Filed
United States Foreign
Intelligence Surveillance Court

NOV 09 2017

LeeAnn Flynn Hall, Clerk of Court

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

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

BOASBERG, J., writing for the Court and joined by JJ. SAYLOR, DEARIE, RUSSELL, JONES, and CONTRERAS:

Figuring out whether a plaintiff has standing to bring a novel legal claim can feel a bit like trying to distinguish a black cat in a coal cellar. "Although the two concepts unfortunately are blurred at times, standing and entitlement to relief are not the same thing. Standing is a prerequisite to filing suit, while the underlying merits of a claim . . . determine whether the plaintiff is entitled to relief." Arreola v. Godinez, 546 F.3d 788, 794-95 (7th Cir. 2008). The Initial Opinion in this action decided that Movants – the American Civil Liberties Union and Yale Law School's Media Freedom and Information Access Clinic – had suffered no injury-in-fact and thus lacked standing to bring their First Amendment claim for access to redacted portions of certain of this Court's opinions. Sitting *en banc* for the first time in our history, we now vacate that decision. Whatever the merits of Movants' suit, we conclude that they have asserted a sufficient injury-in-fact to pursue it.

I. Background

By necessity, this Court conducts much of its work in secrecy. But it does so within a judicial system wedded to transparency and deeply rooted in the ideal that "justice must satisfy the appearance of justice." Levine v. United States, 362 U.S. 610, 616 (1960).

It comes as no surprise, then, that members of the public may at times seek to challenge whether certain controversies merit our continued secrecy or, instead, require some degree of transparency. The matter before us was born from two such challenges. On June 6, 2013, two newspapers released certain classified information about a surveillance program run by the Government since 2006. Within a day, the Director of National Intelligence declassified further details about this bulk-data-collection program, acknowledging for the first time that this Court had approved much of it under Section 215 – the "business records" provision – of the Patriot Act, 50 U.S.C. § 1861.

Very shortly thereafter, Movants filed a motion in this Court asking that we unseal our "opinions evaluating the meaning, scope, and constitutionality of Section 215." FISC No. Misc. 13-02, Motion of June 2, 2013. They argued that, because officials had now "revealed the essential details of the program," there was no legitimate interest in continuing to withhold its legal justification. Id. at 18. Movants thus contended that their First Amendment right of access to court proceedings and documents, as recognized by the Supreme Court in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), now compelled the release of these rulings. Id. at 6-15. They alternatively asked that we invoke FISC Rule of Procedure 62(a) to request that the Government review the opinions' classification and publish any declassified portions. Id. at 15-18.

Judge Saylor opted for the latter discretionary route in this first action. In re Orders of this Court Interpreting Sec. 215 of the Patriot Act, No. Misc. 13-02, 2013 WL 5460064 (Foreign Intel. Surv. Ct. Sept. 13, 2013). Before doing so, however, he concluded that Movant ACLU had established Article III standing to pursue its First Amendment challenge, as its asserted injury satisfied the familiar tripartite standing requirement – *i.e.*, it was "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." Id. at *2 (quoting Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013)). More specifically, he reasoned that, because the ACLU had alleged that the continued withholding of our opinions violated its First Amendment right of access to them, its claimed injury was 1) "actual," as the opinions were not available, 2) "traceable" to the Government's decision not to make them public, and 3) redressable by "this Court's directing that those opinions be published." Id. Judge Saylor also determined that the injury was sufficiently particularized because Movants were "active particip[ants] in the legislative and public debates about the proper scope of Section 215," and the withheld information would assist them in these conversations. Id. at *4. Ultimately, however, he did not reach the merits of their First Amendment claim, choosing instead to order the Executive Branch under Rule 62(a) to conduct a declassification review of certain of our prior opinions. Id. at *8.

Around the same time, the Government released more details about the bulk-data-collection program, including a white paper that explained how FISC Judges had periodically approved the directives to telecommunications providers to produce bulk telephonic metadata for use in the Government's counterterrorism efforts. See Administration White Paper: Bulk Collection of Telephony Metadata Under Section 215 of the USA PATRIOT Act (Aug. 9, 2013). This Court, too, took steps to make more information available to the public. In particular, we

asked the Executive Branch to review several of our opinions, and we released redacted versions of two about the collection of bulk telephony metadata under Section 215. In re Opinions & Orders of this Court Addressing Bulk Collection of Data under the Foreign Intelligence Surveillance Act, No. Misc. 13-08, 2017 WL 427591, at *2-3 (FISC Jan. 25, 2017).

While these revelations may have slaked some of Movants' thirst for information, they also opened up new lines of inquiry. Movants thus filed another motion – which kicked off the current action – on November 7, 2013, asking us to unseal classified sections of our opinions laying out the legal basis for the data collection. See Movants' Motion of Nov. 7, 2013, available at http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Motion-2.pdf. Here, again, they claimed that these passages were "subject to the public's First Amendment right of access" and should be released because "no proper basis exists to keep the legal discussions in [them] secret." Id. at 1. They further contended that we should once more exercise our discretion under Rule 62(a) to ask for a second classification review by the Government and then verify that its response complied with the dictates of the First Amendment. Id. at 24-27.

On November 18, 2013, however, while briefing was ongoing on this issue, the Government published two more redacted opinions by this Court. In re Opinions & Orders of this Court Addressing Bulk Collection of Data under FISA, 2017 WL 427591, at *3. Including the previous pair we had already released, these four opinions constituted all of our rulings that were responsive to Movants' second Motion. In other words, before the Government had even filed an Opposition, the relevant opinions had been "subjected to classification review and the unclassified portions released" with – according to the Government – "as much information . . . as possible consistent with national security." Opp. of Dec. 6, 2013, at 2.

Given such release, the Government's subsequent Opposition argued that the Court should now dismiss Movants' second action. Any further review, it maintained, would merely "duplicate the[se] result[s]," and there was "no basis for th[is] Court to order [it]." Id. The Government also contended that Movants lacked standing to seek such relief because Rule 62(a) allowed only a party to the proceeding that generated the opinion to move for publication, and Movants had not been involved in the underlying actions. Id. at 2-3. Finally, the Government urged this Court not to order yet another review since Movants could challenge the classification decisions through a Freedom of Information Act case in federal district court. Id. at 3-4.

On January 25, 2017, in a lengthy and thoughtful Opinion, Presiding Judge Collyer determined that Movants had no standing to press their case, and she thus dismissed it. See In re Opinions & Orders of this Court Addressing Bulk Collection of Data under FISA, 2017 WL 427591, at *1. Her Opinion focused in particular on a potential standing problem that the parties had not previously identified – namely, whether Movants had alleged the invasion of a "legally and judicially cognizable" interest sufficient to establish the injury-in-fact prong of the standing analysis. Id. at *7. The Court first took the position that an interest was not legally protected "when its asserted legal source – whether constitutional, statutory, common law or otherwise – does not apply or does not exist." Id. at *8.

On this basis, the Court then engaged in a lengthy merits analysis of Movants' claim under the Richmond Newspapers "experience and logic" test to determine whether such a First Amendment right existed in the unique context of FISC judicial proceedings. Id. at *16-21. Although the Constitution does not expressly provide for access to judicial records, in Richmond Newspapers, the Supreme Court "firmly established for the first time that the press and general public have a constitutional right of access to criminal trials." Globe Newspaper Co. v. Superior

Court, 457 U.S. 596, 603 (1982). Since then, it has extended this right to other judicial processes, but has also recognized that such a First Amendment right of access is not absolute. Id. at 607. Rather, to determine whether the public has a right of access to particular judicial proceedings, courts must ask two questions: "whether the place and process have historically been open to the press and general public" (the experience inquiry) and "whether public access plays a significant positive role in the functioning of the particular process in question" (the logic inquiry). Press-Enterprise Co. v. Superior Court (Press Enterprise II), 478 U.S. 1, 8 (1986). Applying this test, Judge Collyer in this case ultimately answered both prongs in the negative, and she therefore concluded that the right of access did not extend to FISC judicial proceedings. In re Opinions & Orders of this Court Addressing Bulk Collection of Data under FISA, 2017 WL 427591, at *16-21. For this reason alone, the Court then held that Movants had not alleged a sufficient injury-in-fact and thus lacked standing to bring their claim. Id. at *21.

Movants quickly moved for reconsideration. As the resolution of the first and second actions had created an intra-court split on the standing issue, we *sua sponte* granted *en banc* review to reconsider the narrow question of whether Movants have asserted a sufficient injury-in-fact for standing purposes. See 50 U.S.C. § 1803(a)(2)(A); FISC R. P. 45 (allowing the Court to order a hearing or rehearing *en banc* if "necessary to secure and maintain uniformity of the Court's decisions"). After substantial and reasoned debate and discussion among all eleven judges of this Court, we now answer that inquiry in the affirmative.

II. Analysis

Article III of the Constitution limits the jurisdiction of federal courts to actual "Cases" and "Controversies." U.S. Const., art. III, § 2. But not just any dispute will do. See Lujan v. Defs. of Wildlife, 504 U.S. 555, 559-61 (1992). The Constitution instead confines the judiciary to deciding

contests that are "appropriately resolved through the judicial process," as distinguished from those better left to the legislative or executive branches in a democratic government. Id. at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). Standing doctrine helps police this boundary by requiring, as an "irreducible constitutional minimum," that a plaintiff establish three elements to proceed with a claim: 1) an injury-in-fact that is 2) caused by the conduct complained of and 3) "likely" to be "redressed by a favorable decision." Id. at 560-61 (quotations omitted).

The focus here is on the first prong. A term of art, an injury-in-fact is the "invasion of a legally protected interest which is both (a) concrete and particularized; and (b) actual or imminent, not conjectural, or hypothetical." Id. at 560 (footnote, internal citations, and quotation omitted). For the purposes of evaluating whether a plaintiff has made this showing, though, "we must assume [Movants'] claim has legal validity." Cooksey v. Futrell, 721 F.3d 226, 239 (4th Cir. 2013) (quotation omitted). Put another way, in deciding whether Movants have alleged a sufficient injury-in-fact for standing purposes, we "must be careful not to decide the question on the merits for or against [Movants], and must therefore assume that on the merits the [Movants] would be successful in their claims." City of Waukesha v. EPA, 320 F.3d 228, 235 (D.C. Cir. 2003); see also Citizen Ctr. v. Gessler, 770 F.3d 900, 910 (10th Cir. 2014) (same); Parker v. District of Columbia, 478 F.3d 370, 377 (D.C. Cir. 2007) ("The Supreme Court has made clear that when considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim."), aff'd sub nom. District of Columbia v. Heller, 554 U.S. 570 (2008); see also Warth v. Seldin, 422 U.S. 490, 501-02 (1975) (assuming validity of legal theory for purposes of standing analysis).

Starting from the premise that Movants' claim is meritorious means that we must assume that withholding our classified opinions violates their First Amendment right of access to judicial

proceedings under the Richmond Newspapers test. From this base, we can readily conclude that this injury is "concrete," as well as "actual," because the opinions are currently not available to them. For at least the reasons articulated by Judge Saylor, moreover, it is sufficiently "particularized" from that of the public because of Movants' active participation in ongoing debates about the legal validity of the bulk-data-collection program.

The Initial Opinion, of course, did not quibble with these conclusions, but instead homed in on the prefatory language of the definition of what constitutes an injury-in-fact. While not every Supreme Court decision even specifies that an alleged injury-in-fact must be to a "legally protected interest," see, e.g., Clapper, 568 U.S. at 409, the Opinion correctly pointed out that some cases have treated this as an independent requirement to establish standing in appropriate circumstances. But from this starting point, the Initial Opinion faltered in concluding that Movants had alleged no legally protected interest because the First Amendment's right of access to court proceedings "did not apply" to FISC Opinions. In re Opinions & Orders of this Court Addressing Bulk Collection of Data under FISA, 2017 WL 427591, at *21.

As courts have repeatedly affirmed, "For purposes of standing, the question [simply] cannot be whether the Constitution, properly interpreted, extends protection to the plaintiff's asserted right or interest." Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1092 (10th Cir. 2006) (*en banc*) (emphasis added). "If that were the test, every losing claim would be dismissed for want of standing." Id.; see also Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 & n.1 (2003) (admonishing against use of "legal interest" test as part of standing analysis when it goes to merits of claim). We must instead assume that Movants are correct that they have a constitutional right of access, Waukesha, 320 F.3d at 235 – so long as that right is cognizable. That is, we ask only whether courts are capable of knowing or recognizing such an

interest. See Black's Law Dictionary (10th ed. 2014) (defining "cognizable" as "[c]apable of being known or recognized"); see also Judicial Watch, Inc. v. U.S. Senate, 432 F.3d 359, 364 (D.C. Cir. 2005) (Williams, J., concurring) (explaining Supreme Court uses terms "legally protected" and "judicially cognizable" interchangeably "(1) to encompass the other conventionally stated requirements (that the injury be concrete and particularized, and actual or imminent) and (2) possibly to serve as a screen (perhaps open-ended) against interests that it would make little sense to treat as adequate").

A plaintiff, for instance, might lack standing "to complain about his inability to commit crimes because no one has a right to a commit a crime," and no Court could recognize such an interest. Citizen Ctr. v. Gessler, 770 F.3d 900, 910 (10th Cir. 2014). On the other hand, he would have standing to bring colorable First Amendment claims, even if he would ultimately lose on the merits. Take the seminal example of Buckley v. Valeo, 424 U.S. 1 (1976). There, the Supreme Court allowed plaintiffs to attack campaign-finance laws as unconstitutional, even though, as it turned out, there is no specific "First Amendment right to make unlimited campaign contributions." Initiative & Referendum Inst., 450 F.3d at 1092-93 (citing Buckley, 424 U.S. at 96). As the Tenth Circuit noted, "We could use any unsuccessful constitutional claim to illustrate the point." Id. at 1092. Indeed, were we to define rights with any greater level of specificity, no plaintiff would have standing to challenge established First Amendment precedent. This is certainly not the case. See, e.g., Citizens United v. FEC, 558 U.S. 310, 365-66 (2010) (overturning precedent that upheld restrictions on corporate independent expenditures).

At bottom, the legally-protected-interest test is not concerned with determining the proper scope of the First Amendment right or whether a plaintiff is correct that such right has in fact been invaded; that is a merits inquiry. Waukesha, 320 F.3d at 235. The test instead seeks only to assess

whether the interest asserted by the plaintiff is of the type that "deserve[s] protection against injury." 13 Charles Alan Wright, Arthur R. Miller, *et al.*, Federal Practice & Procedure § 3531.4 (3d ed. 2008).

Against this backdrop, the sufficiency of Movants' allegation of such a legally protected interest appears clear. They identify the invasion of an interest – the First Amendment right to access judicial proceedings – that courts have repeatedly held is capable of "being known or recognized." The Supreme Court first acknowledged that this interest is one the Constitution protects against wrongful invasion in Richmond Newspapers, 448 U.S. 555, when a plurality held that the public's "right to attend criminal trials is implicit in the guarantees of the First Amendment." Id. at 580 (footnote omitted). Since then, that Court has also held that this right safeguards the public's qualified access to other criminal proceedings, including witness testimony, Globe Newspaper, 457 U.S. at 603-11, *voir dire*, Press-Enterprise Co. v. Superior Court (Press Enterprise I), 464 U.S. 501, 505-10 (1984), and preliminary hearings. Press Enterprise II, 478 U.S. at 10-15.

Many federal Courts of Appeals have likewise held this legally protected interest invaded when the public is walled off from other aspects of criminal trials, such as bail, plea, or sentencing hearings. See, e.g., N.Y. Civil Liberties Union v. N.Y.C. Transit Auth., 684 F.3d 286, 297-98 (2d Cir. 2012) (collecting cases); In re Wash. Post Co., 807 F.2d 383, 388-89 (4th Cir. 1986) (plea and sentencing hearings); In re Hearst Newspapers, LLC, 641 F.3d 168, 175-86 (5th Cir. 2011) (sentencing). Finally, at least six Circuits have concluded that the First Amendment qualified right of access also extends to "civil trials and to their related proceedings and records." N.Y. Civil Liberties Union, 684 F.3d at 298 (emphasis added) (so holding and collecting cases from the Third, Fourth, Seventh, Eighth, and Eleventh Circuits).

These cases all demonstrate that Movants, in asserting a First Amendment right of access to judicial processes, are seeking to vindicate "the sort of interest that the law protects when it is wrongfully invaded." Aurora Loan Servs., Inc. v. Craddieth, 442 F.3d 1018, 1024 (7th Cir. 2006) (emphases modified). No more than this is necessary for standing purposes, even if Movants ultimately fail to prove that the precise scope of the First Amendment right extends to redacted portions of our judicial opinions under the Richmond Newspapers test. The dissent, by contrast, would require Plaintiffs to make that more specific showing at the standing stage – an inquiry that would swallow any merits determination on the First Amendment's contours. It is erroneous to understand the cognizable-interest requirement as "beg[ging] the question of the legal validity of the[ir] claim." Initiative & Referendum Inst., 450 F.3d at 1093 n.3. Rather, as the Tenth Circuit sitting *en banc* has instructed, courts must avoid any such "mischief" inherent in "us[ing] standing concepts to address the question whether the plaintiff has stated a claim." Id. (quoting 13 Wright & Miller, § 3531.4 (2d ed. Supp. 2005)).

Our conclusion that Movants have met this cognizable-interest requirement is also consistent with the approach adopted by every Circuit to consider a similar claim. As far as we can tell, courts have uniformly found standing to bring a First Amendment right-of-access suit so long as plaintiffs allege an invasion related to judicial proceedings. That is so no matter how novel or meritless the claim may be. Some courts have stretched the right-of-access even farther for standing purposes. In Flynt v. Rumsfeld, 355 F.3d 697 (D.C. Cir. 2004), for example, journalists creatively contended that they had a First Amendment right of access to travel with military-combat units to cover the war in Afghanistan. Id. at 698. Although the D.C. Circuit ultimately held that "no such constitutional right exists" – in fact, having deemed Richmond Newspapers entirely inapplicable – it nevertheless easily concluded that plaintiffs had standing to bring their

suit. Id. at 698, 702-04. This was the case even though the journalists' desire to embed with troops was much farther afield from the core Richmond Newspapers right than the one Movants hope to establish today. Here, they ask only to extend the public's right of access to another Article III context – *i.e.*, FISC judicial proceedings.

The dissent criticizes the Court of Appeals' analysis in Flynt, see *post* at 20, but its dislike of the decision does not diminish its import. In any event, the D.C. Circuit does not stand alone in its approach. The Seventh Circuit, for example, has considered a historian's standing to bring a common-law right-of-access claim to sealed grand-jury materials. See Carlson v. United States, 837 F.3d 753, 757-61 (7th Cir. 2016). The plaintiff, it reasoned, "need[ed] only a 'colorable claim' to a right to access these documents, because '[w]ere we to require more than a colorable claim, we would decide the merits of the case before satisfying ourselves of standing.'" Id. at 758 (internal citation omitted); see also Okla. Observer v. Patton, 73 F. Supp. 3d 1318, 1321-22, 1325 (W.D. Okla. 2014) (holding plaintiffs had standing to bring First Amendment right-of-access claim to view executions, but dismissing suit as right did "not extend to the circumstances existing here"); United States v. Ring, 47 F. Supp. 3d 38, 41-42 (D.D.C. 2014) (holding criminal defendant had standing to sue for public access to PowerPoint presentation used during proffer session despite holding on merits that "neither a common law nor First Amendment right of access" attached to the record).

Many courts – including the Supreme Court – have not even felt it necessary to address standing in dealing with tenuous right-of-access claims, despite judges' obligation to raise *sua sponte* any jurisdictional defects. Indeed, courts have routinely ignored what the dissent would believe is a serious question, even while expressly addressing their jurisdiction in other respects. For example, the Fourth and Sixth Circuits rejected mootness challenges to suits asserting a First

Amendment right of access to search-warrant proceedings, despite ultimately deciding that the plaintiffs had no such right to these sealed records under the Richmond Newspapers test. See In re Search of Fair Finance, 692 F.3d 424, 428-29, 433 (6th Cir. 2012) (finding claim not moot); Balt. Sun Co. v. Goetz, 886 F.2d 60, 63-65 (4th Cir. 1989) (same). Mootness, of course, shares a common undergirding with standing: "[T]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 189 (2000) (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n.22 (1997)). To survive a mootness challenge, then, the plaintiffs must have necessarily demonstrated that the requisite personal injury existed at least in the first instance. Even more recently, in Phillips v. DeWine, 841 F.3d 405 (6th Cir. 2016), the Sixth Circuit rejected a much more farfetched challenge by inmates to the constitutionality of Ohio's "statutory scheme concerning the confidentiality of information related to lethal injection." Id. at 410, 419-20. At the outset, the court concluded that the plaintiffs lacked standing to bring their free-speech and prior-restraint causes of action, as their asserted injuries were too hypothetical. But it apparently had no similar concern as to their First Amendment right-of-access claim, holding instead on the merits that no such right existed. Id. at 417-20.

A long list of courts have acted in this fashion. See, e.g., Houchins v. KQED, Inc., 438 U.S. 1, 7-15 (1978) (holding First Amendment provides the media no right of access to county jail, but never questioning standing); Dhiab v. Trump, 852 F.3d 1087, 1096 (D.C. Cir. 2017) (holding plaintiffs have no "right under the First Amendment to receive properly classified national security information filed" in habeas action, but not questioning standing); Wood v. Ryan, 759 F.3d 1076, 1088 (9th Cir. 2014) (Bybee, J., dissenting) (criticizing "majority's newfound right of access" for

death row inmate seeking information on method of his execution as "dramatic extension of anything" previously recognized, but never questioning standing), vacated, 135 S. Ct. 21 (mem.) (summarily vacated on merits, not standing); In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(D), 707 F.3d 283, 291-92 (4th Cir. 2013) (holding no First Amendment right under Richmond Newspapers to court orders and proceedings pursuant to Stored Communications Act, but never questioning standing); In re N.Y. Times Co. to Unseal Wiretap, 577 F.3d 401, 409-11 (2d Cir. 2009) (rejecting, under Richmond Newspapers, newspaper's request to unseal wiretap applications and related materials, but not questioning standing to bring novel claim); Calder v. IRS, 890 F.2d 781, 783-84 (5th Cir. 1989) (applying Richmond Newspapers and holding plaintiff had no First Amendment or statutory right of access to IRS records, but never questioning standing). Although we do not directly rely on any of these cases, we find the uniformity is telling.

Similarly, two former judges of this Court also found it unnecessary to call standing into doubt when rejecting claims premised on the public's right of access to FISC records, see In re Proceedings Required by § 702(i) of FISA Amendments Act of 2008, No. 08-01, 2008 WL 9487946 (FISC Aug. 27, 2008) (McLaughlin, J.); In re Motion for Release of Court Records, 526 F. Supp. 2d 484 (FISC 2007) (Bates, J.), and, as explained above, Judge Saylor expressly held that plaintiffs did have standing to bring such claims under the First Amendment in Movants' first action. See In re Orders of this Court Interpreting Section 215 of the Patriot Act, No. 13-02, 2013 WL 5460064, at *2-4 (FISC Sept. 13, 2013).

The Initial Opinion, by contrast, relies on no case that concludes that a plaintiff lacks a legally cognizable interest, and thus standing, simply because that party cannot show a First Amendment right of access applies or exists in the context of the judicial proceeding at issue. The best it could muster is a single case where the plaintiff sought a common-law right of access to

discovery materials. Bond v. Utreras, 585 F.3d 1061, 1074 (7th Cir. 2009). The Seventh Circuit held that these discovery files – exchanged between parties – "had never been filed with the court and [had] never influenced the outcome of a judicial proceeding." Id. Whatever the merits of that decision, it provides no guidance here, where Plaintiffs seek material far more rooted in judicial proceedings: our opinions. Perhaps recognizing Bond as thin support, the dissent relegates that case to a footnote. Otherwise, no case appears throughout its 25 pages in which any court declined to find standing in like circumstances. This lack of precedential support speaks volumes.

At times, the dissent suggests a variant justification for dismissing the suit: it sees "no legal basis to find that Movants present a colorable claim." *Post* at 13 (emphasis added); see also id. at 17 n.16 ("In the instant matter, the question is whether Movants have a colorable right under the First Amendment to access information in FISC opinions that the Executive Branch determined was classified."). This alternative argument seems decidedly weaker to us. Courts have repeatedly set an exceedingly low bar to establish colorability. See Kennedy v. Conn. Gen. Life Ins. Co., 924 F.2d 698, 700 (7th Cir. 1991) (holding only if claim is "frivolous is jurisdiction lacking"); Panaras v. Liquid Carbonic Indus. Corp., 74 F.3d 786, 790 (7th Cir. 1996) (describing the requirement as "not . . . stringent"). Under this colorability standard, only "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.'" Initiative & Referendum Inst., 450 F.3d at 1093. Whatever the merits of Movants' First Amendment right-of-access claim, it finds its basis in well-established law. The right to access, even in its more narrow formulation, at least covers "a right of access to certain criminal [and civil] proceedings and the documents filed in those proceedings." Phillips, 841 F.3d at 418. Movants merely allege that those "certain" documents include our FISC opinions – *i.e.*, opinions filed in an Article III judicial proceeding. This asserted right is certainly more analogous

to the historical right than – for example – a claim that the First Amendment also grants access to travel with troop battalions on a foreign battlefield. Yet, in Flynt, 355 F.3d 697, the D.C. Circuit never mentioned that it might be frivolous to consider such an extension. In fact, the dissent points to no federal court that has ever dismissed as frivolous a novel claim seeking to extend the First Amendment right of access to a new judicial process. We decline to be the first.

The dissent also suggests our analysis should differ because Plaintiffs seek "classified information." *Post* at 24 (internal quotation marks omitted). It is true that courts rarely presume to review the Executive Branch's decisionmaking, at least without a statutory hook. See Dep't of Navy v. Egan, 484 U.S. 518, 538 (1988). Yet the classified information here is not housed in the Executive Branch; instead, it arises within an Article III proceeding, and Plaintiffs seek access to portions of judicial opinions. As explained above, the right to access judicial proceedings is well established. Courts have thus not hesitated to review claims involving secret court proceedings, even when they ultimately find good reason to deny them. See In re Search of Fair Finance, 692 F.3d at 428-29, 433 (sealed search warrants); Goetz, 886 F.2d at 63-65 (same); In re N.Y. Times Co. to Unseal Wiretap, 577 F.3d at 409-11 (sealed wiretap applications).

Nor do we agree with the dissent that we should change our conclusion simply because we consider a constitutional challenge involving the Executive Branch. See *post* at 23-25. Even if the Supreme Court applies an "especially rigorous" standing analysis in this context, Raines v. Byrd, 521 U.S. 811, 819-20 (1997), it has never suggested such an analysis would involve jumping to the merits of the dispute. More to the point, the dissent cites Clapper v. Amnesty International, 568 U.S. 398 (2013), which noted that courts have declined to find standing when reviewing "actions of the political branches in the fields of intelligence gathering and foreign affairs." *Post*

at 23-24 (quoting Clapper, 568 U.S. at 469). Although that decision admittedly contains some broad language, none offers much insight into the standing question posed here.

In Clapper, the Supreme Court considered a separate facet of the injury-in-fact test – namely, whether the plaintiffs' theory of future injury was too speculative to be "certainly impending." Id. at 409. In fact, Clapper's definition of what constitutes an injury-in-fact did not even include the requirement of a "legally protected" interest upon which the Initial Opinion relies here. Id. at 409 ("To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'") (citation omitted). Clapper, then, does not impose any special standing requirement on this score; in fact, it might be better read to impose no such showing at all. Schuchardt v. President of the United States, 839 F.3d 336, 348 n.8 (3d Cir. 2016) ("Despite Clapper's observation that the standing inquiry is especially rigorous in matters touching on intelligence gathering and foreign affairs," no court has held that "'Article III imposes [a] heightened standing requirement for the often difficult cases that involve constitutional claims against the executive involving surveillance.'") (quoting Jewel v. NSA, 673 F.3d 902, 913 (9th Cir. 2011)) (internal quotations from Clapper omitted)). In any event, the claim presented here survives because the injury is a lack of access to the proceedings of a court, rather than one directly traceable to the activities of the political branches in intelligence gathering or foreign affairs.

* * *

At the end of the day, the question that the Initial Opinion asked and answered is not one of standing. It instead goes to the merits of Movants' legal claim – *i.e.*, whether they have a qualified right of access under the First Amendment to portions of our opinions redacted by the Executive Branch under its classification authority. See Arreola, 546 F.3d at 794-95 ("Although

the two concepts unfortunately are blurred at times, standing and entitlement to relief are not the same thing."). As that is not what concerns us today, we hold that Movants have sufficiently alleged the invasion of a legally cognizable interest as necessary to establish an injury-in-fact. Whether or not they will ultimately succeed in establishing that the Richmond Newspapers experience-and-logic test entitles them to relief, we believe that they should not be barred at this threshold procedural stage. We further offer no opinion on whether other jurisdictional impediments exist to this challenge, but hold only that Movants have established a sufficient injury-in-fact.

III. Conclusion

Because we hold that Movants have the requisite cognizable interest to pursue their constitutional claim, we vacate the Initial Opinion in this action and remand the matter to Judge Collyer for further consideration of Movants' Motion.

COLLYER, *Presiding Judge*, joined by EAGAN, MOSMAN, CONWAY and KUGLER, *Judges*, dissenting:

In law as in life, the answer depends upon the question. Only by framing the question before us in its most general terms can the Majority answer with the unremarkable proposition that some courts – but not the Supreme Court – have found a First Amendment right of access to some federal court proceedings in civil cases when the place and process historically have been public. But the question the Majority poses is not the one presented by the motion in this case. I respectfully dissent and would affirm the decision in In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the FISA [hereinafter In re Opinions of This Court], No. Misc. 13-08, 2017 WL 427591 (FISA Ct. 2017).

The Foreign Intelligence Surveillance Court ("FISC") is a special court with a special and discreet mission: to protect the rights of U.S. persons while reviewing surveillance measures to protect national security. FISC proceedings are classified and the Court operates under specific congressional direction that everything it does must respect and protect the secrecy of those classifications. No member of the public would have any "right" under the First Amendment to ask to observe a hearing in the FISC courtroom. Still less should we be inventing such a "right" in the present circumstances.

To be precise, what Movants seek is not "access to judicial proceedings," as the Majority would have it. Rather, their current request is more limited and specific: having already received this Court's opinions and orders addressing bulk collection of data with classified material redacted, Movants want us to rule that they have a "right" of access to the information classified by the Executive Branch and that Executive Branch agencies must defend each redaction in the face of Movants' challenges.

The effect of the Court's decision today is to displace Congress's judgment that access to classified and ex parte FISC judicial opinions shall be resolved through the procedures set forth in Section 402 of the USA FREEDOM Act, which, as relevantly titled, governs the "[d]eclassification of significant decisions, orders, and opinions" of the FISC. Just as in the days of John Marshall, it is imperative that the Judiciary avoid the appearance of eroding the very principles intended to maintain the careful balance of powers set forth in the Constitution.[1] The Court's decision today unfortunately fails in that effort.

One last introductory comment is due. FISC judges come from district courts around the country. Few of us knew each other before our appointments to the FISC. In our work on the FISC, as with our work in our home courts, we decide alone. The occasion of this en banc review of the In re Opinions of This Court decision has given us a rare and wonderful opportunity to wrestle together over some weighty legal principles and issues. This dissent is written in the same spirit.

I.

The question pending before the en banc Court is whether Movants have shown an injury in fact sufficient to establish constitutional standing and this Court's jurisdiction. There is no dispute between the parties or the members of the Court that Article III of the Constitution limits the judicial power to the adjudication of cases or controversies in which a party seeking relief demonstrates standing for each asserted claim. There likewise is no dispute that the prevailing

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[1] "Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998).

legal standard is set forth in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), and requires that Movants "must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Id. at 560 (internal quotation marks and citations omitted).

The Supreme Court has never abandoned the requirement of a "legally protected interest" for the purpose of establishing Article III standing.[2] See Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) (confirming that "a plaintiff must show that he or she suffered an 'invasion of a legally protected interest'" (quoting Lujan, 504 U.S. at 560)); Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2663 (2015) (same); United States v. Windsor, 133 S. Ct. 2675, 2685 (2013) (same). Furthermore, the Supreme Court has signaled that the phrase "legally protected interest" has meaning independent of the requirement that the alleged invasion be concrete and particularized as well as actual or imminent. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211 (1995) (stating "Adarand's claim that the Government's use of subcontractor compensation clauses denies it equal protection of the laws of course alleges an invasion of a legally protected interest, *and* it does so in a manner that is 'particularized' as to Adarand" (emphasis added)).

To determine whether Movants asserted a legally protected interest, "we do not consider the merits in connection with standing, [but] we do consider whether the plaintiffs have a legal right to do what is allegedly being impeded." Citizen Ctr. v. Gessler, 770 F.3d 900, 910 (10th

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[2] Even when the Supreme Court used the phrase "cognizable interests" for the purpose of evaluating standing it "stressed" that the injury must be both "*legally* and judicially cognizable." Raines v. Byrd, 521 U.S. 811, 819 (1997) (emphasis added). Movants agree that "[t]he injury alleged must also be one that is 'legally and judicially cognizable.'" Movants' En Banc Opening Br. 6, available at http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Movants%27%20En%20 Banc%20Opening%20Brief.pdf.

Cir. 2014). In other words, we consider whether there is some law that at least arguably could be deemed to protect Movants' legal interest such that they can be said to have advanced a colorable claim *to the asserted right*. Aurora Loan Servs., Inc. v. Craddieth, 442 F.3d 1018, 1024 (7th Cir. 2006). As the Seventh Circuit has explained:

> The point is not that to establish standing a plaintiff must establish that a right of his has been infringed; that would conflate the issue of standing with the merits of the suit. It is that he must have a colorable claim to such a right. It is not enough that he claims to have been injured by the defendant's conduct. "The alleged injury must be legally and judicially cognizable. This requires, among other things, that the plaintiff have suffered 'an invasion of a legally protected interest.'"

Id. (quoting Raines, supra note 2, at 819 (quoting Lujan, 504 U.S. at 560)). To be clear, "[w]hile standing does not depend on the merits of the party's contention that certain conduct is illegal, standing does require an injury to the party arising out of a violation of a constitutional or statutory provision or other legal right." Fed. Deposit Ins. Corp. v. Grella, 553 F.2d 258, 261 (2d Cir. 1977). Accord Cox Cable Commc'ns, Inc. v. United States, 992 F.2d 1178, 1182 (11th Cir. 1993) ("No legally cognizable injury arises unless an interest is protected by statute or otherwise."). "The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right." Vermont Agency of Natural Res. v. U.S. ex rel. Stevens, 529 U.S. 765, 772 (2000).

II.

A.

Applying these legal standards, the Supreme Court has directed that "[a]lthough standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, it often turns on the nature and source of the claim asserted." Warth v. Seldin, 422 U.S. 490, 500 (1975). Indeed, the Supreme Court has agreed unanimously that "standing is gauged by the specific common-law, statutory or constitutional claims that a party presents." Int'l Primate Prot.

League v. Adm'rs of Tulane Educ. Fund, 500 U.S. 72, 77 (1991). "Typically . . . the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to adjudication *of the particular claims asserted.*'" Id. (internal quotation marks omitted, emphasis in original).

Accordingly, to determine whether Movants have a legally protected interest the first step is to examine the specific constitutional claims Movants present. Id. Movants assert a First Amendment-protected interest to access information in certain FISC judicial opinions that the Executive Branch determined is classified national security information. Movants further assert a First Amendment-protected interest to require the Executive Branch to explain its rationale for classification and respond to Movants' challenges to their constitutionality, and for the FISC to decide between them.[3] Movants' Mot. 1, 24. They invoke no other source of right for their claims.

The Majority Opinion strays from Movants' "particular claims" and recasts their legal interest as broadly as possible into "access to judicial proceedings," Majority Op. 10. By doing so, the Majority scrambles the scope of an interest recognized under the qualified First Amendment right of public access and the scope of an interest recognized under the common law

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[3] Specifically, Movants seek access to classified information that was redacted from four FISC judicial opinions that were declassified, in part, and made public in 2013. Now that the opinions are public, Movants ask the Court to compel the Executive Branch to conduct a second declassification review and "require the government to justify its proposed redactions, permit Movants an opportunity to respond, and then make findings on the record about whether the proposed redactions are narrowly tailored to avert a substantial risk of harm to a compelling governmental interest." Movants' Reply Br. 2, available at http://www.fisc.uscourts.gov/sites/default/files/ Misc%2013-08%20Reply-1.pdf. Movants claim the qualified First Amendment right of public access mandates these procedures as a matter of right, although they concede that "much of this Court's work may not be subject to a constitutional right of access . . . ." Movants' Reply Br. 1.

right of access. The result is a legal analysis that ignores the Supreme Court's direction to examine the nature and source of Movants' claims and gauge their standing by the specific constitutional claims they present. This confusion has consequences because the First Amendment and the common law are analyzed differently.

The First Amendment provides no general right of access to government proceedings. Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978) (plurality) ("The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act" and "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."). Accord Phillips v. DeWine, 841 F.3d 405, 419 (6th Cir. 2016) (rejecting a broad assertion of a First Amendment right to government information that pertains to a government proceeding and noting that "[n]either this court nor the Supreme Court has ever recognized a right so broad"). Nor does the First Amendment provide a presumptive[4] or general right of access to "judicial proceedings" as a subset of government proceedings. See, e.g., id. (noting that Houchins "sets the baseline principle for First Amendment claims seeking access to information held by the government"). Richmond Newspapers and its progeny offer an "exception" to the Houchins rule that there is no First Amendment right to access government proceedings, id. at 418, but that exception is limited to judicial proceedings that satisfy what has come to be known as the "experience" and "logic" tests

[4] When courts refer to a "presumptive First Amendment right of access," see, e.g., N.Y. Civil Liberties Union v. New York City Transit Auth., 684 F.3d 286, 296 (2d Cir. 2012), that "presumption" only comes into play after the First Amendment actually applies or attaches. There is, however, no "presumption" that the First Amendment applies or attaches to any particular judicial proceeding or document; instead, the Supreme Court established the non-presumptive test set forth in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (plurality opinion), and its progeny.

set forth by the Supreme Court to determine when the First Amendment applies to a particular judicial proceeding to which access is sought, see Press-Enter. Co. v. Superior Court, 478 U.S. 1, 9 (1986) ("Press-Enterprise II") ("If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches.").

The D.C. Circuit observed in Flynt v. Rumsfeld, 355 F.3d 697 (D.C. Cir. 2004), that the Supreme Court has found that a qualified First Amendment right of public access applies to *criminal* judicial proceedings only when the place and process historically have been open to the public and public access plays a significant positive role in the functioning of the particular process in question. 355 F.3d at 704. Lower courts have extended the Richmond Newspapers exception to certain trial-like civil proceedings found to satisfy the same experience and logic tests, but the Supreme Court has never ratified that approach. Id.

Again, standing must be "gauged by the specific . . . constitutional claims that a party presents." Int'l Primate Prot. League, 500 U.S. at 77. The "specific" constitutional claims Movants present are claims under the First Amendment to access information in FISC judicial opinions that the Executive Branch has determined is classified national security information. The FISC issued those opinions in ex parte proceedings that are unique to its jurisdiction under 50 U.S.C. §§ 1842(b) and 1861(b)(1). Movants also assert a concomitant right to challenge the constitutionality of each of those classification decisions, to require the Executive Branch to defend them, and to obtain FISC rulings on it all. Because the unclassified portions of the FISC opinions at issue have already been made public, Movants' alleged interest can only be described as accessing "classified information in FISC judicial opinions"[5] and not the broader universe of

[5] This framing of the interest is consistent with the Court's prior precedent addressing whether the qualified First Amendment right of public access applies to classified FISC judicial proceedings. See In re Motion for Release of Court Records, 526 F. Supp. 2d 484, 491-97 (FISA

"access to judicial proceedings" generally, as perceived by the Majority Opinion.[6] See, e.g., Doe, 749 at 266 (limiting the First Amendment to "secur[ing] a right of access only to *particular* judicial records and documents" and not to "all judicial documents and records").

To be sure, one can find broad statements about a right of the public to access judicial proceedings more generally. But those statements concern the common law right of access, which is a right that was not invoked by Movants and is analytically distinct from the First Amendment right they claimed. As the Fourth Circuit cogently explained, "[t]he common-law presumptive right of access extends to all judicial documents and records" whereas "[b]y *contrast*, the First Amendment secures a right of access only to *particular* judicial records and documents" when it applies. See Doe v. Pub. Citizen, 749 F.3d 246, 265-66 (4th Cir. 2014) (internal quotation marks and citation omitted, emphases added).[7] The Sixth Circuit echoed this

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Ct. 2007) (concluding that the First Amendment provides no public right of access to FISC judicial records).

[6] Movants contend their interest is in "opinions containing significant legal interpretation of the Constitution and statutory law" and they argue that "[f]or those sorts of opinions, at least, the First Amendment has always required courts to operate openly . . . ." Movants' Reply Br. 1. This argument is clearly erroneous. For example, the Supreme Court has implied, and federal circuit courts of appeal have expressly held, that the qualified First Amendment right of public access does not apply to grand jury proceedings where significant opinions are frequently made. See, e.g., Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 218-21 (1979) (making clear that grand jury proceedings historically have been closed to the public and public access would hinder the efficient functioning of those proceedings so such proceedings impliedly would not satisfy the test of experience and logic set forth in Richmond Newspapers); In re Motions of Dow Jones & Co., 142 F.3d 496, 499 (D.C. Cir. 1998) ("A settled proposition, one the press does not contest, is this: there is no First Amendment right of access to grand jury proceedings."); United States v. Smith, 123 F.3d 140, 148 (3d Cir. 1997) ("Not only are grand jury proceedings not subject to any First Amendment right of access, but third parties can gain access to grand jury matters only under limited circumstances.").

[7] Accord In re U.S. for an Order Pursuant to 18 U.S.C. § 2703(D), 707 F.3d 283, 291 n.8 (4th Cir. 2013) (rejecting plaintiffs' contention that the First Amendment protects a general right to access judicial orders and proceedings because "[t]his interpretation of the First Amendment

sentiment when it stated that the First Amendment covers only "*certain* proceedings and documents filed therein and nothing more." Phillips, 841 F.3d at 419 (internal quotation marks omitted, emphasis added).

In describing the right of access to judicial records under the common law, the Supreme Court has stated that "[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978). That right, however, is not sacrosanct and yields when, for example, "Congress has created an administrative procedure for processing and releasing to the public" the material sought by a litigant, id. at 603, which arguably is the case here. Section 402 of the USA FREEDOM Act of 2015[8]—fittingly titled "Declassification of significant decisions, orders, and opinions"—now provides procedures for making FISC judicial opinions publicly available. In addition, the Freedom of Information Act ("FOIA") dictates what "[e]ach agency shall make available to the public . . . ." 5 U.S.C. § 552(a). Moreover, this Court previously held that, with respect to FISC proceedings, the common law right of access is preempted by the Foreign Intelligence Surveillance Act of 1978, codified as amended at 50 U.S.C. §§ 1801-1885c (West 2015) ("FISA"). In re Motion for Release of Court Records, 526 F. Supp. 2d at 490-91 (rejecting the ACLU's claim of a common law right of access because, among other reasons, "[t]he requested records are being maintained under a comprehensive statutory scheme designed to protect FISC records from routine public

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right of access is too broad, and directly contrary to our holding that this right extends only to particular judicial records and documents").

[8] Pub. L. No. 114-23, 129 Stat. 268 (2015), as codified at 50 U.S.C. § 1872.

disclosure"). The essential point, however, is that Movants have not claimed a violation of the common law right of access.

B.

After properly framing Movants' interest as an interest in accessing classified information in FISC judicial opinions rather than the expansion adopted by the Majority, it is necessary to decide whether that interest is protected by law. Movants cite the qualified First Amendment right of public access as their only legally protected interest.[9] The only interest protected by the qualified First Amendment right of public access, however, is an interest in access to trial-like judicial proceedings[10] and related documents when the place and process historically have been open to the public and public access plays a significant positive role in the functioning of the particular process in question. See, e.g., Press-Enterprise II, 478 U.S. at 9 (stating that the "particular proceeding" in question must pass the tests of experience and logic for the qualified First Amendment right of access to attach); Cincinnati Gas & Electric Co. v.

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[9] In re Opinions of This Court, No. Misc. 13-08, 2017 WL 427591, at *21.

[10] As discussed supra page 7, the Supreme Court has never extended the qualified First Amendment right of public access to non-criminal proceedings and the D.C. Circuit continues to adhere to the Supreme Court's application. See, e.g., Flynt, 355 F.3d 697 at 704 ("To summarize, neither this Court nor the Supreme Court has ever applied Richmond Newspapers outside the context of criminal proceedings, and we will not do so today."). Other courts, though, have extended the right to certain trial-like civil and administrative proceedings. See, e.g., N.Y. Civil Liberties Union v. N.Y.C. Transit Auth., 684 F.3d 286, 298 (2d Cir. 2012). While we all recognize this contrary authority, it remains true that, "[b]olstered by the Sixth Amendment's express right for a 'public trial' in 'all criminal prosecutions,' public access to criminal trials forms the core of this First Amendment constitutional right." In re Application of WP Co. LLC, 201 F. Supp. 3d 109, 117 (D.D.C. 2016) (internal citations omitted). See also United States v. Doe, 63 F.3d 121, 127 (2d Cir. 1995) (reciting history of open criminal trials and noting "[i]n Gannett [Co., Inc. v. DePasquale], 443 U.S. 368] 379-81, the Supreme Court, striking the balance in favor of the criminal defendant, determined that the Sixth Amendment guarantee of a public trial was personal to the accused and did not grant the press and general public an independent right of access, at least to pretrial suppression hearings").

Gen. Electric Co., 854 F.2d 900, 903 (6th Cir. 1988) (applying the same tests to a civil proceeding). To distill this point to its essence for our purposes, it is fair to say that the qualified First Amendment right of public access protects only an interest in judicial proceedings and related documents involving places and processes that have been historically public.[11] That rubric patently does not apply to the FISC, FISC proceedings or FISC judicial opinions, or to information classified by the Executive Branch and redacted in declassified versions of FISC judicial opinions.

Working in secrecy at the FISC is not simply a matter of "necessity." Majority Op. 2. It is a legislative imperative under FISA. See, e.g., 50 U.S.C. §§ 1803(c) (stating that "[t]he record of proceedings under this chapter, including applications made and orders granted, shall be maintained under security procedures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence"), 1805(a) (mandating that, "[u]pon an application made pursuant to section 1804 of this title, the judge shall enter an ex parte order as requested or as modified" if certain specified findings are made), 1842(d)(1) (same), 1861(c)(1) (same). The FISC has twice emphasized this congressional mandate. See In re Opinions & Orders of This Court, No. Misc. 13-08, 2017 WL 427591, at *15; In re Motion for Release of Court Records, 526 F. Supp. 2d at 488-90. And at least twice the FISC has emphasized that its proceedings have never been public, it has never held a public hearing, and the number of opinions released to the public is statistically minor relative to the thousands of classified decisions it has issued. See In re Opinions & Orders of This Court, 2017 WL 427591,

[11] The Majority agrees. Majority Op. 6 (admitting that "to determine whether the public has a right of access to particular judicial proceedings, courts must ask . . . whether the place and process historically have been open to the press and general public" (internal quotation marks omitted)).

at *17-20; In re Motion for Release of Court Records, 526 F. Supp. 2d at 487-88, 492-93. Notably, too, in this matter no sealing order or other discretionary action has been taken by the Court to impede public access to its classified opinions or the classified information redacted from its declassified and public opinions.[12] The point is not just that FISC proceedings and judicial documents have never been historically public, but, importantly, the FISC does not exercise discretionary decision making about whether to conduct its proceedings in a non-public fashion—it is required to do so by statute.

This history of non-public proceedings weighs heavily against Movant's asserted First Amendment right of access to information classified by the Executive Branch. Even "[m]ore significant is that from the beginning of the republic to the present day, there is no tradition of publicizing secret national security information . . . ." Dhiab v. Trump, 852 F.3d 1087, 1094 (D.C. Cir. 2017). "The tradition is exactly the opposite." Id.

Movants argue that this Court should not defer to the Executive Branch's classification decisions but should review and potentially reject those decisions. Movants' Reply Br. 2. This argument is considered only to determine whether Movants have identified a right that the First Amendment protects, not to rule on its merits. They have not identified such a First Amendment right to FISC review of Executive Branch classification decisions. Furthermore, this Court has

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[12] In Bond v. Utreras, 585 F.3d 1061, 1073 (7th Cir. 2009), the Seventh Circuit noted that the common law offers a presumptive right of access to most documents filed in court based on the principle that courts "are public institutions that operate openly" and "judicially imposed limitations on this right are subject to the First Amendment." Because the FISC issued no sealing order or protective order preventing Movants' access to the classified information they seek, there has been no "judicially imposed limitation" that would be subject to the First Amendment. Furthermore, contrary to the Majority Opinion's assertion that Bond is "thin support," Majority Op. 15, it stands for the very proposition asserted in the January 25, 2017 Opinion, 2017 WL 427591, at *10, which is that when there is no law that applies to protect a plaintiff's asserted interest, there is no legally protected interest sufficient to establish Article III standing.

previously said that "[u]nder FISA and the applicable Security Procedures, there is no role for this Court independently to review, and potentially override, Executive Branch classification decisions" and, even "if the FISC were to assume the role of independently making declassification and release decisions in the probing manner requested by the ACLU, there would be a real risk of harm to national security interests and ultimately to the FISA process itself." In re Motion for Release of Court Records, 526 F. Supp. 2d at 491.

The Majority Opinion fails to accord these principles the governing weight to which they are entitled. Richmond Newspapers specifically established a two-part test for determining when the qualified First Amendment right of access applies – and that standard requires both the place and the process to have been historically public.[13] The Majority Opinion appears to accept this principle,[14] even as it fails to apply it. There is no legal basis to find that Movants present a colorable claim the First Amendment protects their asserted interest in accessing a place and process that is distinctly not public and required by law to *not* be public.

III.

The Majority Opinion most strenuously decries the January 25, 2017 decision in In re Opinions of This Court because the Majority believes that deciding Movants have no legally protected interest necessarily, and improperly, involved deciding the merits of Movants' cause of action. The Majority Opinion chastises the decision for having "engaged in a lengthy merits analysis of Movants' claim under the Richmond Newspapers 'experience and logic' test,"

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[13] "The First Amendment guarantees the press and the public access to aspects of court proceedings, including documents, 'if such access has historically been available, and serves an important function of monitoring prosecutorial or judicial misconduct.'" United States v. El-Sayegh, 131 F.3d 158, 161 (D.C. Cir. 1997). Accord Press-Enterprise II, 478 U.S. at 9.

[14] See note 11, supra.

Majority Op. 5. But the Majority fails to explain why it believes that addressing Richmond Newspapers constituted deciding the merits of the motion. Plainly an examination of the law invoked by Movants may be part of—even essential to—a proper analysis of standing. See Warth, 422 U.S. at 500 ("[S]tanding . . . often turns on the nature and source of the claim asserted."); Int'l Primate Prot. League, 500 U.S. at 77 ("[S]tanding is gauged by the specific common-law, statutory or constitutional claims that a party presents."). Because application of the experience and logic tests revealed that Movants have no right of public access to classified FISC judicial documents or proceedings, they failed to identify an interest that is legally protected and, thus, have no standing.

The Majority takes the mistaken and circular view that, because the Court must assume that on the merits Movants would be successful in their claims when it evaluates standing, it therefore follows that, "[f]rom this base," the Court can conclude that Movants satisfy the requirements of Article III standing. Majority Op. 8. The Majority misinterprets the Supreme Court's edict that consideration of Article III standing does not involve consideration of the merits. "Because a review of standing does not review the merits of a claim, but the parties and forum involved, our assumption during the standing inquiry that the plaintiff will eventually win the relief he seeks does not, on its own, assure that the litigant has satisfied *any element* of standing." Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 664 n.1 (D.C. Cir. 1996) (internal citations omitted, emphasis added). "Any assumption as to the outcome of the litigation simply does not resolve the issues critical to a standing inquiry." Id. That is because, as the Second Circuit has noted, "[t]he standing question is distinct from whether [a litigant] *has a cause of action!*" Carver v. New York, 621 F.3d 221, 226 (2d Cir. 2010) (citing Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)) (emphasis added). Cf. Libertad v. Welch, 53 F.3d 428, 439 (1st Cir.

1995) ("Appellants need not establish the elements of their cause of action in order to sue, only to succeed on the merits.").

"[W]hat has been traditionally referred to as the question of standing . . . involves analysis of 'whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy . . . .'"[15] DaCosta v. Laird, 471 F.2d 1146, 1152 (2d Cir. 1973) (quoting Sierra Club v. Morton, 405 U.S. 727, 731-732 (1972)) (emphasis omitted). The "merits analysis . . . determines whether a claim is one for which relief can be granted if factually true." Catholic League for Religious & Civil Rights v. City and Cnty. of San Francisco, 624 F.3d 1043, 1049 (9th Cir. 2010) (en banc). "A party's injury in fact is distinct from its potential causes of action." Am. Farm Bureau Fed'n v. U.S. Envtl. Prot. Agency, 836 F.3d 963, 968 (8th Cir. 2016). As demonstrated below, whether Movants can establish the elements of their cause of action alleging that the Court improperly withheld information that the Executive Branch improperly determined was classified national security information requires consideration of factual and legal issues separate from the question of whether the First Amendment applies at all to certain FISC judicial opinions and proceedings. The Majority overlooks this important nuance in the Supreme Court's legal standard that otherwise prohibits consideration of standing from reaching the merits of the cause of action.

The Majority's error also represents a misreading of Richmond Newspapers and its progeny, as well as cases that find no standing when a plaintiff fails to identify a legally protected interest. The Majority Opinion notes the Tenth Circuit's statement in Initiative &

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[15] "Although the standing question is often dressed in the dazzling robe of legal jargon, its essence is simple—what kind of injuries are courts empowered to remedy and what kind are they powerless to address?" Schaffer v. Clinton, 240 F.3d 878, 883 (10th Cir. 2001).

Referendum Inst. v. Walker, 450 F.3d 1082, 1092 (10th Cir. 2006) that, "'[f]or purposes of standing, the question cannot be whether the Constitution, properly interpreted, extends protection to the plaintiff's asserted right or interest.'" Majority Op. 8 (quoting Walker, 450 F.3d at 1092). But the Majority misunderstands the import of the statement: its principle applies when, unlike this matter, there is an *applicable* constitutional provision and both standing and the merits involve the same question about the *scope* of that applicable constitutional provision. See Day v. Bond, 500 F.3d 1127, 1136-1138 (10th Cir. 2007) ("Critically, however, in Walker, the plaintiffs' asserted injury and their claimed constitutional violation were one and the same."). When standing and the merits require different legal analyses, standing can be, and must be, decided first and independently. Id. The Tenth Circuit explained:

> [W]e did note [in Walker] that "the term 'legally protected interest' must do some work in the standing analysis . . . [and] has independent force and meaning without any need to open the door to merits considerations at the jurisdictional stage." Id. at 1093. . . .
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> Practically speaking, Walker mandates that we assume, during the evaluation of the plaintiff's standing, that the plaintiff will prevail on his merits argument—that is, that the defendant has violated the law. See id. ("For purposes of standing, we must assume the [p]laintiffs' claim has legal validity."). But there is still work to be done by the standing requirement, and Supreme Court precedent bars us from assuming jurisdiction based upon a hypothetical legal injury. See Lujan, 504 U.S. at 560, 112 S. Ct. 2130. While Walker addressed an instance in which the merits of the plaintiffs' claims mirrored the alleged standing injury, that is not always the case. *There are cases, such as the one before us here, where the alleged injury upon which the plaintiffs rely to establish standing is distinct from the merits of claims they assert.* E.g., In re Special Grand Jury 89–2, 450 F.3d 1159, 1172–73 (10th Cir.2006) ("[A] plaintiff can have standing despite losing on the merits—that is, even though the [asserted legally protected] interest would not be protected by the law in that case."); see also Duke Power Co. v. Carolina Envt'l Study Grp., Inc., 438 U.S. 59, 78–79, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978).
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> Here, the issue of standing is not necessarily determined by the merits determination. The merits issue is whether K.S.A. § 76–731a is preempted by 8 U.S.C. § 1623. The standing question is whether § 1623 creates a private cause of action. Each of these issues is separate and independent,

> and we may determine whether the Plaintiffs here have standing to assert a private cause of action under § 1623 without reaching the merits of whether § 1623 preempts § 76–731a. See DH2, Inc. v. U.S. Sec. & Exchange Comm'n, 422 F.3d 591, 592 (7th Cir. 2005) (determining that the plaintiff lacked standing because its injury was speculative, without addressing the merits of the underlying claim).
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> Under these conditions, Walker simply does not apply. Accordingly, we now turn to the pure standing question whether § 1623 confers a private cause of action upon the Plaintiffs.

Id. (emphases added).[16] Day makes a useful distinction that is helpful to the immediate discussion.

According to the Tenth Circuit, decisions on standing and the merits remain independent legal inquiries whenever a decision on the merits would *not* necessarily decide standing. Only when both merits and standing require a decision on the same legal question does that Circuit find them conjoined so that standing cannot be separately decided first.[17] That is not the case here.

In Press-Enterprise II the Supreme Court made clear that, when the qualified First Amendment right of public access applies (which is an antecedent inquiry Movants failed to

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[16] To be clear, Walker itself involved a recognized First Amendment right because plaintiffs were asserting a free-speech interest expressly protected by the First Amendment. 450 F.3d at 1088. In the instant matter, the immediate question is whether Movants have a colorable right under the First Amendment to access information in FISC opinions that the Executive Branch determined was classified.

[17] The Tenth Circuit has also recounted "instances in which courts have examined the merits of the underlying claim and concluded that the plaintiffs lacked a legally protected interest and therefore lacked standing." Skull Valley Band of Goshute Indians v. Nielson, 376 F.3d 1223, 1236 (10th Cir. 2004). The D.C. Circuit has clearly held that when "plaintiff's claim has no foundation in law, he has no legally protected interest and thus no standing to sue." Claybrook v. Slater, 111 F.3d 904, 907 (D.C. Cir. 1979) (citations omitted). Deciding standing can often come close to the merits without violating legal principles. See Arjay Assocs., Inc. v. Bush, 891 F.2d 894, 898 (Fed. Cir. 1989) (stating that "[b]ecause appellants have no right to conduct foreign commerce in products excluded by Congress, they have in this case no right capable of judicial enforcement and have thus suffered no injury capable of judicial redress").

surmount in this case), a cause of action arises if (1) access was denied (2) without specific, on-the-record findings (3) demonstrating that "'closure [was] essential to preserve higher values'" and (4) closure was "narrowly tailored to serve that interest.'" 478 U.S. at 13-14 (quoting Press-Enter. Co. v. Superior Ct., 464 U.S. 501, 510 (1984) ("Press-Enterprise I")). Movants contend that their cause of action also includes as an element a right to challenge the government's classification decisions. Movants' Reply In Support of Their Mot. for the Release of Court Records 4, available at http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Reply-1.pdf. These elements form Movants' cause of action, the merits of which were never discussed in In re Opinions of This Court.

As to standing, however, the question focuses on whether classified FISC judicial opinions and proceedings have been historically open to the public and arise from a trial-like setting, see Richmond Newspapers, so that Movants have a colorable legally protected interest. This latter question does not run to the merits of their cause of action but, instead, to "whether the plaintiffs have a legal right to do what is allegedly being impeded." Citizen Ctr., 770 F.3d at 910; see also Grella, 553 F.2d at 261 ("standing does require an injury to the party arising out of a legal right"); Cox Cable Commc'ns, Inc., 992 F.2d at 1182 (there is no injury "unless an interest is protected").

The Majority ignores this directly-applicable precedent in opining that the January 25, 2017 decision ruled improperly on the merits in deciding that Movants had not asserted a legally

protected interest under the First Amendment.[18] The Majority confuses proper application of the Article III requirement that a litigant present a cognizable legal interest with a merits decision on whether that legal interest was unlawfully impaired.

IV.

The Majority Opinion raises other considerations that, in my estimation, are not persuasive and do not detract from the foregoing analysis. From the outset, the Majority Opinion not only confuses the scope of the qualified First Amendment right of public access with the common law presumptive right of access, but the Majority also characterizes as "novel" Movants' theory that a qualified First Amendment right of public access applies to classified and ex parte FISC judicial proceedings that historically never have been public. However, it is not novel. Movants initially presented their First Amendment theory to the FISC more than a decade ago, at which time it was considered and decisively rejected. See In re Motion for Release of Court Records, 526 F. Supp. 2d 484. This same theory has been re-litigated without success multiple times since.[19]

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[18] See In re Opinions of This Court, 2017 WL 427591, at *9-13 (listing cases). The Majority Opinion fails to distinguish these cases and cites no applicable precedent to the contrary. Each of the cases cited in In re Opinions of This Court involved dismissal for lack of subject matter jurisdiction, which is not a decision on the merits. See, e.g., Havens v. Mabus, 759 F.3d 91, 98 (D.C. Cir. 2014) (stating that "[w]e have previously held that dismissals for lack of jurisdiction are not decisions on the merits").

[19] See In re Orders of This Court Interpreting S. 215 of the Patriot Act, No. Misc. 13-02, 2013 WL 5460064, at *1 (FISA Ct. 2013) (stating that the ACLU "assert[ed] a qualified First Amendment right of access to the opinions in question"); In re Proceedings Required by 702(i) of FISA Amendments Act of 2008, Misc. No. 08-01, 2008 WL 9487946, at *3 (FISA Ct. 2008) (observing that the ACLU's request for release under the First Amendment "is similar to a request it made on August 9, 2007"); In re Motion for Release of Court Records, Misc. No. 07-01 (FISA Ct. Feb. 8, 2008) (rejecting on reconsideration the ACLU's First Amendment theory).

More importantly, the Majority suggests that novelty might have legal significance to the real issue, i.e., whether Movants' claims involve injury to a legally protected interest. For example, the Majority Opinion states, "[a]s far as we can tell, courts have uniformly found standing to bring a First Amendment right-of-access suit so long as plaintiffs allege an invasion related to judicial proceedings" and "[t]hat is so no matter how novel or meritless the claims may be." Majority Op. 11. The Majority Opinion cites no case to support this claim of "uniform" judicial "findings." At best, the Majority Opinion goes on to assert that "[s]ome courts have stretched the right-of-access even farther for standing purposes," Majority Op. 11, then cites a single D.C. Circuit decision, namely Flynt v. Rumsfeld, 355 F.3d 697 (D.C. Cir. 2004).

The Flynt decision does not do the work the Majority asks of it. Contrary to the Majority's characterization, the Flynt court found that appellants "asserted no *cognizable* First Amendment claim." 355 F.3d at 703 (emphasis added). Nonetheless, the Flynt court found that they had standing to bring (at best some of) their claims alleging a press right to embed with combat troops, which was advanced based on the First Amendment's express guarantees of free press and speech, not the qualified First Amendment right of public access. Id. The Flynt court discussed standing in a single paragraph that omits without explanation Lujan's definition of "injury in fact" as "an invasion of a *legally protected interest* which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."[20] 504 U.S. at 560 (internal quotation marks and citations omitted, emphasis added). Since Flynt, the Supreme Court has repeatedly reiterated that required element of an injury-in-fact, see supra page 3, calling into question the perfunctory discussion of standing in Flynt. Finally, the Flynt court's

[20] Flynt also makes no mention of the alternative formulation that an "injury in fact" must be legally and judicially cognizable. See Raines, 521 U.S. at 819.

standing analysis did not give any consideration to the novelty of the appellants' claim of a right to embed with troops and did not involve a request for access to judicial proceedings.

The Majority Opinion adds that "many courts—including the Supreme Court—have not even felt it necessary to address standing in dealing with tenuous right-of-access claims," Majority Op. 12, and "[a] long list of courts have acted in this fashion," Majority Op. 13. The Majority Opinion then cites eight decisions from six courts: (1) Houchins v. KQED, Inc., 438 U.S. 1 (1978); (2) Dhiab, 852 F.3d 1087; (3) Phillips, 841 F.3d 405; (4) In re United States for an Order Pursuant to 18 U.S.C. Section 2703(D), 707 F.3d 283; (5) In re Search of Fair Finance, 692 F.3d 424 (6th Cir. 2012); (6) In re New York Times Company to Unseal Wiretap and Search Warrant Materials, 577 F.3d 401 (2d Cir. 2009); (7) Baltimore Sun Company v. Goetz, 886 F.2d 60 (4th Cir. 1989); (8) Calder v. Internal Revenue Service, 890 F.2d 781, 783-84 (5th Cir. 1989)). All of these cases collapse upon examination.

Three of the cases cited by the Majority—Dhiab, In re New York Times Company and Baltimore Sun—did not address standing because they involved permissive intervenors.[21] The federal circuits are split about whether third-parties moving to intervene permissively under Rule 24(b) of the Federal Rules of Civil Procedure in ongoing litigation in which a case or controversy already exists must themselves demonstrate Article III standing. See Mangual v. Rotger-Sabat, 317 F.3d 45, 61 (1st Cir. 2003) (stating that "the circuits are split on the question of whether standing is required to intervene if the original parties are still pursuing the case and thus maintaining a case or controversy"). Cf. In re Endangered Species Act § 4 Deadline Litig., 704

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[21] See Dhiab, 852 F.3d at 1090 (stating that the district court "granted the [press] organizations' motion to intervene"); In re N.Y. Times Co. to Unseal Wiretap & Search Warrant Materials, 577 F.3d at 401 (stating in background section that newspaper moved to intervene and citing the district court case confirming that fact); Baltimore Sun, 886 F.2d at 62 (stating that the Baltimore Sun had petitioned the district court to intervene).

F.3d 972, 980 (D.C. Cir. 2013) ("It remains, however, an open question in this circuit whether Article III standing is required for permissive intervention.").

Houchins involved news media organizations that sought to expand the *scope* of the First Amendment's express protections for a free press into an "implied special right of access to government-controlled sources of information." 438 U.S. at 7-8. It is not surprising that the Supreme Court did not discuss standing given that the question was not whether the First Amendment's right of a free press applied but, rather, whether, properly interpreted, the scope of that right mandated the access sought by the news media organizations. Id.

Because the remaining cases, Phillips, In re United States for an Order Pursuant to 18 U.S.C. Section 2703(D), In re Search of Fair Finance and Calder were silent about the question of standing[22] it is inappropriate to draw any conclusion about what they "felt" about standing. Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 144 (2011) ("The Court would risk error if it relied on assumptions that have gone unstated and unexamined."). At best, it might be argued that the absence of any relevant discussion of standing by these courts *implies* that they thought there was standing, except that "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." Id.[23] "There is no such thing as a precedential sub silentio jurisdictional holding[.]" Cuba v. Pylant, 814 F.3d 701, 709 (5th Cir. 2016).

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[22] Although the Sixth Circuit in Phillips addressed standing with respect to other constitutional claims asserted by the plaintiffs, it failed to do so for the so-called "right-of-access-to-government-proceedings" claim. 841 F.3d at 414-20.

[23] See also United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33, 38 (1952) ("Even as to our own judicial power or jurisdiction, this Court has followed the lead of Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio.").

V.

The Majority Opinion fails to persuade. It confuses the scope of a legally protected interest under the qualified First Amendment right of public access with the scope of such an interest under the common law. It further confuses the standing requirement under Article III that a litigant present an injury to a protected legal interest with the merits decision on whether the litigant can actually prove that the asserted legal interest was impaired. Under Richmond Newspapers, the qualified First Amendment right of public access patently does not apply to non-trial-like judicial proceedings that are not public and never have been. The errors in the Majority Opinion effectively relax the requirements for Article III standing when members of the public ask to review and comment on redacted classified information in FISC judicial opinions. As a result, anyone in the United States apparently has a legally protected First Amendment interest in accessing information in FISC judicial opinions that the Executive Branch determined is classified and may invoke this Court's statutorily-limited and specialized jurisdiction to challenge those classification decisions as unconstitutional. I cannot agree. For these reasons I would conclude that Movants lack standing to assert their claims as Article III standing requirements are understood and applied in any case. But the Court should apply those requirements with particular rigor in *this* case.

The Supreme Court has instructed the lower courts to apply a more rigorous analysis of standing when a party seeks to challenge actions by the Executive or Legislative Branches on constitutional grounds. See, e.g., Raines, 521 U.S. at 819-20. To be precise, the Supreme Court has stated that "our standing inquiry has been *especially rigorous* when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." Id. (emphasis added). Accord Crawford v. United States Dep't of the Treasury, 868 F.3d 438, 457 (6th Cir. 2017). Layered onto this

"especially rigorous" analysis is the Supreme Court's observation that "we have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs," as also is the case here. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013).[24]

Intelligence gathering is one of the "vital aspects of national security." Gen. Dynamics Corp. v. United States, 563 U.S. 478, 486 (2011). "Matters intimately related to . . . national security are rarely proper subjects for judicial intervention." Haig v. Agee, 453 U.S. 280, 292 (1981). Accordingly, "unless Congress specifically has provided otherwise, courts traditionally

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[24] The Majority disagrees that "we should change our conclusion simply because we consider a constitutional challenge involving the Executive Branch." Majority Op. 16. The Majority's position is difficult to follow; one cannot avoid a Raines analysis here. An especially rigorous standing analysis is required—without reference to the merits—whenever the merits of the dispute would force a court to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional. Raines, 521 U.S. at 819-20. Movants are asking the FISC to do exactly that. Critically, there has been no sealing, closure, or protective order issued by the FISC to impede Movants' access to the classified information they seek, so there is no discretionary judicial action being challenged by Movants, unlike cases in which the qualified First Amendment right of access was found to apply. See, e.g., Press-Enter. II, 478 U.S. at 4 (judicial closure order); Press-Enter. I, 464 U.S. at 503-504 (same); Globe Newspaper Co. v. Superior Court for Norfolk Cnty., 457 U.S. 596, 598 (1982) (same); Richmond Newspapers, 448 US. at 559-60 (same).

The Majority Opinion also seizes on the dissent's quotation from Clapper to insist that there is no "special standing requirement" for plaintiffs seeking review of acts by the political branches in the fields of intelligence gathering and foreign affairs. Majority Op. 17 (claiming that the dissent is reading Clapper to impose such a requirement and citing Schuchardt v. President of the United States, 839 F.3d 336 (3d Cir. 2016)). But Schuchardt addressed a heightened standing requirement in line with the analysis in Jewel v. Nat'l Sec. Agency, 673 F.3d 902, 913 (9th Cir. 2011), in which the Ninth Circuit rejected a district court's requirement that plaintiffs demonstrate a "strong" and "persuasive" claim to Article III standing when suing NSA. This dissent quotes Clapper to caution against *relaxing* standing requirements and expanding judicial power, 568 U.S. at 408-409, not to advocate for special standing requirements. Like this dissent, Clapper made no mention of a "special" or "heightened" requirement to establish standing in the national security realm or otherwise. Rather, in combination, Raines and Clapper require courts to ensure the vigor of the principles of separation of powers by giving close attention and exacting consideration to the elements of standing when asked to review actions of the political branches involving intelligence gathering.

have been reluctant to intrude upon the authority of the Executive in . . . national security affairs," Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988), including "the protection of classified information," which the Supreme Court has directed "must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it," id. at 529.

"'Relaxation of standing requirements is directly related to the expansion of judicial power[.]'" Clapper, 568 U.S. at 408-409 (quoting United States v. Richardson, 418 U.S. 166 (1974) (Powell, J., concurring)). "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." Id. Importantly, "decision-making in the field[] of . . . national security is textually committed to the political branches of government." Schneider v. Kissinger, 412 F.3d 190, 194 (D.C. Cir. 2005). In the exercise of that textually-committed decision-making, Congress has already provided two avenues for any member of the public to obtain access to FISC judicial opinions (Section 402 of the USA FREEDOM Act and FOIA), subject to Executive Branch classification decisions which, under FOIA, are subject to examination in federal district courts insofar as specifically provided by statute.

The Majority Opinion provides no basis in law for the FISC to expand its jurisdiction contrary to Supreme Court guidance, statutory provisions that limit its jurisdiction to a specialized area of national concern, and the evident congressional mandate that the Court conduct its proceedings ex parte and in accord with prescribed security procedures. Applying

well-established principles of Article III standing with the rigor appropriate to a constitutional challenge to Executive Branch determinations in the national security sphere, I continue to conclude that Movants lack standing to assert the constitutional claim in question.

For all these reasons, I respectfully dissent.