UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

IN RE OPINIONS & ORDERS ISSUED BY THIS COURT ADDRESSING BULK COLLECTION OF DATA UNDER VARIOUS PROVISIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT	No. Misc. 13-08

MOVANTS' EN BANC OPENING BRIEF IN SUPPORT OF THEIR MOTION FOR THE RELEASE OF COURT RECORDS

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Introduction

This en banc proceeding concerns the narrow question of whether parties who requested but were denied access to judicial records of this Article III court have suffered an injury in fact and established standing for the purpose of Article III. They have. As the Supreme Court has explained many times, the test of standing and that of the merits are different. To invoke a court's jurisdiction, a party need not show that it will prevail on the merits of its case, only that it seeks relief from a concrete injury. Virtually every court to confront a claim of access to judicial records has either held or assumed that the denial of access to judicial records is an injury in fact. This is true for the Supreme Court, and it is true even of cases in which the Supreme Court, having assumed or expressly found standing, went on to *reject* the claimed right of access on the merits. It is also true of this Court, which on three previous occasions properly exercised jurisdiction over right-of-access claims. In short, overwhelming authority makes clear that Movants have standing here, based on the fact that they requested but were denied access to judicial records.

Factual and Procedural Background

On November 6, 2013, Movants filed a motion seeking the release of this Court's opinions addressing "the bulk collection of Americans' information." Mot. for Release of Court Records at 3. The motion followed disclosures, by government officials and in the press, that intelligence agencies had used the Foreign Intelligence Surveillance Act ("FISA") to justify the bulk collection of Americans' internet metadata and location information, in addition to the bulk collection of their call records. *See, e.g.*, James R. Clapper, Dir. of Nat'l Intelligence, Cover Letter Announcing Document Release at 3 (Aug. 21, 2013), http://1.usa.gov/1bU8Cgt; Charlie Savage, *In Test Project, N.S.A. Tracked Cellphone Locations*, N.Y. Times, Oct. 2, 2013, http://nyti.ms/18OAlz2. The government's reliance on FISA for these purposes came as a

surprise to the public. Nothing on the face of the statute purported to grant such broad authority, and nothing in the legislative history of FISA or the amendments embodied in the PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), suggested that Congress intended to authorize the bulk collection of Americans' information. Movants filed the motion now before the Court in order to inform the public about the scope and meaning of these laws, as interpreted by the FISC in response to government applications for far-reaching surveillance authority.

In response to Movants' motion, the government identified four opinions addressing bulk collection. Two of the opinions address the bulk collection of Americans' call records under Section 215 of the PATRIOT Act. 50 U.S.C. § 1861 (2010). They were released with redactions, following a government declassification review, after two members of the Court requested publication under FISC Rule 62.[1] The other two opinions address the bulk collection of Americans' internet metadata under FISA's pen-register provision. 50 U.S.C. § 1842 (2010). They were released by the government with redactions, following a declassification review, after Movants filed their public access motion.[2]

The redactions in the opinions are substantial, making it difficult for a reader to understand the Court's legal analysis. In two of the opinions, dozens of pages are almost entirely redacted. *See* Kollar-Kotelly Opinion at 8–9, 31–38, 73–79; Bates Opinion at 36–52, 57–70. In addition, certain key facts, definitions, and concepts have been redacted, including:

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[1] Amended Memorandum Opinion, *In re Application of the FBI for an Order Requiring the Production of Tangible Things from* [*Redacted*], No. BR 13-109 (FISC Aug. 29, 2013), http://bit.ly/1mi50JX ("Eagan Opinion"); Memorandum, *In re Application of the FBI for an Order Requiring the Production of Tangible Things from* [*Redacted*], No. BR 13-158 (FISC Oct. 11, 2013), http://bit.ly/1ua6Ulc ("McLaughlin Opinion").

[2] Opinion and Order, [*Redacted*], No. PR/TT [Redacted] (FISC released Nov. 18, 2013), http://1.usa.gov/19Ct5rl ("Kollar-Kotelly Opinion"); Memorandum Opinion, [*Redacted*], No. PR/TT [Redacted] (FISC released Nov. 18, 2013), http://1.usa.gov/19Ct7Q5 ("Bates Opinion").

- The definition and description of the "metadata" for which bulk collection was authorized;[3]
- The duration of the bulk collection authorized;[4]
- The manner in which Americans' bulk internet metadata was used, in addition to "contact chaining"; and[5]
- The nature and duration of the government's non-compliance with the FISC's orders.[6]

Of these, perhaps the most troubling is the first, because by redacting the definition and descriptions of metadata, the government has made it impossible for the public to understand what surveillance the government actually proposed to conduct. *See, e.g.*, Kollar-Kotelly Opinion at 7–11; Bates Opinion at 2. Thus, for example, the opinions recite the Fourth Amendment's third-party doctrine but omit the information necessary to understand how the Court applied this doctrine to increasingly pervasive technologies and unprecedented surveillance activities. *See* Ellen Nakashima & Greg Miller, *Official Releases What Appears To Be Original Court File Authorizing NSA To Conduct Sweeps*, Wash. Post, Nov. 18, 2013, http://www.wapo.st/IGqxNK (because "[t]hree pages [of the Kollar-Kotelly Opinion] describing the categories of 'metadata' . . . were redacted," its "true scope" remains "unclear"); *see also* Bates Opinion at 57–71 (describing the Court's legal analysis distinguishing internet metadata from content as "difficult line-drawing," following fifteen pages of redacted text).

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[3] *See* Kollar-Kotelly Opinion at 7–11, 19 ("[Redacted] like other forms of metadata, is not protected by the Fourth Amendment . . . ."); Bates Opinion at 2, 35, 71 ("The government requests authority to [redacted] categories of [sixteen pages of redacted material].").

[4] *See, e.g.*, Bates Opinion at 4.

[5] *See, e.g.*, Kollar-Kotelly Opinion at 42–43 ("NSA proposes to employ two analytic methods on the body of archived meta data it seeks to collect. . . . The two methods are: (1) *Contact chaining* . . . [(2)] [Redacted].").

[6] *See, e.g.*, Bates Opinion at 2–3 ("[T]he government acknowledges that NSA exceeded the scope of authorized acquisition continuously during the more than [redacted] years of acquisition under these orders."); *id.* at 105 ("[T]he unauthorized collection included: [redacted].").

Critically, there is no indication in the public record that the Court had any role in reviewing which portions of its opinions should be made available to the public. The government appears to have determined for itself what should be redacted, and what should not. This is significant because in response to another access motion, the Court required the government to explain and justify its proposed withholdings. That review proved essential in ensuring that the government's redactions were not overbroad.[7]

On January 25, 2017, the Court issued an Opinion dismissing this proceeding for lack of jurisdiction, holding that "the First Amendment does not afford a qualified right of access" to the legal opinions sought by Movants and that "Movants lack standing under Article III." Op. at 2. The Court's *sua sponte* determination that it lacked jurisdiction over Movants' requests for access conflicted with the Court's previous rulings. *See In re Orders of this Court Interpreting Section 215 of the PATRIOT Act* ("*In re Section 215 Orders*"), No. Misc. 13-02, 2013 WL 5460064 (FISC Sept. 13, 2013) (Saylor, J.); *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484 (FISC 2007) (Bates, J.); *In re Proceedings Required by 702(i) of FISA Amendments Act of 2008*, No. Misc. 08-01, 2008 WL 9487946, at *2–3 (FISC Aug. 27, 2008) (McLaughlin, J.). After Movants sought to alter or amend the judgment and to join briefing on

[7] In *In re Section 215 Orders*, the government originally insisted that the FISC opinion at issue "should be withheld in full" and a public version could not be provided, but it abandoned that claim when required to submit a "detailed explanation" justifying it. Order at 1–2, No. 13-02 (FISC Nov. 20, 2013), http://bit.ly/258tRH8. The government conceded that the opinion could be released in redacted form. Even then, however, the government's proposed redactions were overbroad. Only after a further meeting with Court staff did the government determine that "certain additional information in the Opinion [wa]s not classified" and could be released. Gov't Second Submission at 3, *In re Section 215 Orders,* No. 13-02 (FISC Feb. 6, 2014), http://bit.ly/1fAc4Tx.

the standing question with a similar motion in Docket No. Misc. 16-01, the Court initiated this en banc proceeding.[8]

Argument

I. Movants have standing to seek access to this Court's opinions.

As a federal court established by Congress under Article III, this Court possesses inherent powers, including "supervisory power over its own records and files." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978); *accord Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) ("It has long been understood that [c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution."). As this Court has previously determined, the FISC therefore has "jurisdiction in the first instance to adjudicate a claim of right to the court's very own records and files." *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 487.

To invoke the Court's jurisdiction and advance such a right-of-access claim, the movant must establish standing under Article III. It must show: "(1) that it has suffered an 'injury in fact'; (2) that the injury is caused by or fairly traceable to the challenged actions of the defendant; and (3) that it is likely that the injury will be redressed by a favorable decision." *Ethyl Corp. v. EPA*, 306 F.3d 1144, 1147 (D.C. Cir. 2002) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

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[8] In 2015, while this proceeding was pending, Congress enacted the USA FREEDOM Act, Pub. L. No. 114-23, 129 Stat. 268 (2015), which directs the government to publicly release significant opinions of this Court to the greatest extent practicable. *See* 50 U.S.C. § 1872. However, the government has taken the position that its statutory disclosure obligation does not apply to opinions that predate the Act's passage on June 2, 2015. As a result, a number of significant opinions and orders of this Court issued prior to June 2015 remain secret in their entirety. Those opinions are the subject of a separate access motion pending before the Court. *See* Mot. for Release of Court Records, *In re Opinions and Orders of this Court Containing Novel or Significant Interpretations of Law*, No. Misc. 16-01 (FISC filed Oct. 21, 2016).

Movants here satisfy all three requirements.

A. Denying Movants access to this Court's opinions constitutes an injury in fact.

Movants seek access to four of the FISC's opinions, and denial of access to these judicial opinions constitutes an injury sufficient to satisfy Article III. The injury-in-fact requirement is designed to ensure that the party invoking the court's jurisdiction has a "personal stake in the outcome of the controversy." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Thus, the asserted injury must be "'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Susan B. Anthony List v. Driebus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Lujan*, 504 U.S. at 560). The injury or interest alleged must also be one that is "legally and judicially cognizable." *Raines v. Byrd*, 521 U.S. 811, 819 (1997).

A party who asserts a constitutional right of access to court records, and is denied that access, has suffered an injury that is both concrete and particular. The injury is concrete because the party seeking access is in fact being deprived of information, and it is particular because the party specifically sought and was denied the material. Virtually every court has agreed, either explicitly or implicitly, with this basic proposition.

For instance, the Supreme Court's decisions uniformly presume that a party seeking to inspect judicial records or attend court proceedings has standing. In *Press-Enterprise Co. v. Superior Court* ("*Press-Enterprise II*"), 478 U.S. 1 (1986), the Supreme Court considered whether it had "jurisdiction under Article III, § 2, of the Constitution." *Id.* at 6. While its discussion focused on the issue of mootness, the Court never questioned that the media company asserting a right of access had suffered an injury in fact. Nor did the Court anywhere suggest that the media company's standing turned on the merits of its access claim. The Supreme Court's earlier right-of-access decisions are in line with this approach. *See Globe Newspaper Co. v.*

Superior Court, 457 U.S. 596, 603 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 563–64 (1980) (plurality); *Gannett Co. v. DePasquale*, 443 U.S. 368, 377–78 (1979) (rejecting newspaper publisher's Sixth Amendment right-of-access claim on the merits).

The lower courts have followed suit. Nearly every court confronted with a claim of access to judicial records or proceedings has held, either explicitly or implicitly, that the party denied access has suffered an Article III injury.

The Seventh Circuit recently analyzed the question at length in response to a suit for access to grand jury transcripts. *Carlson v. United States*, 837 F.3d 753, 758–61 (7th Cir. 2016). It recognized that the public has "a general right to inspect and copy public records and documents, including judicial records and documents," and that "[t]he denial at the threshold of the right to petition for access inflicts an 'injury-in-fact.'" *Id.* at 759 (quoting *Nixon*, 435 U.S. at 597). It sharply distinguished standing from the merits, emphasizing that "Carlson has standing to assert his claim to the grand-jury transcripts, because they are public records to which the public may seek access, even if that effort is ultimately unsuccessful (perhaps because of sealing, national security concerns, or other reasons)." *Id.* at 757–58; *see also id.* at 759. The Fourth Circuit has likewise held that the denial of access to judicial records is an injury-in-fact. *Doe v. Pub. Citizen*, 749 F.3d 246, 264 (4th Cir. 2014) (holding that intervenors' injury "is formed by their inability to access judicial documents and materials filed in the proceedings below, information that they contend they have a right to obtain and inspect under the law"); *In re Wash. Post Co.*, 807 F.2d 383, 388 n.4 (4th Cir. 1986) (finding that newspaper "meets the standing requirement because it has suffered an injury that is likely to be redressed by a favorable decision"). Moreover, as the Fourth Circuit made clear, when the withheld information is contained in court records, the injury is shared by all who wish to inspect those records—but that

does not render the asserted injury insufficient under Article III, so long as the party invoking the court's jurisdiction has sought and been denied access. *See Pub. Citizen*, 749 F.3d at 253, 264; *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 449–50 (1989) ("The fact that other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure under FACA does not lessen appellants' asserted injury."); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998).

Just a few weeks ago, the D.C. Circuit implicitly affirmed the same principles when it addressed a right-of-access claim on the merits. Though a fractured panel held that the intervenors in *Dhiab v. Trump*, No. 16-5011, 2017 WL 1192911 (D.C. Cir. Mar. 31, 2017), had no First Amendment right to access the force-feeding videotapes sought, none of the panel judges even entertained the idea that the intervenors lacked *standing* to pursue their access claim. Even Judge Williams, who questioned whether the videos sought were "judicial records," plainly believed that the court of appeals had jurisdiction to reach the merits. *See id.* at *12 (Williams, J., concurring); *see also Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777 (3d Cir. 1994) ("[W]e need not determine that the Newspapers will ultimately obtain access to the sought-after Settlement Agreement. We need only find that the Order of Confidentiality being challenged presents an obstacle to the Newspapers' attempt to obtain access."); *cf. California First Amendment Coal. v. Calderon*, 150 F.3d 976, 981 n.8 (9th Cir. 1998) ("Although we conclude that Procedure 770 does not violate the Coalition's First Amendment rights to gather news, the Coalition asserts an interest that is at least arguably protected by the first amendment.").

Even outside the domain of judicial records and proceedings, courts have broadly recognized that the denial of access to information or proceedings is almost always an injury in fact.

The Supreme Court has consistently held that a party suffers an Article III injury when he or she seeks and is denied information, regardless of whether the party is ultimately entitled to the information sought. *See Pub. Citizen*, 491 U.S. at 449–50 (fact that a party sought and was denied specific agency records "constitutes a sufficiently distinct injury to provide standing" under the Freedom of Information Act); *see also Akins*, 524 U.S. at 21–25 (holding that a group of voters had a concrete injury based upon their inability to receive certain donor and campaign-related information from an organization); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982) (concluding that deprivation of information about housing availability was sufficient to constitute an Article III injury). Perhaps most tellingly, even when the Supreme Court has *rejected* a claimed right of access on the merits, it has held or assumed that the party deprived of access had standing. *See, e.g.*, *Pub. Citizen*, 491 U.S. at 449–50; *Pell v. Procunier*, 417 U. S. 817, 834 (1974) (rejecting, on the merits, reporters' claim that the First Amendment afforded right of access to prisons or their inmates); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (similar).

In a related context, the Second Circuit recently held that a plaintiff denied access to administrative proceedings had suffered an injury in fact. *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 294–95 (2d Cir. 2011). The court found that the plaintiff had standing to assert a First Amendment violation because it had suffered an injury to "a cognizable interest" in being excluded from hearings. *Id.* at 295. Standing did not depend on whether the plaintiff could show a First Amendment right to attend administrative hearings in general, or on whether the plaintiff ultimately established a right to attend these hearings in particular. *See also Flynt v. Rumsfeld*, 355 F.3d 697, 702 (D.C. Cir. 2004) (observing, in case where reporter was

denied access to military combat units, "we assume the validity of appellants' allegation of injury, although having crossed that threshold, we may ultimately determine it to be invalid").

The case law is consistent on the question of Article III standing in right-of-access cases in part because the Supreme Court and other courts routinely distinguish between the "judicially cognizable interest" necessary to support standing and the legal entitlement necessary to prevail on the merits. *Bennett v. Spear*, 520 U.S. 154, 167 (1997). Those invoking the Court's jurisdiction need not establish the latter to demonstrate the former. *See Warth*, 422 U.S. at 500 ("[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal."); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006) ("[W]here the plaintiff presents a nonfrivolous legal challenge, alleging an injury to a protected right such as free speech, the federal courts may not dismiss for lack of standing on the theory that the underlying interest is not legally protected."); *Arreola v. Godinez*, 546 F.3d 788, 794–95 (7th Cir. 2008). As the Supreme Court explained, "[i]t is firmly established . . . that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). Accordingly, "[d]ismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is so insubstantial, implausible, foreclosed by prior decisions of [the Supreme] Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Id.* As described above, a party's ability to access judicial opinions and records has repeatedly been recognized as a

protectable interest that is sufficient to support a party's standing and the subject-matter jurisdiction of Article III courts.[9]

The Court erred in its Opinion by conflating Movants' standing with their ability to prevail on the merits. The Court's standing decision rested principally on its finding that Movants had not asserted a "legally protected" interest, *see* Op. at 2, but that finding was incorrect for several reasons.

Most significantly, even the Court acknowledged that "whether a litigant's interest is 'legally protected' does not depend on the merits of the claim," Op. at 17; *see id.* at 13 (quoting *Warth*, 422 U.S. at 500)—yet the Court nonetheless went on to conclude that Movants' interest was not legally protected here because it failed on the merits. *See id.* at 30–39 ("Accordingly, the question for the Court is whether the First Amendment applies.").[10] Movants, of course, strenuously disagree with the Court's conclusion that its legal opinions are categorically exempt from the First Amendment right of access. The crucial point here, though, is that it was improper for the Court to hold that it lacked *jurisdiction*. As the Seventh Circuit has observed:

> That [the] petition is not guaranteed to be granted, because a court may find a valid justification for denying him access, in no way destroys his standing to seek the documents. . . . To hold otherwise would amount to denying standing to everyone who cannot prevail on the merits, an outcome that fundamentally misunderstands what standing is.

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[9] Although Movants respectfully disagree with the heightened showing required by Judge Saylor in *In re Section 215 Orders*, 2013 WL 5460064, at *2, Movants satisfy that standard too. The access Movants seek "would be of concrete, particular assistance to [Movants] in their own activities," as Judge Saylor recognized when he concluded that the ACLU and the Media Freedom and Information Access Clinic had standing to seek disclosure of the Court's opinions interpreting Section 215. *Id.* at *2–4; Order and Opinion at 10–11, *In re Section 215 Orders*, No. Misc. 13-02 (FISC Aug. 7, 2014), http://bit.ly/1Ca8eFC.

[10] *Compare In re Motion for Release of Court Records*, 526 F. Supp. 2d at 487 (observing that while certain provisions of FISA "may have some limited bearing on the merits of the ACLU's claim, . . . they do not deprive this Court of the power to *entertain* that motion in the first place").

Carlson, 837 F.3d at 759; *see Initiative & Referendum Inst.*, 450 F.3d at 1092 ("For purposes of standing, the question cannot be whether the Constitution, properly interpreted, extends protection to the plaintiff's asserted right or interest. If that were the test, every losing claim would be dismissed for want of standing."); *Judicial Watch, Inc. v. U.S. Senate*, 432 F.3d 359, 364 (D.C. Cir. 2005).

This principle is so widely accepted that even the lone right-of-access case that the Opinion cites in support of its standing theory—the Seventh Circuit's decision in *Bond v. Utreras*, 585 F.3d 1061 (7th Cir. 2009)—fails to dispute it. *See id.* at 1073. Because the putative intervenor in *Bond* did not raise any "colorable" argument that the pre-trial discovery files he sought were "judicial records," the Seventh Circuit found that he lacked standing. *Id.* at 1073–74. But that decision also acknowledged that "the general right of public access to *judicial records* is enough to give members of the public standing to attack a protective order that seals this information from public inspection." *Id.* at 1074 (emphasis added); *see also id.* at 1073 ("It is beyond dispute that most documents filed in court are presumptively open to the public; members of the media and the public may bring third-party challenges to protective orders that shield court records and court proceedings from public view."). Indeed, the Seventh Circuit returned to this point in *Carlson*, where it distinguished *Bond* and found standing to consider a request for release of grand jury transcripts, which it readily concluded *are* judicial records. *See Carlson*, 837 F.3d at 758–60. This case is even more straightforward. There is no question that the judicial opinions sought by Movants are judicial records, and thus they plainly fall within the ambit of the First Amendment's protection. *See Union Oil Co. v. Leavall*, 220 F.3d 562, 568 (7th Cir. 2000) ("[I]t should go without saying that the judge's opinions and orders belong in the public domain."); *United States v. Mentzos*, 462 F.3d 830, 843 n.4 (8th Cir. 2006) (denying

motion to file opinion under seal "because the decisions of the court are a matter of public record"); *see generally U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) ("Judicial precedents are . . . valuable to the legal community as a whole. They are not merely the property of private litigants.").

Moreover, the Court's focus on the "perplexity in the case law" concerning whether, as a general matter, an interest is judicially cognizable, *see* Op. 13–14, was unnecessary given the specific interest presented by Movants' claims. As Movants have explained, the case law overwhelmingly recognizes that standing may be established based on a party's interest in, and denial of access to, judicial records. To be sure, determining whether a given interest is judicially cognizable *can* present a difficult question in some cases. An asserted injury can be so unorthodox or frivolous that it is not "judicially cognizable" or "legally protectable." *See Initiative & Referendum Inst.*, 450 F.3d at 1093 ("[A] plaintiff whose claimed legal right is so preposterous as to be legally frivolous may lack standing on the ground that the right is not 'legally protected.'"); *Allen v. Wright*, 468 U.S. 737, 752 (1984) (questioning whether an injury may be "too abstract" to be judicially cognizable). But that is not remotely the case here. As shown above, Movants assert a widely recognized interest—one routinely embraced by Article III courts as a proper basis for exercising their jurisdiction.

There are compelling legal and practical reasons for courts to carefully avoid collapsing standing and the merits. First, conflating the two invites courts to resolve constitutional questions at the threshold, as the Court did here, prior to evaluating other available forms of relief. *Compare In re Section 215 Orders*, 2013 WL 5460064, at *7–8 (ordering declassification review and partial release pursuant to Rule 62); *see also United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 478 (1995) (describing the Supreme Court's "policy of avoiding unnecessary

adjudication of constitutional issues"). Second, in the context of First Amendment right-of-access claims, conflating these questions may improperly shift the burden of proof on certain issues from the party resisting public access to the party seeking it. Ordinarily, it is the party resisting access that must establish both an overriding need for non-disclosure and narrow-tailoring. *See Press-Enterprise Co. v. Superior Court* ("*Press-Enterprise I*"), 464 U.S. 501, 510 (1984); *Globe Newspaper*, 457 U.S. at 606–07. But if standing depends on the merits, that burden suddenly belongs to the party seeking access, who must show jurisdiction at the outset. Third, in many cases, conflating standing with the merits would require courts to make premature factual determinations in the absence of an adequate record, because federal courts have an independent obligation to assess their jurisdiction. Yet a detailed factual inquiry is usually inappropriate at the outset, where even "a generalized allegation of injury in fact" suffices. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1012 n.3 (1992).

Finally, contrary to the Opinion's suggestion, the fact that Movants, at this stage in the proceeding, are being denied access to only portions of these judicial opinions does not void Movants' standing. Op. at 1–2, 10. Movants continue to suffer an injury in fact with respect to the undisclosed portions of the opinions. *See, e.g.*, *Pub. Citizen*, 749 F.3d at 255–57 (standing to seek redacted court opinion); *United States v. Park*, 619 F. Supp. 2d 89, 91–93 (S.D.N.Y. 2009). Indeed, it would make no sense to hold that the government's partial, voluntary disclosure of a judicial opinion—however limited—would eliminate a party's standing to petition the Court for disclosure of the remainder of those opinions under the First Amendment.

For all these reasons, Movants' undisputed claim that they have sought and been denied access to the Court's opinions is sufficient to establish that they have suffered an injury under Article III.

B. Movants also satisfy the requirements of causation and redressability.

Movants also satisfy the requirements of causation and redressability. Because this Court has ultimate "supervisory power over its own records and files," *Nixon*, 435 U.S. at 598, it is ultimately responsible for determining which parts of its opinions, if any, the public may see. The Court, in other words, has caused and may redress the denial of access that Movants challenge. As this Court has previously held, it has the same authority over its records and files as any other Article III court and, therefore, may "adjudicate a claim of right to the court's very own records and files." *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 487.

The decision under review appears to question this Court's authority over its own opinions and orders. In several places, it suggests that the Executive Branch was responsible for the denial of access because it classified the information the Court included within its opinions. Although the decision does not state it expressly, the upshot of its logic appears to be that the Executive Branch—not the Court—has denied Movants' access to the redacted portions of the opinions and that only the Executive Branch may remedy that denial.[11]

Respectfully, this is incorrect. These records were created by Article III judges engaged in legal analysis while ruling on surveillance applications submitted by the government. As the Supreme Court has held, Article III courts have ultimate authority over their records and files. *Nixon*, 435 U.S. at 598. This is no less true when the records contain information that the

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[11] Op. at 1–2 ("[T]he four opinions the Movants seek were never under seal and were declassified by the Executive Branch and made public with redactions in 2014. Consequently, although characterized as a request for the release of certain of this Court's judicial opinions, what the Movants actually seek is access to the redacted material that remains classified pursuant to the Executive Branch's independent classification authority."); Op. at 28 ("The entirety of the information sought by the Movants is classified information redacted from public FISC opinions that is being withheld by the Executive Branch pursuant to its independent classification authorities and remains subject to the statutory mandate that the FISC maintain its records under the aforementioned security procedures.").

government deems to be classified. Indeed, there are many contexts in which courts review the public's right of access to classified information. Though courts typically accord a measure of deference to the government's justifications for classifying information, courts make their own determinations of whether and to what extent judicial records should be sealed or redacted. They do so under the Freedom of Information Act, in the face of the government's invocation of Exemptions 1 and 3, under which the government may withhold properly classified information or information that would expose intelligence sources and methods. *See Goldberg v. Dep't of State*, 818 F.2d 71, 77 (D.C. Cir. 1987) (even in the national-security context, courts must not "relinquish[] their independent responsibility" to review an agency's withholdings); *Ctr. for Const'l Rights v. CIA*, 765 F.3d 161, 167 (2d Cir. 2014). They also do so in resolving claimed rights of access under the First Amendment.

For instance, in 1986, the Fourth Circuit considered a claimed right of access to records in criminal proceedings containing classified information. The government argued that the court had to simply accept the government's judgment of what the public may see. The Fourth Circuit emphatically rejected that plea for complete deference:

> [W]e are equally troubled by the notion that the judiciary should abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present. History teaches us how easily the spectre of a threat to "national security" may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse.

In re Wash. Post Co., 807 F.2d at 391–92.

In a recent Espionage Act prosecution involving a "substantial amount of classified information," the government again claimed that its classification decisions set the bounds of

public access to the proceedings. *See United States v. Rosen*, 487 F. Supp. 2d 703, 705, 716–17 (E.D. Va. 2007). That court also emphatically rejected the government's claim:

> While it is true, as an abstract proposition, that the government's interest in protecting classified information can be a qualifying compelling and overriding interest, it is also true that the government must make a specific showing of harm to national security in specific cases to carry its burden in this regard. The government's *ipse dixit* that information is damaging to national security is not sufficient to close the courtroom doors nor to obtain the functional equivalent, namely trial by code.

Id. at 716–17.

In both of those cases, as in others, the courts conducted an independent evaluation of the government's predictions of national-security harm in determining the public's right to access judicial records. *See also McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983) ("Because the present case implicates first amendment rights, however, we feel compelled to go beyond the FOIA standard of review for cases reviewing CIA censorship pursuant to secrecy agreements. . . . Accordingly, the courts should require that CIA explanations justify censorship with reasonable specificity, demonstrating a logical connection between the deleted information and the reasons for classification."); *Doe v. Gonzales*, 386 F. Supp. 2d 66, 76 (D. Conn. 2005) ("While the court recognizes the defendants' expertise in the area of counter-terrorism and is inclined to afford their judgments in that area deference, those judgments remain subject to judicial review."); *United States v. Grunden*, 2 M.J. 116, 122 (C.M.A. 1977) (explaining that the trial judge "must be satisfied from all the evidence and circumstances" that classification warrants the closure of proceedings).

The Opinion's contrary view seems to stem from a misconception of the relationship between the First Amendment right of access and the government's classification authority. Where the right of access applies, the standard for denying the public access to judicial records is a constitutional one. *See, e.g.*, *In re Wash. Post Co.*, 807 F.2d at 391–92. The government may

not satisfy that constitutional standard by simple reference to the classification label it has assigned to a document. Except in narrow circumstances where Congress has expressly incorporated executive classification decisions into law, *see, e.g.*, 5 U.S.C. § 552(b)(1), those decisions have significance solely within the Executive Branch. They signify the Executive's belief that disclosure of information would cause harm. But where the First Amendment right of access applies, the government must *demonstrate* that harm to justify closure—not simply invoke its own prior determination.[12]

Moreover, contrary to the Opinion's assertion, Op. at 29, the review that the First Amendment requires of claims of harm is *not* a direct review of the government's classification decisions—the government may continue to label information as classified, no matter a court's ruling on the First Amendment right of access. But the Court's constitutional review does carry consequences; specifically, it determines whether the public has a legal right to access the Court's records. *See In re Wash. Post Co.*, 807 F.2d at 391–92 (addressing access to court proceedings).

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[12] The D.C. Circuit's recent decision in *Dhiab v. Trump*, 2017 WL 1192911, does not hold to the contrary. While the panel reversed the unsealing of classified court records in a Guantanamo habeas proceeding, it did so only after all three judges independently concluded that the government had demonstrated in "multiple ways" a compelling need to seal the records. *Id.* at *7. The court made no holding about the existence or scope of the constitutional access right. Judge Randolph expressed doubt that the First Amendment right of access extended to classified information, habeas proceedings, or even civil proceedings. *Id.* at *3–6 (Randolph, J.). But Judges Rogers and Williams criticized his sweeping assertions about the lack of an access right, with Judge Rogers refuting, at length, the notion that the right of access does not extend to classified information. *See id.* at *12 (Rogers, J., concurring) (noting that the Supreme Court "crafted a test where the threshold First Amendment question is whether 'the particular process in question' passes the experience and logic test, not whether the records submitted in that proceeding contain classified information. Because the test accounts for the protection of national security information, the presence of such information in a judicial proceeding does not crowd out the decades-old and flexible approach set forth in *Press-Enterprise II*." (citations omitted)).

Section 1803(c) does not alter this analysis. The Opinion cited that statute for the proposition that Congress has ordered the Court to treat the government's classification decisions as conclusive. Op. at 28–29. But the statute does not say this. Here is the full text of the provision:

> Proceedings under this chapter shall be conducted as expeditiously as possible. The record of proceedings under this chapter, including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence.

50 U.S.C. § 1803(c). The statute directs the Chief Justice to "establish[]" security measures and requires only "consultation" with Executive Branch officials. The statute leaves ultimate authority over this Court's records where the Supreme Court first found it—with the Article III courts. *See Nixon*, 435 U.S. at 598.

In any event, if the statute said what the Opinion says it does, the statute would violate the First Amendment. The right of access is rooted in the First Amendment and may not be abridged by Congress. *See, e.g.*, *In re N.Y. Times Co.*, 828 F.2d 110, 115 (2d Cir. 1987) (statutory confidentiality requirements imposed in the Wiretap Act "cannot override" the constitutional access right). In deciding whether to deprive the public of access, the Court must make its own determination that the constitutional standards are satisfied. Of course, the statute may be relevant to the merits of Movants' claims; for example, the government may argue that it bears upon the "logic" and "experience" test. But if the Court ultimately agrees with Movants that the First Amendment right of access applies to the legal opinions Movants seek, then that right would supersede any contrary legislative command.

Accordingly, this Court has ultimate control over its orders and opinions and, as a result, has caused and may redress the denial of access that Movants challenge.

Conclusion

For the foregoing reasons, Movants have standing to seek access to this Court's opinions.

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Respectfully submitted,

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* This memorandum has been prepared with the assistance of Yale Law School students, Regina Wang and Andrew Udelsman. This brief does not purport to present the institutional views of Yale Law School, if any.

CERTIFICATE OF SERVICE

I, Patrick Toomey, certify that on this day, April 17, 2017, a copy of the foregoing motion was served on the following persons by the methods indicated:

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