*, 3 F.4th at 1356 (quoting S. Rep. No. 94-755, at 418 (1976)). This language "included nothing about the waiver of a . . . hearing." *Fuentes*, 407 U.S. at 95–96. While it raised the specter of criminal prosecution if Mr. Taylor divulged information subject to the agreement as part of accessing court, it did not explicitly, clearly, or specifically waive his right to access court. "[W]hen"—as here—"the contractual language relied upon does not, on its face, even amount to a waiver," a court "need not concern [itself] with the involuntariness or unintelligence of a waiver." *Id.* at 95.

Even if there had been a clear waiver, courts "do not presume that the waiver of a constitutional right . . . is enforceable." *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 223 (4th Cir. 2019). Rather, for a waiver to hold water, it "not only must be voluntary but must be [a] knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences." *Fairchild v. Lehman*, 814 F.2d 1555, 1559 (Fed. Cir. 1987) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). Furthermore, the government's interest in enforcing the waiver must not be "outweighed by a relevant public policy that would be harmed

by enforcement." *Overbey*, 930 F.3d at 223; *see also Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1397 (9th Cir. 1991) (holding that when it seeks to enforce a contractual waiver of a constitutional right, the government bears the burden of "demonstrat[ing] that the public interest is better served by enforcement . . . than by non-enforcement").

Here, significant public policy considerations weigh against enforcing any purported waiver of Mr. Taylor's right to access court. Our national history reflects a deeply rooted commitment to caring for veterans. Congress first provided for veterans' pensions in 1789, and the VA has now been administering disability benefits for nearly a century. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985). The system for seeking disability benefits is intentionally designed to be easy for veterans to access. *See id.* at 311. The administrative adjudicatory process is deliberately non-adversarial, the VA has a statutory duty to help an applicant develop supportive evidence, and the VA must give an applicant the "benefit of the doubt" when the evidence in favor of and against their claim is "roughly equal." *Henderson v. Shinseki*, 562 U.S. 428, 431 (2011). In recognition of the strong public policy in favor of providing benefits to veterans in need, the Supreme Court has long recognized a "canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). For these reasons, the public

interest would not be served by enforcing a waiver which would have the effect of automatically denying disability benefits to a veteran injured by his own government's human experimentation.

Even assuming the government had any legitimate interest in keeping secret its human experimentation on Mr. Taylor, that interest could not justify wholly depriving Mr. Taylor of his right to access the courts in light of the ample alternatives to a total bar on court access. The judiciary is capable of accommodating governmental interests in secrecy without depriving injured persons of a forum in which to litigate their claims. Courts routinely adjudicate matters arising from even highly sensitive government employment, and the federal courts have proven capable of overseeing litigation involving secret materials. There are extremely rare instances in which courts have determined that cases involving certain state secrets cannot be litigated under any circumstances, but there is no indication that Mr. Taylor's claim for the benefits Congress allocated him falls into this narrow category. Particularly in light of the important public policy in providing benefits to veterans, the government's complete bar on allowing Mr. Taylor to access the courts with respect to his benefits for at least 35 years cannot be justified.

As the Supreme Court explained decades ago, courts regularly and capably oversee litigation of claims arising from highly sensitive government employment.

In *Webster v. Doe*, the Court rejected the Central Intelligence Agency's argument that its decisions to terminate employees should be absolutely exempt from judicial review to avoid "extensive 'rummaging around' in the [Agency's] affairs to the detriment of national security." 486 U.S. 592, 604 (1988). The Court observed that "Title VII claims attacking the hiring and promotion policies of the Agency are routinely entertained in federal court," and emphasized the abilities of district court judges to safeguard sensitive information. "[T]he District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." *Id.* In spite of the secrecy attending CIA employment, Agency employees are not barred from accessing courts to litigate their injuries. *See, e.g.*, *Roberta B. v. United States*, 61 Fed. Cl. 631, 632 (2004); *Peter B. v. CIA*, 620 F. Supp. 2d 58, 73 (D.D.C. 2009). There is no reason to expect that courts could not have similarly accommodated any military need for confidentiality if Mr. Taylor had been permitted to petition for benefits without threat of prosecution.

There is nothing unique about the context of national security that justifies locking the courthouse doors to claimants like Mr. Taylor. The Supreme Court has consistently rejected the suggestion that national security matters are "too subtle

[or] complex for judicial evaluation." *United States v. United States Dist. Ct.* (*Keith*), 407 U.S. 297, 320 (1972).

Congress has likewise confirmed that federal courts have the competence and responsibility to address claims and defenses implicating Executive Branch secrets. Indeed, Congress has created several statutory mechanisms that depend on courts to adjudicate matters involving government secrets and presume that courts will do so: the Classified Information Procedures Act (CIPA), the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1805, and the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(4)(B) & (b)(1), 18 U.S.C. App. 3.

CIPA empowers federal judges to craft special procedures to determine whether and to what extent classified information may be used in criminal trials, including procedures requiring disclosure to defendants. For over 40 years, "courts have effectively applied" CIPA, which has "provide[d] Federal courts with clear statutory guidance on handling secret evidence." S. Rep. No. 110-442, at 9 (2008) (Conf. Rep.).

FISA empowers all federal district courts—not just the FISA court—to review highly sensitive information *in camera* and *ex parte* to determine whether the surveillance was authorized and conducted in accordance with the statute. *See* 50 U.S.C.A. § 1806(f). The statute entrusts each federal court with deciding

whether disclosures to the parties are necessary to assist in making this determination. *See id*.

And Congress assigned the judiciary a vital role in policing claims of secrecy in the context of FOIA. In 1974, Congress overrode the Supreme Court's decision in *EPA v. Mink*, 410 U.S. 73 (1973), to ensure that federal judges are empowered to review national security claims *de novo*. *Ray v. Turner*, 587 F.2d 1187, 1190–91 (D.C. Cir. 1978). Congress noted that "a government affidavit certifying the classification of material pursuant to an executive order will no longer bring the curtain down on an applicant's effort to bring such material to public light." S. Judiciary Comm. Report, *Amending the Freedom of Information Act*, S. 2543, 93rd Cong. (May 16, 1974), *reprinted in* H. Subcomm. on Gov't Info. & Individual Rights, H. Comm. on Gov't Operations, 94th Cong., Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and Other Documents, at 182 (Mar. 1975) ("Source Book"). Congress's decision to strengthen FOIA's judicial review provisions in the context of national security claims was expressly based upon the "extensive abuses of the classification system that [had] come to light in recent years." Source Book at 181. "That Congress felt strongly about [applying *de novo* review to classified materials] is shown by the fact that although the legislation was initially vetoed by President Ford, Congress overrode the President's veto by supermajorities of 371 to

31 in the House and 65 to 27 in the Senate." *Halpern v. FBI*, 181 F.3d 279, 291 (2d Cir. 1999). Congress "stressed the need for an objective, independent judicial determination, and insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security." *Turner*, 587 F.2d at 1194.

In cases that do not fall within the congressionally mandated procedures of FISA, FOIA, or CIPA, courts use analogous procedures to protect governmental interests in secrecy while still allowing litigants to receive their day in court. One procedure that has been used successfully in cases involving military secrecy is representation by security-cleared counsel. *See, e.g.*, *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130, 1132 (2d Cir. 1977) ("The Department of Defense has cleared, or can and will clear, for access to the material the judge and magistrate assigned to the case, the lawyers and any supporting personnel whose access to the material is necessary.").

In recent years, a great many cases involving military secrecy have been litigated in the federal courts as part of the habeas litigation attending the detention of hundreds of men at Guantánamo. Courts addressing the habeas claims of these men have developed workable procedures designed to allow reasonable access to classified evidence, while protecting the government's secrecy interest. *See* Const. Project & Hum. Rts. First, Habeas Works: Federal Courts' Proven Capacity to

Handle Guantánamo Cases - A Report from Former Federal Judges 17 (2010) (describing procedures that seek "to strike a careful balance between protecting classified information and ensuring that petitioners have enough information to challenge their detention").

In still other cases involving government assertions of the state secrets privilege, courts have developed a variety of innovative "procedures which will protect the privilege and yet allow the merits of the controversy to be decided in some form." *Fitzgerald v. Penthouse Int'l Ltd.*, 776 F.2d 1236, 1238 n.3 (4th Cir. 1985). These courts have utilized a number of additional tools to safeguard sensitive information, including protective orders, seals, bench trials, and specialized discovery procedures. *See In re U. S.*, 872 F. 2d. 472, 478 (D.C. Cir. 1989) (bench trial); *In re Under Seal*, 945 F.2d 1285, 1287 (4th Cir. 1991) (protective orders as well as depositions in secure facilities); *Horn v. Huddle*, 647 F. Supp. 2d 55, 58 n.3 (D.D.C. 2009); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 323 F. Supp. 2d 82, 84 (D.D.C. 2004) (prohibiting certain deposition questions and permitting the government "to have a representative present at any deposition" of deponent "to monitor compliance with this Order and to otherwise ensure that state secrets are not revealed"); *United States v. Lockheed Martin Corp.*, No. CIVA1:98CV00731EGS, 1998 WL 306755 (D.D.C. 1998) (protective order); *Air-*

Sea Forwarders, Inc. v. United States, 39 Fed. Cl. 434, 436–37 (Fed. Cl. 1997) (protective order).

And in long-running litigation brought by a plaintiff who alleged that CIA agents had dropped LSD into his drink while he sat in a Paris café, the government's interest in secrecy was accommodated by permitting it to produce redacted documents so that the case could proceed through discovery, summary judgment, and trial. *See Kronisch v. United States*, 150 F.3d 112 (2d Cir. 1998).

There exists a narrow category of cases in which courts have found that government claims of secrecy override a litigant's interest in having a claim adjudicated. Most of these cases turn on a rule of contract law, inapplicable here: "Under *Totten v. United States*, 92 U.S. 105 (1875), contracts to perform 'secret services' for the United States are unenforceable in court." *Air-Sea Forwarders, Inc.*, 39 Fed. Cl. at 440 , *aff'd*, 166 F.3d 1170 (Fed. Cir. 1999). These cases result from courts' "common-law authority to fashion contractual remedies in Government-contracting disputes," *Gen. Dynamics Corp. v. United States*, 563 U.S. 478, 485 (2011), and have no bearing on a claim for veterans' benefits. The only non-contract cases that resulted in dismissal of claims on the basis of state secrets either involved unique contexts such as the CIA's secret overseas torture of prisoners, *see El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); *Mohamed v. Jeppesen*, 614 F.3d 1070 (9th Cir. 2010) (en banc), or claims in which the

government actually possessed a secret "valid defense"—that is, a defense that would actually defeat the claim asserted. *See, e.g.*, *In re Sealed Case*, 494 F.3d 139, 149–50 (D.C. Cir. 2007) (state secrets dismissals require that secret evidence would establish a "meritorious" defense, not merely a "possible" or "plausible" one). Mr. Taylor's claim for benefits fits in none of these narrow categories.

Thus, even assuming the government possessed a legitimate interest in enforcing a secrecy agreement against Mr. Taylor, that interest could be accommodated without wholly depriving Mr. Taylor of access to a judicial forum. And the government's interest in enforcing any waiver must be measured against the strength of the public policy favoring Mr. Taylor's access to treatment and assistance. When it comes to claims by our nation's veterans for the benefits that Congress allotted them for injuries the Executive Branch inflicted, the same branch should not be permitted to shut the courthouse doors, nor to profit now from its own misconduct.

CONCLUSION

For the reasons stated above and in Mr. Taylor's brief, amici agree that the government's conduct violated Mr. Taylor's constitutional right of access to a process for securing his disability benefits.

Dated: October 4, 2021

By: */s/ Dror Ladin*

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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Short Case Caption: Taylor v. McDonough

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I, Dror Ladin, counsel for amici curiae and a member of the Bar of this Court, certify that on October 4, 2021, a copy of the attached Brief of Amici Curiae American Civil Liberties Union and American Civil Liberties Union of the District of Columbia was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

October 4, 2021

/s/ Dror Ladin
DROR LADIN