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

REPLY BRIEF OF AMICUS CURIAE

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INTRODUCTION

Part I of this reply brief explains why the four jurisdictional arguments made by the Government's response brief do not succeed. Parts I and II also highlight arguments that the government has not addressed, which establish the Foreign Intelligence Surveillance Court's (FISC's) jurisdiction over this matter.

From the response brief, it is clear that the absence of a sustained treatment of the common law right of public access has left a critical gap in information provided to the court—both because common law establishes an independent right of access to FISC opinions, and because appellate courts frequently use the common law right in evaluating the historical prong of *Press-Enterprise II*.[1] *See Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*), 478 U.S. 1, 8 (1986). The response brief also fails adequately to address the appellate courts' jurisprudence in its analysis of whether and how the First Amendment right of access applies to the FISC.

Accordingly, Part III of this brief raises a number of new arguments, on the merits, to underscore why there so clearly exists both a common law and First Amendment right of access to FISC opinions. In doing so, it elucidates where the circuits are split, particularly in regard to the balancing test applied once the

[1] The amicus opening brief to the FISCR discussed the history of the common law and First Amendment public rights of access only insofar as they established a cognizable claim for purposes of standing. *See* FISCR Am. Br. at 13-19, 22-24.

presumption of access attaches. It proposes a balancing test based on factors considered by other federal courts that also address cases involving sealed records, classification, and national security. It notes, for the first time, that the FISC has already effectively applied the First Amendment right of access test, demonstrating that it is entirely feasible. It concludes with a brief discussion of why this question is so important not just as a matter of rule of law and separation of powers, but also in regard to the legitimacy of the FISC as a court of law.

SUMMARY OF ARGUMENT

The FISC has jurisdiction over the motion before the court. Further, the common law and First Amendment rights of access apply. Under the former, for material to be withheld, the court must consider articulable facts, not general statements about national security implications. For the latter, the court is required to ensure that any redactions in its opinions are narrowly tailored to meet the demands of national security. In the end, the result may be the same as the current redactions; however, the First Amendment standard must be met and the final decision made by the FISC.

Part I recognizes that the FISC has inherent supervisory authority over its own records and therefore exercises non-statutory jurisdiction over all common law and First Amendment public rights of access. Each of the four arguments offered by the response brief to the contrary fails. First, the jurisprudence establishes that no statutory cause of action is required for the court to exercise its inherent powers. The

court with original jurisdiction over the case oversees all contemporaneous and future motions for access to records. None of the myriad inherent powers cases at issue rely on a separate, statutory cause of action. The FISC would have to rule against the Supreme Court, every circuit, and four prior decisions of the FISC, to find for the government. Second, contrary to the government's contention, none of the third party common law or First Amendment right of access cases specifically rely on 28 U.S.C. § 1331. Third, FOIA cannot serve as a substitute for judicial action as it does not (because it cannot) create a cause of action for records held by the judiciary. That statute focuses exclusively on agency records. Regardless of whether the executive branch happens to have judicial records in its files, as the Supreme Court has held, courts retain jurisdiction over their own documents. The government response brief is further in tension with two arguments that the government has elsewhere raised. In both district court and at the FISC, it has argued that even under FOIA, FISC opinions are still subject to the FISC's control, suggesting that the court does, in fact still retain jurisdiction. Perhaps more concerning, the government has gone into district court and argued that because the FISC is a specialized court, the district court should not exercise jurisdiction over FISC records—an argument at odds with the argument it advances in its representations to this court, where it suggests that (non-specialized) district courts have jurisdiction over FISC documents. Fourth, while the government argues that the court cannot exercise

jurisdiction over this matter because Movants are not parties under FISC Rule of Procedure 62, it is of no consequence whether they are or are not parties to the underlying dispute. All of the inherent powers cases involve efforts by third parties to obtain access to matters that are (or were) properly before the court. There is no question in this case that the four opinions being sought were well within the court's domain; therefore, the FISC properly exercises jurisdiction over them.

Part II underscores the constitutional limitations on Congress and the Executive Branch. Even if the legislature wanted to create a statutory cause of action, or to deny a cause of action, to a common law or First Amendment public right of access, it could not do so without violating separation of powers. The FISC is an Article III court and thus carries all the inherent powers of the federal judiciary.

Part III goes to the merits of the argument. First, it carefully applies the common law right of access to matters before the FISC to establish that the motion before the court can only be overcome on the grounds of known, articulable facts—not on the basis of hypothesis or conjecture. It is beyond dispute that opinions are judicial documents to which the right of access attaches. The common law does not enquire into the type of proceeding or whether or not it is closed. It looks solely at the type of document. As the four opinions being sought are final dispositions, moreover, they are entitled to a strong presumption of access. The common law balancing test requires the FISC to ensure that the withholding of any part of the opinions to be

supported by articulable facts known to the court. A hypothetical or vague "threat to national security" is insufficient. Second, Part III applies the First Amendment right of public access specifically to the records in question. It notes, in contrast to the government's assertion, that the FISC opinions meet the experience prong of *Press-Enterprise II* under the three possible approaches that the court may adopt: by virtue of common law, based on the history of the FISC, and in light of the experience of other, specialized and non-specialized Article III courts in the United States. The opinions also meet the "logic" prong, as they play an enormously significant, positive role in the adjudicatory process. FISC opinions generally, and the four being sought in particular, address weighty matters of law. They illuminate how the executive branch wields its power—including when it does so outside the restrictions of law. And they address novel and significant interpretations of statutory provisions. Under the First Amendment, it is the solemn duty of the FISC to ensure that any withholding of any opinion, or any portion thereof, is narrowly tailored to meet the requirements of national security. Indeed, the FISC has already applied the First Amendment standard to a motion for access to its records with great success.

Part IV addresses the floodgates argument lurking in the background of the Government response brief, noting that the types of matters with which the FISC deals are precisely the matters of law with which citizens are and should be

concerned; that by releasing as much of its opinions as it can, the FISC fulfills a number of important interests, amongst which is ensuring its own legitimacy—a position frequently challenged because of the subject matter with which the court deals; and that well establishes processes and practicalities will prevent the court from becoming overwhelmed.

The brief concludes by noting that the end result for the four opinions may be the same as the current redactions; however, in reaching this conclusion, the FISC is constitutionally required to apply the First Amendment test and to make its own determination.

ARGUMENT

I. THE FOUR JURISDICTIONAL ARGUMENTS MADE BY THE GOVERNMENT FAIL TO ACCOUNT FOR THE COURTS' OWN TREATMENT OF INHERENT SUPERVISORY POWERS AS ESTABLISHING NON-STATUTORY JURISDICTION OVER PUBLIC RIGHTS OF ACCESS.

The Government's response brief lays out four arguments to support its assertion that this court lacks jurisdiction over its own opinions: first, that there is no statutory cause of action for the FISC to hear motions from third parties for access to its records; second, that 28 U.S.C. § 1331 applies only to district courts and not to the FISC; third, that the Freedom of Information Act (FOIA) assigns the cause of action to district courts; and fourth, that movants are not party to the underlying actions and

therefore have no legally-protected interest derived from Rule 62.[2] Gov't Resp. Br. at 1, 2, 10, 13, 15, 17. None of these arguments survives scrutiny.

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[2] The response brief also replies to Movants' argument regarding ancillary jurisdiction. *See* Movants' Opening Br. at 8-12; Gov't Resp. Br. at 9-11. The only point I will add is that in its response, the Government miscites *Kokkonen v. Guardian Life Insurance Co.* Gov't Resp. Br. at 1, 8-9, 11.

In that case, an action for breach of agency agreement was brought between an insurance agent and insurer and removed, based on diversity jurisdiction, to federal court. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). The case settled; however, the order dismissing the case did not retain the jurisdiction of the district court to oversee the settlement. *Id.* at 380-381. When the settlement fell apart and one party returned to federal court to obtain files to which it felt entitled under the agreement, the court lacked ancillary jurisdiction, as the facts to be determined regarding the alleged breach of contract were distinct from those in the principal suit. *Id.* at 381. Justice Scalia, on behalf of the Court, wrote:

> The situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal—either by separate provision (such as a provision "retaining jurisdiction" over the settlement agreement) or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist. That, however, was not the case here.

Id. Dismissal pursuant to Rule 41(a)(1)(ii) empowered district courts, with the consent of the parties, to incorporate the settlement agreement or to explicitly retain jurisdiction over the contract. The court had not done so, leaving enforcement of the settlement agreement to state courts (absent some other, independent basis for federal jurisdiction). *Id.* at 381-82.

That case is completely different from the motion before this Court, which is merely seeking access to the FISC's *previous* opinions on matters that were properly before it. It is not a separate breach of contract claim based on a settlement agreement that should be litigated before a state court. All *Kokkonen* says is that, while ancillary jurisdiction is available in some circumstances, the failure of the lawyers to incorporate the settlement agreement in the order dismissing the case meant that jurisdiction fell to the state court.

A. Inherent powers doctrine establishes Article III courts' non-statutory jurisdiction over third party common law and First Amendment right of access motions.

The response brief sidesteps the inherent powers doctrine, which establishes that Article III courts have non-statutory jurisdiction over third party common law and First Amendment right of access motions that stems from the courts' inherent powers. Instead, the brief draws a distinction between doing something (invoking a power) and asking a court to do something. Gov't Resp. Br. at 1.[3] For the latter, the brief argues, subject matter jurisdiction is required. *Id.* The argument proceeds: Congress has control over subject matter jurisdiction, which it establishes via statute.[4] But the Foreign Intelligence Surveillance Act (FISA) does not explicitly provide an independent cause of action, as it does not grant the FISC jurisdiction over its own decisions. Instead, Congress has assigned just two categories of cases to the FISC (applications and the adjudication of certain types of challenges). Ergo,

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[3] A good illustration may be found in contempt powers: i.e., just because Article III courts have the ability to sanction contumacious behavior does not mean that third parties can make a motion *requesting* that the court hold an individual in contempt.

[4] The government cites *Ankenbrandt v. Richards* in support of the proposition that Congress has sole control over subject matter jurisdiction and that the latter "is determined based on a review of 'the relevant jurisdictional statutes.'" Gov't Resp. Br. at 7. However, cases like *Ankenbrandt*, which simply held that federal courts don't handle domestic relations matters under the diversity of citizenship provision of 28 U.S.C. §1332, do *not* say that strict limits on subject matter jurisdiction divest a court of the fundamental attributes that come with the creation of an Article III court. *See Ankenbrandt v. Richards*, 504 U.S. 689, 698-99 (1992).

absent an independent cause of action or legal right, Movants lack subject matter jurisdiction. Gov't Resp. Br. at 1.

The problem with applying that distinction in this context is that the FISC has *inherent* supervisory power *over its own records*. *Nixon v. Warner Commc'ns Inc.*, 435 U.S. 589, 598 (1978). In *Nixon*, television networks sought 22 hours of tape recordings subpoenaed during the criminal trial of several of President Nixon's former advisors. *Id.* at 594. There was no question that the court had jurisdiction over the tapes. The trial had been held before Judge John Sirica in the U.S. District Court for the District of Columbia. The networks applied to the same court to gain access to the records. *United States v. Mitchell*, 386 F. Supp. 639 (D.D.C. 1974). There was no statutory basis for jurisdiction asserted by movants or held by the Court. It was entirely based on the court's inherent power over its records, to which there was a well-established common law right of public access. *Nixon*, 435 U.S. at 607. Writing for the Court, Justice Powell explained:

> It 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*. In contrast to the English practice, American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, and in a newspaper publisher's intention to publish information concerning the operation of government.

435 U.S. at 597-98 (internal citations omitted, emphasis added). In *Nixon*, there was no question that the court had jurisdiction over the right of access claim. It did not stem from a statutory cause of action. It was rooted in the court's inherent supervision of judicial records.

1. Like the Supreme Court, every circuit recognizes the inherent power of Article III courts to entertain third party common law and First Amendment public rights of access for judicial records.

Like the Supreme Court, circuit courts routinely exercise jurisdiction over common law and First Amendment right of access motions for pretrial documents. *See e.g., Assoc. Press v. U.S. Dist. Court for the Cent. Dist. of Cali.*, 705 F.2d 1143, 1145 (9th Cir. 1983); *United States v. Smith*, 776 F.2d 1104, 1111-12 (3d Cir. 1985).

So, too, do they exercise jurisdiction over judicial records while proceedings are underway. This includes material admitted into evidence in criminal proceedings.[5] Jurisdiction is vested in the court by nature of their status as Article III entities. As the Fifth Circuit observed, "the media shares the common law...right of access to exhibits. **Control of that access is vested in the court.**" *United States v. Branch*,

[5] *See, e.g., In re Application of Nat'l Broad. Co.*, 635 F.2d 945 (2d Cir. 1980); *United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981); *United States v. Martin*, 746 F.2d 964 (3d Cir. 1984); *United States v. Webbe*, 791 F.2d 103 (8th Cir. 1986); *United States v. Graham*, 257 F.3d 143, 145 (2d Cir. 2001); *Valley Broad. Co. v. U.S. Dist. Court for Dist. of Nev.*, 798 F.2d 1289 (9th Cir. 1986); *In re Providence Journal Co.*, 293 F.3d 1, 9-13 (1st Cir. 2002).

26 F.3d 1118, 1994 WL 286169, at *1 (5th Cir. 1994) (unpublished, per curiam) (emphasis added).

Courts similarly exercise jurisdiction over requests for records involved in ongoing civil cases. *See, e.g.*, *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178 (4th Cir. 1988); *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984); *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983). In *Lugosch v. Pyramid Co. of Onondaga*, media organizations sought to inspect documents filed under seal in support of a motion for summary judgment. Exercising jurisdiction over its records, the court concluded "a presumption of immediate public access attach[ed] under both the common law and the First Amendment." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006).

Once a court has issued a decision, the original court retains jurisdiction to hear third party motions for common law and First Amendment right of access to it. In *ex parte* warrant applications, for instance, after an investigation has concluded, the court that issued the warrant retains jurisdiction over requests for unsealing. *See, e.g.*, *United States v. Bus. of Custer Battlefield Museum & Stores*, 658 F.3d 1188, 1192-96 (9th Cir. 2011) (application to district court that sealed the affidavits supporting the warrant application granted under a common law right of access); *In re Application of Newsday, Inc.*, 895 F.2d 74 (2d Cir. 1990) (common law right of access to wiretap application granted after guilty plea entered); *Baltimore Sun Co.*

v. Goetz, 886 F.2d 60 (4th Cir. 1989) (affidavits supporting a warrant subject to the right of public access).

Grand jury proceedings, like matters before the FISC, are cloaked in secrecy. Nevertheless, once concluded, courts exercise jurisdiction over common law and First Amendment requests for grand jury records. *See, e.g.*, *In re Petition of Am. Historical Ass'n*, 49 F. Supp. 2d 274, 295 (S.D.N.Y. 1999); *In re Petition of Craig*, 942 F. Supp. 881, 882 (S.D.N.Y. 1996), *aff'd*, 131 F.3d 99 (2d Cir. 1997); *Carlson v. United States*, 837 F.3d 753, 760 (7th Cir. 2016); *In re Petition of May*, 651 F. Supp. 457 (S.D.N.Y. 1987) (unpublished memorandum and order). In *Carlson*, the court wrote, "**Even when grand-jury materials are in the custody of government attorneys, they 'remain the records of the courts and courts must decide whether they should be made public.**'" 837 F.3d at 760 (quoting *In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d 24, 31 (2d Cir. 1981)) (emphasis added).

Pari passu, courts routinely exercise jurisdiction over third party efforts to obtain transcripts, exhibits, and evidence after the close of a criminal trial.[6] In *In re Knight Publishing Co.*, the court exercised jurisdiction over its records from the underlying

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[6] *See, e.g.*, *United States v. Beckham*, 789 F.2d 401 (6th Cir. 1986); *In re Application of Nat'l Broad. Co.*, 653 F.2d 609, 613 (D.C. Cir. 1981); *United States v. Mitchell*, 551 F.2d 1252, 1257-58 (D.C. Cir. 1976); *Webster Groves Sch. Dist. v. Pulitzer Publ'g Co.*, 898 F.2d 1371 (8th Cir. 1990). Common law and First Amendment right of access claims also have been brought in regard to product liability suits. *See, e.g.*, *Littlejohn v. Bic Corp.*, 851 F.2d 673, 678 (3d Cir. 1988); *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1310-1313 (11th Cir. 2001).

case, acknowledging both the common law and the First Amendment right of access. *In re Knight Publ'g Co.*, 743 F.2d 231 (4th Cir. 1984). In *United States v. Edwards*, the trial had "long since ended." *United States v. Edwards*, 672 F.2d 1289, 1290 (7th Cir. 1982). Nevertheless, the initial court exercised jurisdiction, releasing an audio recording that had been admitted into evidence and played during the trial. *Id.* at 1291. The Seventh Circuit upheld the lower court's decision, acknowledging that it is "clear that there is a strong presumption in favor of the common law right of access to judicial records." *Id.* at 1290.

2. The original court that heard the matter retains jurisdiction, including when the underlying proceedings or records in question are hidden from public view.

The general rule, followed by every circuit, is that once an item becomes "a judicial record," the court that originally had the matter before it retains jurisdiction. This rule does not change just because the underlying proceeding or records in question are hidden from public view. Grand jury transcripts, for instance,

> are produced under "the supervision of" the district court, *Branzburg*, 408 U.S. at 688, 92 S.Ct. 2646, and as a result they represent an exercise of the court's power; they are "filed with the court," *Bond*, 585 F.3d at 1073. They constitute a form of judicial papers. Because grand-jury transcripts are, in their very nature, judicial documents (just as a transcript of a trial would be), there is no need for them to become part of the judicial proceeding through admission into evidence...Thus, the presumptive right of access attaches and is sufficient to "give members of the public standing." *Bond*, 585 F.3d at 1073-74.

Carlson, 837 F.3d at 760 (citation omitted). *See also In re Petition of Craig*, 131 F.3d 99, 103 (2d Cir. 1997); *In re Petition to Inspect & Copy Grand Jury Materials*, 735 F.2d 1261, 1268 (11th Cir. 1984), *cert. denied,* 469 U.S. 884 (1984); *Haldeman v. Sirica*, 501 F.2d 714, 715 (D.C. Cir. 1974).

Even where there is a statutory basis for *denying* access to the underlying documents, the courts' inherent power trumps the statutory reading. The Federal Rules of Criminal Procedure, for instance, lay out exceptions for grand jury secrecy. Fed. R. Crim. P. 6(e). Nevertheless, courts may act outside their constraints, subject to their own authority.[7] As the Supreme Court has noted, "Rule 6(e) is but declaratory" of the principle that disclosure is committed to the discretion of the trial judge. *Pittsburgh Plate Glass Co. v. United States,* 360 U.S. 395, 399 (1959).

Where the underlying proceedings are closed for national security purposes, the original court continues to exercise jurisdiction over third party motions.[8] In a 1986

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[7] *See, e.g., In re Biaggi,* 478 F.2d 489, 492-93 (2d Cir. 1973); *In re Petition to Inspect & Copy Grand Jury Materials,* 735 F.2d at 1267-68; *In re Application of Johnson,* 484 F.2d 791, 796-97 (7th Cir. 1973).

[8] In the national security context, even Article I courts exercise jurisdiction over common law and First Amendment right of access claims. *See, e.g., Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) ("The First Amendment...protects the people's right to know that their government acts fairly, lawfully, and accurately .... When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First Amendment...protected the people against secret government.")

espionage case, for example, the Fourth Circuit entertained a First Amendment right of access motion to retroactively vacate an order sealing transcripts. *In re Wash. Post Co. v. Soussoudis*, 807 F.2d 383, 389 (4th Cir. 1986). The court emphasized that it, and it alone, held dominion over the records and the decision of whether or not they should be made available to the public:

> We note...that, troubled as we are by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants, **we are equally troubled by the notion that the judiciary should abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present.** History teaches us how easily the spectre of a threat to "national security" may be used to justify a wide variety of repressive government actions. A **blind acceptance by the courts of the government's insistence on the need for secrecy...without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse.**

Id. at 391-92 (emphasis added).

Courts exercise jurisdiction over not just records material to adjudication, but over their final judgments as well. In *Doe v. Pub. Citizen*, for instance, consumer groups moved for a First Amendment right of access to the partially-redacted opinion. *Doe v. Pub. Citizen*, 749 F.3d 246, 265-68 (4th Cir. 2014). The court exercised jurisdiction over "the public's constitutional and common-law rights of access to judicial records and documents," granting access on First Amendment grounds. *Id.* at 252. In matters involving sentencing, courts similarly exercise jurisdiction over common law and First Amendment right of access motions. *See,*

e.g., *United States v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989); *United States v. Kravetz*, 706 F.3d 47, 56-59 (1st Cir. 2013).

3. All of these cases proceeded without a separate, statutory cause of action, and with jurisdiction derived directly from the courts' inherent supervisory powers over common law and First Amendment rights of access.

The Government's response brief states, "[a]part from explicit statutory authorization, the only basis on which an Article III court (other than the Supreme Court) may exercise subject matter jurisdiction is the narrow doctrine of ancillary jurisdiction." Gov't Resp. Br. at 8-9. That statement is simply not true. In *none* of the aforementioned cases did jurisdiction derive from statutory authority. In *every* case, the court's jurisdiction over common law and First Amendment rights of action motions is anchored in the court's inherent supervisory powers.

The court that heard the original matter is the one that holds jurisdiction. Indeed, it would be bizarre if it were otherwise. It would make no sense to file a motion in the Eastern District of Kentucky, for instance, to gain access to records held by a district court in Washington, D.C. The motion is made to the court that oversees the case—not on the grounds that there is an independent statutory cause of action, but because the court controls its own records and thus exercises jurisdiction over common law and First Amendment right of access claims.

The notion of the same court that first heard the matter retaining control is so ingrained that common law doctrine requires that deference be given to the decision of the original court overseeing the case. As the Supreme Court explained in *Nixon*,

> [C]ases that have recognized [a common law right of access to judicial records] agree that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.

Nixon, 435 U.S. at 599. *See also In re Wash. Post*, 807 F.2d at 390; *Baltimore Sun Co.,* 886 F.2d at 64.

The legal right in question resides in common law and the U.S. Constitution. The D.C. Circuit explained,

> As all parties agree, the existence of the common law right to inspect and copy judicial records is indisputable. This right serves the important function of ensuring the integrity of judicial proceedings in particular and of the law enforcement process more generally.

In re Application of Nat'l Broad. Co., 653 F.2d 609, 613 (D.C. Cir. 1981) (emphasis added). In *United States v. Mitchell*, three commercial television networks, the Public Broadcasting System, the Radio Television News Directors Association, and a large manufacturer of phonograph records all sought access to audio recordings that had been used during the Watergate trial. *United States v. Mitchell Appeal of Nat'l Broad. Co., Inc.*, 551 F.2d 1252 (D.C. Cir. 1976). The District of Columbia Circuit observed,

> The common law has long recognized a *right* to inspect and copy public records. In England, the right was narrowly circumscribed, and only a limited number of persons enjoyed it. But the American courts tended to view any limitation as repugnant to the spirit of our democratic institutions, and therefore granted all taxpayers and citizens access to public records...*That the common law right to inspect public records extends to judicial records is clear*. As Judge Gesell observed, the right to inspect and copy judicial records...has been settled at least since 1894.

551 F.2d at 1257-58 (footnotes omitted).

4. The FISC itself has repeatedly recognized that it has jurisdiction over common law and First Amendment right of access claims, based on its inherent powers.[9]

Over the past decade, on four separate occasions, the FISC has exercised jurisdiction over third party right of access motions to its records.[10]

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[9] Like all Article III courts, the FISC exercises myriad inherent powers, such as issuing supplemental opinions, managing its docket, contemplating contempt proceedings, requiring briefings on novel issues of law, extending comity to district courts, ordering the suspension of collection programs pending further submissions, and directing the destruction of noncompliant communications—none of which are explicitly mentioned in statutes.

[10] The Government's response brief only lists three instances; however, as reflected in the following text, in one docket the FISC has twice acknowledged its jurisdiction over third party right of access requests for its records. *See* Gov't Resp. Br. 5. The Government also noted five pending motions. *Id.* There is now a sixth motion, submitted after the Government filed its response brief, seeking public access to the court's transcripts. *See* Judicial Watch, Inc.'s Motion for Publication of Court Transcripts, *In re Transcripts of this Court Related to the Surveillance of Carter Page*, Misc. No. 18-03 (FISA Ct. July 25, 2018), http://www.fisc.uscourts.gov/sites/default/files/FISC%20Misc%2018-03%20Judicial%20Watch%20Inc%27s%20Motion%20For%20Publication%20of%20Transcripts%20180725_2.pdf.

In 2007, the FISC observed, "Notwithstanding the esoteric nature of its caseload, the FISC is an inferior federal court established by Congress under Article III, and like all such courts was vested with certain inherent powers upon its creation." *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484 (FISA Ct. 2007) (Misc. No. 07-01) (Bates). In that case, the ACLU asserted a common law and First Amendment right of access to certain judicial records. The court concluded that it had jurisdiction over the motion. 526 F. Supp. 2d at 486. Judge John Bates looked to *Nixon* to recognize that the FISC, like every Article III court, "has supervisory power over its own records and files.'" *Id.* (quoting and citing *Nixon*, 435 U.S. at 598. He wrote,

> How the FISC exercises its supervisory power over its records, and the extent to which release of its records is either prohibited by statute (or by statutorily required security procedures) or compelled by the Constitution or the common law, go directly to the merits of the ACLU's claims, and not to the Court's jurisdiction over the ACLU's motion.

526 F. Supp. 2d at 486-87. Judge Bates added, "Indeed, it would be quite odd if the FISC did not have jurisdiction in the first instance to adjudicate a claim of right to the court's very own records and files." 526 F. Supp. 2d at 487.

In 2008, the FISC again considered a motion, this time requesting "any legal opinions issued by the Court" regarding "the scope, meaning and constitutionality of the FAA." *In re Proceedings Required by § 702(i) of the FISA Amendments Act of 2008*, Misc. No. 08-01, 2008 WL 9487946, at *2 (FISA Ct. Aug. 27, 2008). The

court exercised jurisdiction over the motion. Judge Mary A. McLaughlin applied Judge Bates's reasoning, finding "no reason to reach a different conclusion." *Id.* at *3.

In 2013, the FISC once more encountered a First Amendment right of access motion, this time to § 215-related opinions. *In re Orders of This Court Interpreting Section 215 of the Patriot Act,* Misc. No. 13-02, 2013 WL 5460064 (FISA Ct. Sept. 13, 2013). Judge Saylor exercised jurisdiction over the motion, with a citation to Judge Bates's 2007 opinion. He held that principles of comity required that a separate suit first filed in the Southern District of New York be allowed to proceed. He ordered that, in the interim, the government conduct declassification review of any opinions responsive to the motion and not subject to the FOIA litigation, and to report to the Court. *Id.* at *1.

In 2014, the FISC addressed yet another First Amendment right of access motion, this time in relation to its opinions interpreting 50 U.S.C. § 1861. *In re Orders of this Court Interpreting Section 215 of the Patriot Act*, Misc. No. 13-02, 2014 WL 5442058 (FISA Ct. Aug. 7, 2014). Yet again, the court exercised jurisdiction over the motion.

In exercising jurisdiction over these motions, the court recognizes a long history of "[c]ertain implied powers" that "necessarily result to our Courts of justice from the nature of their institution." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-44 (1991).

See also Eash v. Riggins Trucking Inc., 757 F.2d 557, 561-64 (3d Cir. 1985) (en banc) (discussing scope of Article III inherent powers); Am. App. B (detailing cases addressing the inherent powers of the courts). Foremost among these is the power of the judiciary to issue and control its own opinions.

In short, to agree with the government, the FISC would have to rule against the Supreme Court, every federal circuit, and four prior opinions of this court to find that it lacks jurisdiction over Movants' right of access claim.

B. None of the third party common law or First Amendment right of access cases rely on 28 U.S.C. § 1331.

The Government's response brief argues that, to the extent there is a cause of action for constitutional questions, it is given to district courts under 28 USC § 1331. Gov't Resp. Br. at 2, 10, 15. That provision states, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The problem with this argument is that *none* of the common law or First Amendment right of action cases discussed above rely on 28 U.S.C. § 1331 in any way. Every one of them is grounded in the courts' inherent powers.

Even *Carlson v. United States*, which the government miscites, relied on the inherent power of the courts to supervise grand juries, not, as the response brief suggests, federal question jurisdiction under 28 USC § 1331. Gov't Resp. Br. at 10. *Carlson* was filed as a "miscellaneous action," meaning that it was a petition to the

Court that oversaw the grand jury, to permit access to grand jury records. *In re Petition of Am. Historical Ass'n*, 49 F. Supp. 2d 274 (S.D.N.Y. Dec. 9, 1998) (filing a miscellaneous action M-11-189). To the extent that there was jurisdiction, it was under the court's supervisory powers. *Carlson*, 837 F.3d at 761.

> The grand jury...falls under the supervisory authority of the district court. [] It thus follows, as the Supreme Court confirmed both before and after the Criminal Rules were adopted, that the disclosure of sealed grand jury materials is committed to the discretion of the trial judge....The inherent supervisory power of the court over the grand jury is well established. The Constitution itself makes the grand jury a part of the judicial process.

Carlson, 837 F.3d at 761 (internal citations and quotations omitted).

Common law and First Amendment right of access motions do not go to federal district or appellate courts because of federal question jurisdiction. They go to particular courts (the ones who heard the underlying action) because of Article III courts' inherent supervisory powers over their own records.

C. FOIA does not (because it cannot) assign a cause of action to records held by the judiciary.

The response brief argues that, in the alternative, FOIA assigns the cause of action to a district court and not to the FISC. Gov't Resp. Br. at 15. This argument does not withstand scrutiny. First, it fundamentally misconstrues FOIA, which deals with executive, not judicial records. 5 U.S.C. § 552(a)(3)(A). *See also* FISCR Am. Reply Br. at 8-11. Second, it fails to recognize that just because the government has

a document, or a copy of a document, does not mean that courts are divested of jurisdiction. Third, it ignores the continued control that FISC exercises over its records even under FOIA. Fourth, it is in tension with arguments that the Government has made in district court arguing that FISC, not the district courts, have control over FISC opinions. Fifth, it selectively ignores the Government's own argument, made in district court, that *because* the FISC is a specialized entity, the district court should *not* exercise jurisdiction over FISC's records.

1. FOIA deals exclusively with executive branch records.

The rationale behind FOIA was to rein in the administrative state, within which "the weed of improper secrecy had been permitted to blossom and was choking out the basic right to know." H.R. Rep. No. 89-1497, at 2 (1966). *See also* FISCR Am. Br. at 10. FOIA therefore created a presumption of transparency for agency records. FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538.[11] At no time, despite repeated amendments to FOIA and FISA, has Congress ever indicated that it intended either judicial records generally, or FISC records in particular, to be accessible under FOIA. *See also* FISCR Am. Reply Br. at 10-11. Nor could Congress take such action, even if it wanted to. To do so would be to reach into the core of the judicial power and violate separation of powers. *See* Am. Br. at 7-11. FOIA merely

[11] FOIA provides district courts with jurisdiction "to enjoin [agencies] from withholding agency records" and may "order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

gives the public access to documents held by the executive branch. Judicial records, including records of research data and design, are exempt.

2. The Supreme Court has held that regardless of whether the government has judicial documents, or copies of documents, in its files, the courts retain jurisdiction over their own records.

Just because government files contain documents, or copies of documents, does not divest the courts of jurisdiction over their records. This is precisely the issue the Supreme Court confronted in regard to grand jury materials.

The Court considers grand juries to be "an arm of the court," whose "in camera proceedings constitute 'a judicial inquiry.'" *Levine v. United States*, 362 U.S. 610, 617 (1960) (quoting *Hale v. Henkel*, 201 U.S. 43 (1906)). The similarities to matters before the FISC are striking: "Unlike ordinary judicial inquiry, where publicity is the rule, grand jury proceedings are secret." *Levine*, 362 U.S. at 617. "Since grand jury materials are traditionally the records of the Judicial Branch, it would be curious logic indeed to deduce from this premise that such materials are included within the Department of Justice's files or materials." *Cuisinarts*, 665 F.2d at 31. The court concluded that the "disclosure of grand jury materials is solely within the discretion of the court." *Id.* (referencing *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959).

Like grand jury records, FISC opinions derive from closed proceedings. Like grand jury records, FISC opinions are also held by the Executive Branch. And like

grand jury records, the fact that FISC opinions are held by the DOJ in their files does nothing to divest them of their status *as judicial records*.

3. As the Government has argued in multiple courts, under FOIA, FISC opinions are still subject to the court's supervision.

The government has repeatedly argued that the FISC retains control of its opinions even after the conclusion of the matter before it. In 2012, the Electronic Frontier Foundation sought access to FISC opinions and orders regarding the implementation of section 702. Complaint at 1-2, *Elec. Frontier Found. v. DOJ*, 57 F. Supp. 3d 54 (D.D.C. Aug. 30, 2012) (No. 12-1441-ABJ), ECF No. 1 [hereinafter EFF Complaint].[12] The DOJ objected, arguing that the FISC controls its own opinions and orders after they have issued. Since the court had not ordered the publication, the EFF could not obtain it through FOIA. *See* Declaration of Mark A. Bradley ¶ 7, *Elec. Frontier Found. v. DOJ*, 57 F. Supp. 3d 54 (D.D.C. Apr. 1, 2013) (No. 12-1441-ABJ), ECF No. 11-3 [hereinafter Bradley Dec.]; Department of Justice's Statement of Material Facts Not in Genuine Dispute at 3, *Elec. Frontier Found. v. DOJ*, 57 F. Supp. 3d 54 (D.D.C. Apr. 1, 2013) (No. 12-1441-ABJ), ECF

[12] ODNI had stated to Senator Wyden "that on at least one occasion the [FISC] held that some collection carried out pursuant to the Section 702 minimization procedures used by the government was unreasonable under the Fourth Amendment," and "the government's implementation of Section 702 of FISA has sometimes circumvented the spirit of the law, and on at least one occasion the [FISC] has reached this same conclusion." Letter from Kathleen Turner, Director of Legislative Affairs, Office of Director of National Intelligence, to Senator Ron Wyden (July 20, 2012), cited and quoted in EFF Complaint at 4.

No. 11-2. The Government moved for summary judgment on grounds that the DOJ has "no discretion in regard to" the opinions and that publication is entirely in the FISC's hands.[13] The EFF moved to stay the proceedings while it pursued the matter at the FISC.[14]

The DOJ then came to the FISC and, even as it argued against this court's jurisdiction over the EFF's motion, acknowledged "the inherent jurisdiction previously recognized by this Court with respect to its supervisory power over its own records and files." Gov't Opposition Brief at 2, *In re Motion for Consent to Disclosure of Court Records*, Misc. No. 13-01 (FISA Ct. June 7, 2013). The FISC, rejecting the Government's argument, determined that it had jurisdiction. It noted

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[13] The Government argued, "As the Supreme Court concluded long ago, '[t]here is nothing in the legislative history to suggest that in adopting the Freedom of Information Act to curb agency discretion to conceal information, Congress intended to require an agency to commit contempt of court in order to release documents.'" Memorandum of Points and Authorities in Support of the Department of Justice's Motion for Summary Judgment at 2, *Elec. Frontier Found. v. DOJ*, 57 F. Supp. 3d 54 (D.D.C. Apr. 1, 2013) (No. 12-1441-ABJ), ECF No. 11-1 (citing *GTE Sylvania, Inc. v. Consumers Union of U.S.*, 445 U.S. 375, 387 (1980)). *See also id.* at 15 ("Pursuant to the FISC Rules of Procedure" the DOJ "has no discretion over the release of FISC orders."); Bradley Decl. ¶8, n.2 ("FISC rules do not permit the Government to release FISC opinions to a FOIA requester or any other member of the public without a FISC order.").

[14] Plaintiff's Unopposed Motion to Stay Proceedings, *Elec. Frontier Found. v. DOJ*, 57 F. Supp. 3d 54 (D.D.C. Apr. 24, 2013) (No. 12-1441-ABJ), ECF No. 12; Motion of the Electronic Frontier Foundation for Consent to Disclosure of Court Records or, in the Alternative, a Determination of the Effect of the Court's Rules on Statutory Access Rights; *In re Motion for Consent to Disclosure of Court Records*, Misc. No. 13-01 (FISA Ct. May 21, 2013).

that as an Article III court, it "'has supervisory power over its own records and files.'" (quoting *In re Motion*, 526 F. Supp. 2d at 486, which quoted *Nixon*, 435 U.S. at 598. The FISC pointed out a certain tension in the government's position:

> The very reason the parties are now before this Court is the Government's contention...that this Court...continues to exert authority and control over copies of the Opinion in the Government's possession in a manner that prohibits the disclosure sought by EFF pursuant to FOIA. The Court has little difficulty concluding that it has jurisdiction to adjudicate this dispute between the parties over whether the Court has in fact prohibited such disclosure and, if so, whether the prohibition should be modified or lifted.

Op. and Order at 3, *In re Motion for Consent to Disclosure of Court*, Misc. No. 13-01 (FISA Ct. June 12, 2013). The fact that the matter had already been settled was of no jurisdictional consequence. Because of the nature of the Court's docket, such requests "are seldom, if ever, filed contemporaneously with the issuance or publication of an order or opinion." *Id.* at 6.

4. The FOIA argument in the response brief is in tension with arguments that the Government has made in district court that *because* the FISC is a specialized court, the district court should *not* exercise jurisdiction over FISC records.

The response brief fails to acknowledge that the government has argued in the Northern District of California that *because* of its specialized subject matter, the *FISC*, and not the district court, should exercise jurisdiction over its records.

In that case, Twitter sought a declaratory judgment that the government's refusal to allow the company to publish data about FISA-related orders violated the First

Amendment. Defendants' Notice of Motion and Partial Motion to Dismiss at 1, *Twitter, Inc. v. Holder*, Case No. 14-cv-4480 (N.D. Cal. Jan. 9, 2015). The DOJ argued in response that the district court should "decline jurisdiction over plaintiff's FISA based claims." *Id.* at 15. The government emphasized that "[p]roceeding in this manner... would provide the litigants the benefit of the FISC's expertise as a court of specialized jurisdiction." *Id.*

The government addressed, at length, the unique nature of FISC's docket, suggesting that any

> challenge to orders issued by the FISC or directives issued under a FISC-approved program should be brought before the FISC. This approach would be consistent with the framework established by Congress, which created the FISC as a court of specialized jurisdiction to administer the provisions of FISA.

Id. at 19. This is precisely the argument that I raised in FISCR in response to the Government's earlier FOIA claim, and which Movants raised in their opening brief in this case.[15] But the response brief ignores it, instead arguing—contrary to supporting arguments they have made in federal court—that any effort by third parties to obtain FISC opinions should be heard in a (non-specialized) district court.

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[15] *See* FISCR Am. Reply Br. 10-11 ("[The entire purpose of FISA is to concentrate national security cases before a specialized court with a particular expertise and procedures designed to handle national security matters. It would be contrary to this design to read into a prior statute a requirement that only district courts could be used to obtain FISC opinions."). *See also* Movants' Opening Br. at 14-15.

If the specialization of this court matters for *denying* district courts jurisdiction over questions regarding FISC records, then surely it matters for *granting* FISC jurisdiction over the same. Specialization cannot only matter for jurisdictional purposes when it is convenient to the government.

D. In none of the third party common law and First Amendment right of access cases is the movant a party to the underlying action.

Finally, the Government's response brief argues that movants are third parties; therefore, they have no legally-protected interest derived from Rule 62 and no cause of action. Gov't Resp. Br. at 13, 17. *See also* FISC R. of P. 62; *In re Orders of this Court Interpreting § 215 of the Patriot Act*, Misc. No. 13-02, 2013 WL 5460064, at *5 (FISA Ct. Sept. 13, 2013). Movants, the government writes, "are neither an authoring judge of this Court nor a party to any" of the underlying proceedings. Gov't Resp. Br. at 17. This argument, too, falls short.

It is entirely true that Movants were not party to the underlying actions that led to the opinions being sought. But the government, in making this argument, misses a critical point: common law and First Amendment right of access claims do not require petitioners to be party to the underlying action. Members of the public and the media need not establish standing or bring a new case forward. Instead, *any* member of the public can bring a motion—as petitioners, not as plaintiffs—to courts, based on their common law and First Amendment rights and the court's inherent supervisory powers. In this case, Movants have similarly *petitioned* the court for

access to the court's records. This is not a new case or controversy. It is a motion for access to records over which the court has supervisory control.

The whole point of the common law and First Amendment right is that the right of public access does not belong to the parties in a suit; it belongs to the public at large. Parties cannot be relied on to protect those rights. Nor can the parties negotiate away the public's right of access. It is the court's duty to protect those rights.

II. CONGRESS CANNOT REACH INTO THE CORE JUDICIAL POWER TO GRANT, DENY, OR IN ANY WAY INFLUENCE THE FISC'S SUPERVISORY POWER OVER ITS OWN OPINIONS.

The Government's response brief treats Congress's failure to provide a statutory cause of action for public access to the FISC's records as dispositive of the question of jurisdiction. In so doing, it ignores the fact that Congress *cannot* reach into the core judicial power to grant, deny, or in any way influence a court's supervisory power over its own opinions. To do so would be to run roughshod over basic separation of powers—an argument that I raised in the opening brief but the government never addressed in its response.

The fact that FISC is an Article III court, and not an Article I tribunal, matters tremendously. Am. Br. at 5-11; Am. App. 1-51. The Constitution vests "the judicial power of the United States" in Article III. U.S. Const. art. III, § 1. Unlike its English predecessors, the grant of power derives directly from the People. U.S. Const.

Preamble. Article III serves as a fully independent, co-equal branch of government. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219-23 (1995).

The purpose behind separating the judicial power from the legislative and executive powers was to prevent the concentration of power in one entity. *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933). As Madison famously penned, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist No. 47*, at 301 (James Madison) (Clinton Rossiter ed. 1961). Accordingly, the branches may "neither...invade the province of the other[s] [nor] control, direct or restrain the action[s] of the other[s]." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923). *See also Miller v. French*, 530 U.S. 327, 341 (2000).

The judicial power of the United States includes, at its core, the power to dispose of matters properly before the courts. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Once the judicial process begins, Congress cannot, as a constitutional matter, interfere. *See United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). Even after a decision is rendered, the legislature and the executive cannot invade the judicial realm. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); *Plaut*, 514 U.S. at 217-18.

Article III courts have inherent powers that stem from their role in administering justice. Among these powers is inherent supervisory power over judicial records. *Nixon*, 435 U.S. at 598. The paradigmatic case of a judicial record is a court's decision in any matter properly before it. At some level, all the courts *have* is their decisions.

The government's argument relies on the assumption that Congress *could* interfere—namely, that it could *strip* an Article III court of its inherent supervisory power over its own decisions. It cannot.

If Congress tried to strip the FISC of this power, then one of two statements would have to be true. Either the action would be an unconstitutional violation of separation of powers, or the court would not be an Article III court. It is well-recognized, however, that the FISC is an Article III court.[16] Congress intended FISC to be an Article III court. *See Foreign Intelligence Electronic Surveillance: Hearings Before the Subcomm. on Legis. of the H. Permanent Select Comm. on Intelligence,* 95th Cong. 26-31, 116 (1978). FISC meets the structural constitutional requirements: Article III courts are defined by the constitutional requirements of

[16] FISCR Am. Br. at 8; *In re Sealed Case*, 310 F.3d 717, 731-32 (FISA Ct. Rev. 2002) (per curiam); *United States v. Cavanagh*, 807 F.2d 787, 792 (9th Cir. 1987); *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 *3 (FISA Ct. Jan. 25, 2017); *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 486; *In re Kevork*, 634 F. Supp. 1002, 1014 (C.D. Cal. 1985), *aff'd*, 788 F.2d 566 (9th Cir. 1986). *See also* Am. Br. at 5.

unity, supremacy, and inferiority. James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 Harv. L. Rev. 643, 649 (2004). Appeal is from the FISC to FISCR to the Supreme Court. 50 U.S.C. § 1803(b), (k). The Constitution insulates Article III judges, who "shall hold their offices during good behavior and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office." U.S. Const. art. III, § 1. FISC judges are Article III judges. 50 U.S.C. § 1803(a)(1). Therefore, such action must be understood as unconstitutional.

The response brief never answers this argument, sidestepping the inherent authorities of the FISC that go to its core function as an Article III court. It is mere sophistry to say that a court has no subject matter jurisdiction over its own records. Congress did not interfere because it *cannot* interfere in a core Article III power.

III. MOVANTS HAVE A COMMON LAW AND FIRST AMENDMENT RIGHT OF ACCESS TO THIS COURT'S OPINIONS.

The law recognizes two separate rights of access to judicial proceedings and records: "a common law right to inspect and copy public records and documents, including judicial records and documents," and "a First Amendment right of access to criminal proceedings" and documents therein. *United States v. Bus. of Custer Battlefield Museum & Stores*, 658 F.3d 1188, 1192-96 (9th Cir. 2011) (internal quotations and citations omitted). Movants have a qualified right of access, under both rights, to the

four opinions being sought. As the common law right of access is relevant to the First Amendment analysis, as well as an independent basis on which Movants have a right of access, this part begins with that right, before addressing the application of the First Amendment right specifically to FISC opinions.

A. Movants have a common law right of access to the four opinions that can only be overcome based on articulable facts, known to the court, and not on the basis of hypothesis or conjecture.

From the earliest days of the Republic, courts have recognized that the public has a common law right of access to judicial records.[17] This right is foundational to our system of government. *See Ex parte Drawbaugh*, 2 App. D.C. 404, 406-07, 1894 WL 11944 (D.C. Ct. App. 1894) ("any limitation of the right to a copy of a judicial

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[17] *See Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 668 (1834); *Banks v. Manchester*, 128 U.S. 244, 253 (1888); *In re McLean*, 16 F. Cas. 237, 239 (C.C.S.D. Ohio 1879) (No. 8877); *In re Chambers*, 44 F. 786 (C.C.D. Neb. 1891); *Nash v. Lathrop*, 6 N.E. 559, 560-61, 563 (Mass. 1886). Federal courts have repeatedly recognized the long history of the common law public right of access to judicial records. *See, e.g.*, *Lugosch*, 435 F.3d at 119 ("The common law right of public access to judicial documents is firmly rooted in our nation's history."); *United States v. Amodeo (Amodeo I)*, 44 F.3d 141, 145 (2d Cir. 1995) ("The common law right of public access to judicial documents is said to predate the Constitution."); *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161 (3d Cir. 1993) ("The existence of [the common law] right, which antedates the Constitution and which is applicable in both criminal and civil cases, is now beyond dispute.") (internal quotations and citations omitted); *United States v. Mitchell*, 386 F. Supp. 639, 641 (D.D.C. 1975) ("[The] privilege of the public to inspect and obtain copies of all court records...reaches far back into our common law and traditions. Absent special circumstances, any member of the public has a right to inspect and obtain copies of such judicial records."). *See also* FISCR Am. Br. at 14-16 (discussing the history of the English common law public right of access to judicial records prior to the Founding).

record or paper, when applied for by any person having an interest in it, would probably be deemed repugnant to the genius of American institutions."). *See also Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976). The right serves numerous salutary functions.

> [It] promotes public confidence in the judicial system....As with other branches of government, the bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury, and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness.

Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 660 (3d Cir. 1991) (quoting *Littlejohn v. Bic Corp.*, 851 F.2d at 678). It also "promotes 'public respect for the judicial process' and helps to assure that judges perform their duties in an honest and informed manner." *Id.* (quoting *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 606 (1982)). "This common law right is not some arcane relic of ancient English law. To the contrary, the right is fundamental to a democratic state." *Mitchell*, 551 F.2d at 1258.

Accordingly, the Supreme Court has recognized the federal common law right "to inspect and copy public records and documents." *Nixon*, 435 U.S. at 597. The right evolved to address "many of the same purposes as are advanced by the first amendment." *Valley Broad. Co.*, 798 F.2d 1289, 1293 (9th Cir. 1986) (underlying action: *United States v. Spilotro,* CR–LV–83–11–LDG (D. Nev.). However, it "is

not of constitutional dimension, is not absolute, and is not entitled to the same level of protection afforded constitutional rights." 798 F.2d at 1293 (citing *Nixon*, 435 U.S. at 597-98). It cannot, for instance, be used for nefarious purpose or to subvert the administration of justice. *Nixon*, 435 U.S. at 598.

The Supreme Court has not identified what factors should be weighed to determine when access would be appropriate. Instead, it has stated that courts should consider "the interests advanced by the parties in light of the public interest and the duty of the courts." *Nixon*, 435 U.S. at 602. Such determination is "best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Id.* at 599. *See also In re Wash. Post*, 807 F.2d at 390; *Baltimore Sun v. Goetz*, 886 F.2d 60 (4th Cir. 1989)

1. The four opinions being sought are judicial documents to which the common law right of access attaches.

Before the common law right of access attaches, a court must ascertain whether the documents are "judicial documents" or "judicial records." *Amodeo I*, 44 F.3d at 145. "[T]he mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access." *Id.* The document must be "relevant to the performance of the judicial function and useful in the judicial process." *Id.* at 145-46. *See* also *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 412-413 (1st Cir. 1987) (extending the common law right of access to "materials on which a court relies in determining the litigants' substantive rights.");

Id. at 409 (applying the presumption to documents relied upon for an informed judgment and material to the court's deliberations); *San Jose Mercury News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1102 (9th Cir. 1999) (recognizing centrality of documents to which the common law right applies in reaching a final determination). In *Joy v. North*, the Second Circuit observed,

> At the adjudication stage...very different considerations apply. An adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny. We simply do not understand the argument that derivative actions may be routinely dismissed on the basis of secret documents.

Joy v. North, 692 F.2d 880 (2d Cir. 1982). In determining whether documents are material to the adjudication, the inquiry does not rest, in any form, on the nature of the court or the subject matter under consideration. The emphasis is on the *type of document*.

Judicial opinions lay at the heart of the judicial function. They are not just useful to the court in making a final determination, but they *are* the adjudication of the matter itself. They are absolutely necessary to the judicial process. What is being sought in this case are four judicial opinions. There can be no question that they are thus judicial records to which the common law right of access attaches.

2. The four opinions being sought are entitled to a strong presumption of access.

"Once the court has determined that the documents are judicial documents and that therefore a common law presumption of access attaches, it must determine the

weight of that presumption." *Lugosch*, 435 F.3d at 119. As explained by the Second Circuit,

> [T]he weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts. Generally, the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance.

United States v. Amodeo (Amodeo II), 71 F.3d 1044, 1049 (2d Cir. 1995). *See also Lugosch*, 435 F.3d at 119. As the matter moves towards final resolution, the burden increases to demonstrate why the judicial records related to that point in the adjudication should not be made public. An important tipping point towards the presumption occurs when judicial records attach to a dispositive motion, even where such motions have been filed under seal or protective order. *See, e.g.*, *Foltz v. State Farm Mut. Auto. Ins.*, 331 F.3d 1122, 1136 (9th Cir. 2003).

Judicial opinions are not just matters affecting adjudication, but the disposition of the matter itself. As the court observed in *Joy v. North*, the final decision of the court, absent exceptional circumstances, should be in the public domain. *Joy*, 692 F.2d at 880. For centuries, U.S. courts have recognized that a strong presumption of common law right of access attaches to opinions.

> The decisions and opinions of the justices are the authorized expositions and interpretations of the laws, which are binding upon all the citizens. They declare the unwritten law, and construe and declare the meaning of the statutes. Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to

> the opinions, and that it is against sound public policy to prevent this, or to suppress and keep from the earliest knowledge of the public the statutes, or the decisions and opinions of the justices. Such opinions stand, upon principle, on substantially the same footing as the statutes enacted by the legislature. It can hardly be contended that it would be within the constitutional power of the legislature to enact that the statutes and opinions should not be made known to the public .... The policy of the state always has been that the opinions of the justices, after they are delivered, belong to the public.

Nash v. Lathrop, 142 Mass. 29, 35-36 (1886) (cited by *Banks v. Manchester*, 128 U.S. 244, 253-54 (1888)).

The judiciary bears the responsibility of making its opinions publicly available. Without public access to judicial decisions, the law itself is incomplete:

> As ours is a common-law system based on the "directive force" of precedents, its effective and efficient functioning demands wide dissemination of judicial decisions .... Even that part of the law which consists of codified statutes is incomplete without the accompanying body of judicial decisions construing the statutes. Accordingly, under our system of jurisprudence the judiciary has the duty of publishing and disseminating its decisions.

Lowenschuss v. W. Publ 'g Co., 542 F.2d 180, 185 (3d Cir. 1976) (quoting Benjamin N. Cardozo, *The Nature of the Judicial Process* 20, 21-22 (1963)).

The FISC generally operates in secrecy; nevertheless, it is a court of public record. Its opinions create, interpret and apply the law, and they act as precedent. *See* FISCR Am. Br. at 6-7. Under the common law test, which is based purely on the type of document being sought, the four opinions being sought are entitled to a strong presumption of access.

3. Under the common law balancing test, the FISC is required to ensure that the withholding of any material is supported by articulable facts known to the court, and not on the basis of mere supposition.

Once establishing the weight of the presumption of access, the FISC must "balance competing considerations against it," *Amodeo II*, 71F. 3d at 1050; for "although the common law right creates a strong presumption in favor of access, the presumption can be overcome by sufficiently important countervailing interests." *San Jose Mercury News*, 187 F.3d at 1102. The circuits apply different tests, but even under the most lenient applicable test, at a minimum, the decision must be supported by articulable facts known to the court, and not on the basis of mere supposition.

At the most public access-committed end of the balancing spectrum is the "compelling circumstances" test, which is followed by the Second and Ninth Circuits. Under this approach, "only the most compelling circumstances should prevent contemporaneous public access to" judicial records. *In re Application of Nat'l Broad. Co.*, 635 F.2d at 952. *See also Valley Broad. Co.*, 798 F.2d at 1293; *San Jose Mercury News.*, 187 F.3d at 1102-03 (party seeking to block public access must articulate compelling reasons backed by specific factual findings). In *In re Application of Nat'l Broad. Co.*, the court relied upon *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) and *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539 (1976). 635 F.2d at 951-952. The court reasoned that because the common law right

of access advances the same matters protected by the First Amendment, the two rights of access have comparable bounds. *Id.* at 951-53. Elaborating on the factors that would be relevant to the balancing test, the Ninth Circuit emphasized,

> courts should consider all relevant factors, including: "the public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purpose or infringement upon trade secrets...After taking all relevant factors into consideration, the district court must base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture."

Foltz, 331 F.3d at 1135 (quoting and citing *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995)).[18] Part of the reason for the necessity of articulating facts on which the decision is based is that it allows "for meaningful 'appellate review of whether relevant factors were considered and given appropriate weight.'" *Id.* (citing *Hagestad*, 49 F.3d at 1434).

At the other end of the spectrum is a general balancing test that gives a defendant's competing fair trial rights precedence. *Belo Broad. Corp v. Clark*, 654 F.2d 423, 431 (5th Cir. 1981). This approach is loosely consistent with *Nixon*, in which the court implied that a balancing approach to access is required. *Nixon*, 435

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[18] The Ninth Circuit does not extend the right of access to search warrant materials during pre-indictment investigations. *See Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989) (note that the case held the same thing in regard to the Ninth Amendment public right of access). It also does not apply the right to materials filed under seal in *nondipositive* motions. *Phillips ex rel. Estates of byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002).

U.S. at 602-603. But the *Belo* court went further, being willing "to err, if err we must, on the side of generosity in the protection of a defendant's right to a fair trial before an impartial jury." *Belo Broad. Corp.*, 654 F.2d at 431. The Fifth Circuit's primary concern in constructing this test was to protect defendants' Sixth Amendment rights.

Three circuits (the Third, Seventh, and D.C. Circuits) adopt the middle ground: that the trial court start with "a strong presumption" in favor of access, which can be overcome only "on the basis of articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture." *Edwards*, 672 F.2d at 1294. *See also In re Application of Nat'l Broad. Co.*, 653 F.2d at 613 (only if "justice so requires" can the presumption be overcome); *United States v. Criden*, 648 F.2d 814, 823 (3d Cir. 1981) (recognizing a strong presumption of public access to evidentiary material); *United States v. Hubbard*, 650 F.2d 293, 317-22 (D.C. Cir. 1981) (laying out six factors for a court to consider in determining whether to make documents public). In *Edwards*, the court tried to follow *Nixon*, balancing the presumption against appropriate limitations:

> While we are unwilling to go so far as the Second Circuit's statement that only exceptional circumstances will justify non-access, we hold that there is a strong presumption in support of the common law right to inspect and copy judicial records. Where there is a clash between the common law right of access and a defendant's constitutional right to a fair trial, a court may deny access, but only on the basis of articulated facts known to the court, not on the basis of unsupported hypothesis or conjecture...We stress that it is vital for a court to clearly state the basis of its ruling, so as to permit appellate review of whether the relevant factors were considered and given appropriate weight.

Edwards, 672 F.2d at 1294 (footnote and citations omitted). In *Criden*, Judge Joseph Weis in his concurrence noted that some considerations that might swing the balance against access would be improper use of the documents, "including publication of scandalous, libelous, pornographic, or trade secret materials; infringement of fair trial rights of the defendants or third persons; and residual privacy rights." *Criden*, 648 F.2d at 830 (Weis, J., concurring).

In the context of the FISC, the balancing test applied by the Third, Seventh, and D.C. Circuits is the most applicable. At some level, a convincing argument could be made that the "compelling circumstances" test followed by the FISC is already met by the statutory requirements and the foreign intelligence specialization of the court. On the other hand, the approach followed by the Fifth Circuit, which grants the defendant extra weight, stems from the court's commitment ensuring that justice results from the progress of a trial. The types of matters that come before the FISC are generally different in kind. To the extent that Sixth Amendment concerns present, moreover, they can be addressed by the factors considered by the court in tailoring the test to each context.

We are thus left with the third approach, which states that where a strong presumption of public access exists, it can only be overcome based on articulable facts and not on general national security assertions. This approach is consistent with the district courts which also, with some regularity, confront matters involving

national security and classification. *See* Am. App. at 71-98. Further, it would ensure that the record is robust enough for the appellate court, should any re-examination be necessary.

The FISC will want to construct relevant areas to consider in determining whether to make all or portions of its opinions public. In *United States v. Hubbard*, the D.C. Circuit laid out several factors. 650 F.2d at 317-22. These elements are adaptable to the national security context. First, the FISC could consider the need for public access to the documents at issue. Application of this will differ from context to context, depending upon the subject matter of the issues being adjudicated and the broader context. To the extent that matters of law are involved, for instance, the court may shift the balance in favor of disclosure. On the other hand, to the extent that matters of sources and specific methods may be revealed, the balance may shift away from public access. Second, the FISC could look at the public use of the documents. To the extent that certain authorities are subject to renewal, for instance, then information about the statutory interpretation and the application of the law may be particularly important for the public discourse. Third, the FISC may look to whether and to what extent the government objects to the release of certain information. Instead of simply assuming that the full opinion should be withheld, the government would have to provide articulable facts about why certain information should be redacted. Fourth, the FISC should look at the extent to which the opinion impacts

constitutional rights, such as citizens' Fourth Amendment interests. Where there is a significant impact, the fulcrum would shift, creating a stronger presumption of disclosure. On the other hand, where matters may relate primarily to particular targets or selectors, for instance, there may be less of a necessity, and greater risk, in disclosure. Fifth, to the extent that release of all or portions of the opinions may prejudice ongoing investigations or trials, the Court would want to be more circumspect about making the information public.

The FISC, of course, could develop its own approach, such as that used in the D.C. Circuit to scrutinize classification assertions in the FOIA context. For instance, it could apply a test based on reasonableness, good faith, specificity, and plausibility. Am. Br. at 29. *See also Gardels v. CIA*, 689 F.2d 1100 (D.D.C. 1982). But whichever balancing test the court decides to adopt, it is clear that a strong presumption applies to release of the opinions. At a minimum, this means, under the common law right of access, that articulable facts and not conjecture must undergird the court's decision to withhold material.

B. Movants have a First Amendment right of access to the opinions, subject to redactions justified by the government to the court's satisfaction.

The public and press also have a "qualified First Amendment right to attend judicial proceedings and to access certain judicial documents." *Hartford Courant*

Co. v. Pellegrino, 380 F.3d 83, 91 (2d Cir. 2004).[19] In determining which records are entitled to a First Amendment right of access, the court must ascertain whether the judicial records "have historically been open to the press and general public" as well as whether "public access plays a significant positive role in the functioning of the particular process in question."[20] *Press-Enterprise II*, 478 U.S. at 1, 8. Under the

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[19] The First Amendment right of access attaches to numerous judicial records. *See, e.g., In re Providence Journal Co.*, 293 F.3d at 10-13 (applied to memoranda of law); *Phoenix Newspapers, Inc. v. U.S. Dist. Court for Dist. of Ariz.*, 156 F.3d 940, 948 (9th Cir. 1998) (transcripts of closed criminal proceedings); *Grove Fresh Distrib., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (noting that "[t]he First Amendment presumes that there is a right of access to proceedings and documents."); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 505 (1st Cir. 1989) ("after Richmond Newspapers, a blanket prohibition on the disclosure of records of closed criminal cases...implicates the First Amendment"); *In re Search Warrant*, 855 F.2d 569, 573 (8th Cir. 1988) (although "[t]he Supreme Court has not addressed the question whether the First Amendment right of public access extend to documents," "[w]e are persuaded that" it "does extend to the documents filed in support of search warrant applications."); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (documents filed in connection with summary judgment motion). This includes, most particularly, the final determination of matters before the court. "[I]t would be anomalous" for the First Amendment to apply to some judicial records but not to "the court's opinion itself. *Doe,* 749 F.3d at 267-68. *See also United States v. Mentzos*, 462 F.3d 830, 843 n.4 (8th Cir. 2006) (denying motion to file opinion under seal "because the decisions of the court are a matter of public record."). In light of the increasing emphasis on the public right of access as the proceedings and documents approach final adjudication, there is something distinctly odd about the government's argument that the First Amendment right of access does not attach to a final adjudication itself. The only arguments offered in support go to the classified nature of the FISC's proceedings, bypassing the doctrine's structural emphasis on approaching the final determination. I therefore here focus on the application of the test specifically to the context of the FISC.

[20] It is worth noting here that two different approaches have been adopted to ascertain whether "the public and the press should receive First Amendment protection in their

experience and logic tests, Movants are entitled to a First Amendment right of access to the four opinions.

1. The four opinions meet the three possible ways in which "experience" can be analyzed: by common law, by the history of that particular court, and by the history of other, similarly-situated courts.

In determining experience, there are three possible questions that could be posed: how the documents in question are treated based on the common law right of access, how this particular court treats such documents, and how similarly-situated courts have treated such documents. The Government ignores the first and last questions, instead focusing on the second, and arguing that based on statute and practice, FISC proceedings and documents are not available to the public and, therefore, the opinions in question fail the experience prong of *Press-Enterprise II*. That argument is based on an antiquated understanding of FISC opinions and their availability in the public domain. It also bypasses the other two questions, which are certainly

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attempts to access certain judicial documents." *Hartford Courant Co.*, 380 F.3d at 92. The first is the experience and logic test from *Press-Enterprise II*, addressed above. The second, which also derives from *Press-Enterprise II*, examines "the extent to which the judicial documents are 'derived from or [are] a necessary corollary of the capacity to attend the relevant proceedings.'" *Lugosch*, 435 F.3d at 120 (quoting *Press-Enterprise II*, 478 U.S. at 93). In light of the closed nature of most FISC proceedings, as established by Congress, this brief focuses on the first approach. It is here that the distinction I drew in my opening brief to the FISCR between "proceedings" and judicial opinions comes directly into play. *See* FISCR Am. Br. at 8-9. **Judicial opinions are *not* a transcript of what occurred during a particular proceeding. They are a final judgment issued by the court on the matter before it.**

probative, if not dispositive of whether the experience prong is met by the opinions in question.

In regard to the first question, courts "have generally invoked the common law right of access to judicial documents in support of finding a history of openness." *Press-Enterprise II*, 478 U.S. at 8. *See also In re Application of N.Y. Times Co. for Access to Certain Sealed Court Records*, 585 F. Supp. 2d 83, 92 (D.D.C. 2008) (relying on the existence of a common law right of access in establishing historical evidence for finding a First Amendment right of access). As established above, the common law right of public access clearly applies to judicial opinions.

In relation to the second question, although the government has argued that FISC proceedings are secret and that orders submitted to the FISC are sealed, it has overlooked a critical point: FISC opinions typically are *not*, as a class, hidden from public view. In advancing its argument, the government relies in part on the court's 2007 decision. On that occasion, Judge Bates relied on "an unquestioned tradition of secrecy, based on the vitally important need to protect national security" to deny Movants, on the merits, a First Amendment right of access. *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 490-91.

This case can be distinguished in two critical ways. First, Movants in the 2007 motion were seeking access to "court orders and government pleadings" related to section 702. *Id.* at 485. Judge Bates noted that "The requested records are being

maintained under a comprehensive statutory scheme designed to protect FISC records from routine public disclosure." *Id.* at 491. Movants in this case, however, are not seeking access to court orders and government pleadings. They are seeking access to four FISC opinions, which are different in kind than underlying applications, pleadings, and orders.

Second, at the time Judge Bates issued his opinion, *there were only 3 FISC opinions in the public domain.*[21] Over the past decade, it has become increasingly common for FISC opinions to be released. There are now **more than 60 FISC opinions and 115 orders publicly available** in full or partially-redacted form.[22] The nature of the court's work, moreover, has shifted. From issuing only one opinion prior to 2001, over the past seventeen years, the court increasingly has had to address

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[21] *See In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002); *In re All Matters Submitted to Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611 (FISA Ct. 2002) (reversed by *In re Sealed Case*); *In re Application of the United States for an Order Authorizing the Physical Search of Nonresidential Premises and Personal Property* (FISC Ct. June 11, 1981), *reprinted in* S. Rep. No. 97-280, at 16-19 (1981).

[22] *See* FISCR Am. App. Tab A; Opinion, *In re Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review*, No. FISCR 18-01 (FISA Ct. Rev. Mar. 16, 2018) (per curiam) http://www.fisc.uscourts.gov/sites/default/files/FISCR%2018-01%20Opinion%20March%2016%202018.pdf; Order Amending the Rules of Procedure for the Court, No. 18-01 (FISA Ct. Rev. May 3, 2018), http://www.fisc.uscourts.gov/sites/default/files/FISCR%2018%2002%20180503.pdf; Order, *In re: Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review*, No. FISCR 18-01 (FISA Ct. Rev. Feb. 26, 2018), http://www.fisc.uscourts.gov/sites/default/files/FISCR%2018%2001%20WCB%20Order%20Feb%2026%202018.pdf.

matters of law and statutory construction in reasoned determinations on matters before it. The experience of the court is shifting: not only is it writing more opinions, but these opinions, albeit in redacted form, are publicly available. This suggests that even when the question focuses exclusively on the FISC, the experience prong is satisfied.

Courts, however, do not look simply to the experience of the particular court. Instead, they ask the third question, which applies the experience test "to that type or kind of hearing throughout the U.S." *El Vocero de Puerto Rico (Caribbean Int'l News Corp.) v. Puerto Rico*, 508 U.S. 147, 150 (1993) (per curiam) (*quoting Rivera-Puig v. Garcia Rosario*, 983 F.2d 311, 323 (1st Cir. 1992)). Even *Press-Enterprise II*, in evaluating California pre-trial hearings, for instance, looked both to the practices in other states as well as to other types of hearings—including the probable cause hearing in Aaron Burr's 1807 trial for treason. *Press-Enterprise II*, 478 U.S. at 10-11. Courts even look to the experience of similarly-situated courts prior to the founding and in different countries. In *Hartford Courant Co.*, the Second Circuit, for example, looked to "Early English usage," *Tomlins's Law Dictionary of 1809*, and "the first years of the Republic" to ascertain whether clerks generally maintained docket sheets for purposes of the historical prong. *Hartford Courant*, 380 F.3d at 94. The First Circuit suggested that "[t]radition is not meant...to be construed [] narrowly." *In re Boston Herald, Inc.*, 321 F.3d 174, 184 (1st Cir. 2003). The court

thus looked "also to analogous proceedings and documents of the same type or kind." *Id.* (internal quotations omitted).

In the immediate case, there are two possible points of comparison within the United States and within the past decade, both of which unquestionably place the four opinions being sought within the reach of the First Amendment. First, the other three specialized Article III courts (the U.S. Court of Appeals for the Federal Circuit, the U.S. Court of International Trade, and the Judicial Panel on Multidistrict Litigation), which are all courts of record, routinely make their opinions readily available. *See* Am. App. A. As an historical matter, moreover, *every single one of the now-defunct Article III specialized courts* (the four Customs Courts, two Emergency Courts of Appeals, Commerce Court, Special Railroad Court, and Court of Claims) likewise published their opinions. *See* Am. App. A.

Second, without question, all *other* Article III courts routinely make their opinions publicly available. The common law system, and our democratic institutions of government, depend upon it. *See* FISCR Am. Br. at 24-27. *See also* Motion of the American Civil Liberties Union et. al for the Release of Court Records at 13, *In Re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, Misc. No. 13-08) (FISA Ct. Nov. 7, 2013).

With the above considerations in mind, Movants easily meet the experience prong of *Press-Enterprise II*.

2. Public access to the four opinions also meets the logic prong, playing "a significant positive role" in the functioning of the judicial process.

The logic prong of *Press-Enterprise II* requires that public access to the judicial records play "a significant positive role" in the functioning of the judicial process. *Press-Enterprise II*, 478 U.S. at 1, 9, 11. *See also Globe Newspaper Co.*, 457 U.S. at 605-7; *Wash. Post v. Robinson*, 935 F.2d 282, 287-92 (D.C. Cir. 1991). As has already been well-established, access to judicial opinions in general plays a critical function in the United States. FISCR Am. Br. at 24-27. Access to *this court's opinions, in particular*, is particularly vital. FISC opinions address weighty and important matters of constitutional and statutory law, which daily impact citizens' rights. They also demonstrate the extent to which the executive complies with legal constraints and how efficiently or well agencies operate. FISC opinions address novel and significant applications of the law. These are matters of vital public importance.

a. FISC opinions address weighty matters of law.

Congress created the FISC to issue orders for domestic electronic surveillance undertaken for foreign intelligence purposes. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801–1811 (2012). After September 11, 2001, the court's role evolved, forcing the

Court to issue opinions on weighty matters of law. FISCR Am. Br. at 4-6. As a result, the FISC routinely engages in Fourth Amendment analysis,[23] and rules on critically-important First and Fifth Amendment questions.[24] It interprets what the statutory language in FISA means, and, in so doing, establishes what the law is. Both the

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[23] *See, e.g.,* Memorandum Opinion and Order, *[REDACTED]* (FISA Ct. Apr. 26, 2017), https://www.dni.gov/files/documents/icotr/51117/2016_Cert_FISC_Memo_Opin_Order_Apr_2017.pdf; Memorandum Opinion and Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [REDACTED]*, No. BR 13-158 (FISA Ct. Oct. 11, 2013) (McLaughlin, J.), http://www.fisc.uscourts.gov/sites/default/files/BR 13-158 Memorandum-1.pdf; Amended Memorandum Opinion and Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [REDACTED]*, No. BR 13-109 (FISA Ct. Aug. 29, 2013), http://www.fisc.uscourts.gov/sites/default/files/BR 13-109 Order-1.pdf; Memorandum Order and Opinion, *[REDACTED]* (FISA Ct. 2012), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2007%2006.13.17%20--%20REDACTED%20w%20replacemnt%20page.pdf; Memorandum Opinion, *[REDACTED]*, 2011 WL 10945618 (FISA Ct. Oct. 3, 2011), https://www.dni.gov/files/documents/0716/October-2011-Bates-Opinion-and Order-20140716.pdf; Memorandum Opinion and Order, *[REDACTED]* (FISA Ct. 2010), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2013%2006.13.17%20--%20REDACTED.PDF.

[24] S*ee, e.g.*, Opinion, *In re Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review*, No. FISCR 18-01 (FISA Ct. Rev. Mar. 16, 2018) (per curiam) http://www.fisc.uscourts.gov/sites/default/files/FISCR%2018-01%20Opinion%20March%2016%202018.pdf (First Amendment); Opinion on Motion for Disclosure of Prior Decisions, *[REDACTED]* (FISA Ct. 2014), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2012%2006.13.17%20--%20REDACTED.PDF (Fifth Amendment).

courts and the executive look to FISC opinions as precedent. And its decisions impact the rights of millions of Americans, daily. *See* FISCR Am. Br. at 4-8.

b. FISC opinions demonstrate how the executive branch implements the law and the extent to which the government fails to comply with the law.

In addition to approving targeting and minimization procedures, "the Court must examine the manner in which the government has implemented them."[25] To fulfill its responsibility, the Court enquires into government practice, requires the government to correct any material facts, and demands that the government disclose any instances of non-compliance to the court. *See* FISC R. of P. 13(a), (b). These mechanisms reveal government actions that fall outside statutory and constitutional bounds. In this capacity, **FISC opinions reveal numerous instances where the government has acted outside statutory and constitutional constraints.**

From 2011 to 2016, for instance, NSA minimization procedures prohibited the use of U.S. person identifiers to query upstream collection. In October 2016, the NSA informed the court that it had been violating "that prohibition, with much greater frequency than had previously been disclosed." Mem. Op. and Order at 19, *[REDACTED]* (FISA Ct. Apr. 26, 2017) (Collyer, J.),

[25] Memorandum Opinion and Order at 11, *[REDACTED]* (FISA Ct. 2009), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2011%2006.13.17%20--%20REDACTED.PDF (Hogan, J.) (opinion released on June 13, 2017 in relation to FOIA request case, *Elec. Frontier Found. v. DOJ*, 16-cv-02041 (N.D. Cal.).

https://www.dni.gov/files/documents/icotr/51117/2016_Cert_FISC_Memo_Opin_Order_Apr_2017.pdf. Because of the Fourth Amendment issues at stake, the court could not confirm that the 2016 certifications complied with the statutory and constitutional requirements, requiring an extension for the NSA to obtain information necessary to make this determination. Judge Rosemary Collyer raised concern about the NSA's "'lack of candor'" and the possibility that the agency's actions fell outside statutory constraints and the Constitution. *Id.*

On another occasion, responding to unauthorized PR/TT collection, the court appeared troubled at misinformation provided to the FISC:

> The court...specifically directed the government to explain whether [the] unauthorized collection involved the acquisition of information other than the approved Categories [REDACTED] In response, the Deputy Secretary of Defense stated that the 'Director of NSA has informed me that at no time did NSA collect any category of information ...other than the [REDACTED] categories of meta data' approved in the [REDACTED] Opinion, but also noted that the NSA's Inspector General had not completed his assessment of this issue. [REDACTED]...As discussed below, **this assurance turned out to be untrue**.

Mem. Op. at 11, *[REDACTED]*, No. PR/TT (FISA Ct. (date redacted)) (Bates, J.), https://www.dni.gov/files/documents/1118/CLEANEDPRTT%202.pdf (emphasis added). Judge John Bates contemplated the reason for the misrepresentation:

> "On the record before the Court, the most charitable interpretation possible is ...non-communication with the technical personnel directly responsible [REDACTED] resulting from poor management. However, given the duration of this problem, the oversight measures ostensibly taken since [REDACTED] to detect overcollection, and the extraordinary fact that NSA's end-to-end review overlooked unauthorized acquisitions that were documented in

virtually every record of what was acquired, it must be added that **those responsible for conducting oversight at NSA failed to do so effectively**."

Id. at 21-22.

In 2008, the FISC re-authorized bulk telephony metadata collection. Primary Order at 1-2, *In re Production of Tangible Things from [REDACTED],* No. BR 08-13 (FISA Ct. Mar. 2, 2009), https://www.dni.gov/files/documents/section/pub_March%202%202009%20Order%20from%20FISC.pdf. Because it would result in NSA obtaining the records of U.S. persons inside the United States, not themselves the subject of any investigation, the Court ordered that access to the archived data would *only* occur: "when NSA has identified a known telephone identifier for which, based on the factual and practical considerations of everyday life on which reasonable and prudent persons act, there are facts giving rise to a reasonable, articulable suspicion that the telephone identifier is associated with [REDACTED]." *Id.* at 3.

In January 2009, the government informed the court that for more than two years (May 2006 to January 2009) the NSA had not been complying with the court order. To contrary, "only 1,935 of the 17,835 identifiers on the alert list were RAS-approved." *Id.* at 4 n.2. "Thus, since the earliest days of the FISC-authorized collection of call-detail records by the NSA, the NSA [had] on a daily basis" accessed the metadata in violation of the minimization procedures. *Id.* at 4-5. For the

FISC, the government's explanation for its actions was "illogical" and "strain[ed] credulity." *Id.* at 5.

In a section of his opinion labeled, "Misrepresentations to the Court," Judge Reggie Walton spelled out the inaccurate descriptions of the alert process submitted by the NSA to the Court. The agency had stated that it was only after "concluding that each of the telephone numbers satisfied the [RAS standard] was a number added to the list. *Id.* at 7. This turned out to be untrue, despite repeated representations to the court. *Id.* at 8. The court recognized that the "vast collection program" had been "premised on a flawed depiction of how the NSA uses BR metadata." *Id.* at 10-11. "This misperception by the FISC existed from the inception of its authorized collection in May 2006, buttressed by repeated inaccurate statements made in the government's submissions, and despite a government-devised and Court-mandated oversight regime." The court concluded, "The minimization procedures...approved and adopted as binding by the orders of the FISC **have been so frequently and systematically violated** that it can fairly be said that this critical element of the overall BR regime has never functioned effectively." *Id.* at 11. The court stated,

> in light of the scale of this bulk collection program, the Court must rely heavily on the government...To approve such a program, the Court must have every confidence that the government is doing its utmost to ensure that those responsible for implementation fully comply with the Court's orders. The Court no longer has such confidence.

Id. at 12. *See also id.* at 8 ("The court cannot say with assurance that there is no reasonable expectation that the government will resume the practices at issue.")

How the government exercises its power, whether it does so in violation of the law, and the reason that such failures occur (e.g., because an agency lies to the court, makes an honest a mistake, or is poorly managed), are matters of profound public interest.[26] Preventing this information from coming to light means that the FISC, and

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[26] The examples provided in the text are not isolated incidents. The opinions in the public domain reveal numerous instances where the government has acted outside legal constraints for months, and even years at a time, with a direct impact on citizens' rights. For instance, the government has collected citizens' communications without legal authorization—a matter of great public interest, as "Information that is never acquired in the first place cannot be misused." Opinion at 15, *[REDACTED]* (FISA Ct. est. 2003) (Baker, J.), https://www.dni.gov/files/documents/icotr/EFFFOIA-Jan-31-Doc-2.pdf. *See, e.g.*, Mem. Op. and Order at 11, *[REDACTED]* (FISA Ct. 2009) (Hogan, J.), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2011%2006.13.17%20--%20REDACTED.PDF ("NSA problems principally involve analysts improperly acquiring the communications of U.S. Persons."); Mem. Op., *[REDACTED]*, 2011 WL 10945618 (FISA Ct. Oct. 3, 2011), https://www.dni.gov/files/documents/0716/October-2011-Bates-Opinion-and Order-20140716.pdf (NSA made material misrepresentation of upstream collection under 702 and prior PAA authorities,_resulting in collection of tens of thousands of unauthorized communications over a period of years; Op. and Order, *[REDACTED]*, Nos. [REDACTED] (FISA Ct. May 13, 2011), https://www.dni.gov/files/documents/icotr/EFF-FOIA-Jan-31-Doc-10.pdf (unauthorized surveillance under traditional FISA/electronic surveillance (50 U.S.C. §§1801-1812) ranged from 15 months to three years ;and had submitted applications with false statements in it); Mem. Op. at 11 n.7, *[REDACTED]* (FISA Ct. Aug. 30, 2013) (Walton, J.), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2003%2006.13.17%20--%20REDACTED.PDF (failure to de-task certain facilities no longer eligible for Section 702 collection, a failure that "likely resulted in NSA's acquisition of communications falling outside the scope of Section 702.")

The opinions show that the government has failed to abide by the targeting procedures. *See, e.g.,* Mem. Op. at 10, *[REDACTED]* (FISA Ct. 2010) (Bates, J.), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2002%2006.13.17%20--%20REDACTED_updated.pdf. The government has also failed to properly apply minimization procedures. *See, e.g.,* Mem. Op. and Order at 11, FISC, Judge Hogan, 2009, released June 13, 2017 in EFF v. DOJ 16-cv-02041, doc. 5), at 11; Mem. Op. at 11 n.7, *[REDACTED]* (FISA Ct. Aug. 30, 2013) (Walton, J.), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2003%2006.13.17%20--%20REDACTED.PDF; Mem. Op., *[REDACTED]*, 2011 WL 10945618 (FISA Ct. Oct. 3, 2011), https://www.dni.gov/files/documents/0716/October-2011-Bates-Opinion-and Order-20140716.pdf.

At times not only has the government neglected to purge information improperly obtained, but it has tried to keep and use the data. *See e.g.* Mem Op. at 9-10, *[REDACTED]* (FISA Ct. 2010) (Bates, J.), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2002%2006.13.17%20--%20REDACTED_updated.pdf; Opinion and Order, *[REDACTED]*, Nos. [REDACTED] (FISA Ct. May 13, 2011), https://www.dni.gov/files/documents/icotr/EFF-FOIA-Jan-31-Doc-10.pdf. Further, it has engaged in illegal and potentially unconstitutional query of communications. *See, e.g.,* Mem. Op. and Order at 19, *[REDACTED]* (FISA Ct. Apr. 26, 2017) (Collyer, J.), https://www.dni.gov/files/documents/icotr/51117/2016_Cert_FISC_Memo_Opin_Order_Apr_2017.pdf.

The government has accessed and disseminated citizens' communications in violation of the law. *See, e.g.,* Mem. Op. at 17, *[REDACTED]*, No. PR/TT [REDACTED] (FISA Ct.) (Bates, J.), https://www.dni.gov/files/documents/1118/CLEANEDPRTT_2.pdf; Memorandum Opinion at 17-18, *[REDACTED]*, No. PR/TT [REDACTED] (FISA Ct.) (Bates, J.), https://www.dni.gov/files/documents/1118/CLEANEDPRTT_2.pdf; Supplemental Opinion and Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 09-15 (FISA Ct. Nov. 5, 2009) (Walton, J.), http://www.dni.gov/files/documents/section/pub_Nov 5 2009 Supplemental Opinion and Order.pdf.

In addition, the government has at times failed to inform the Court of its noncompliance, as required under the FISC Rules of Procedure. *See, e.g.,* Mem. Op. at 10, *[REDACTED]* (FISA Ct. 2010) (Bates, J.),

only the FISC, can monitor government action. But the FISC is not equipped to pass new laws, which are precisely what is required to address the problems that persist. For that, a robust, public discussion is necessary.

These problems are not going away. As this court observed,

> it is clear...that NSA's efforts to comply with the terms of FISA authorizations, under Section 1881a and otherwise, remain a work in progress, and the Court will continue to monitor the state of compliance, both as part of its oversight function regarding prior approvals...and insofar as it may bear on requests for future authorizations.

Mem Op. at 11-12, *[REDACTED]* (FISA Ct. 2010) (Bates, J.), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2002%2006.13.17%20--%20REDACTED_updated.pdf.

c. FISC opinions address novel and significant interpretations of statutory provisions.

The response brief laments the fact that there are currently five motions pending before the court asking for access to FISC's records. Gov't Resp. Br. at 4-6. The reason requests are being made for FISC opinions is in part because, as discussed above, they are matters of law that daily impact the rights of millions of Americans.

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https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2002%2006.13.17%20--%20REDACTED_updated.pdf.; Mem. Op. and Order at 12-14, *[REDACTED]* (FISA Ct. 2009) (Hogan, J.), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2005%2006.13.17%20--%20REDACTED.PDF.

These are all matters of great public interest, which go directly to satisfying the logic prong of *Press-Enterprise II*.

But it is also a product of the government's making: over the past decade, the government has, repeatedly, asked this court for new interpretations of the law that push statutory and constitutional bounds.

To some extent, the novel questions of law that have presented are simply a matter of efforts by the government to take advantage of new technologies and to perform its functions more efficiently. In 2007, for instance, DOJ applied for permission to implement an early warning system to alert the government to the presence of foreign powers and agents of foreign powers in the United States, noting that the new procedures "would enable the Government to direct electronic surveillance with a much higher degree of speed and agility than would be possible through the filing of individual FISA applications." Memorandum of Law in Support of Application for Authority to Conduct Electronic Surveillance of [REDACTED] at 12, *In re [REDACTED]*, No. [REDACTED] (FISA Ct. Dec. 12, 2006), https://www.documentcloud.org/documents/1379006-large-content-fisa-order-documents.html.

But, to some extent, they also are a product of efforts to expand government collection capabilities in ways that stretch statutory provisions. For instance, the government crafted a new definition of "facility" that significantly altered the volume of communications that could be collected. *See* Order and Memorandum Opinion, *In re [REDACTED]*, No. [REDACTED] (FISA Ct. Apr. 3, 2007),

https://www.dni.gov/files/documents/1212/CERTIFIED COPY - Order and Memorandum Opinion 04 03 07 12-11 Redacted.pdf. It sought to broaden pen register/trap and trace to include bulk collection. *See* Op. and Order at *1-2, *[REDACTED]*, No. PR/TT [REDACTED] (FISA Ct.) (Kollar-Kotelly, J.), (FISCR Am. App. F 266). *See also* Primary Order, *[REDACTED]*, No. PR/TT [REDACTED] (FISA Ct.) (Walton, J.), (FISCR Am. App. G 576). It convinced the court to allow it to collect information not just to or from selectors, but also "about" them. *See* Order at *12, *In re [REDACTED]*, No. [REDACTED] (FISA Ct. May 31, 2007) (Vinson, J.), (FISCR Am. App. G 525). And it argued that the NSA, not the court, makes probable cause findings for selectors. *See* Order and Mem. Op., *In re [REDACTED]*, No. [REDACTED] (FISA Ct. Apr. 3, 2007), (FISCR Am. App. G 554).

At times, the FISC has been forced to push back against government requests and statutory interpretations. It has raised concern about the government's "expansive interpretation of the relevant statutory provisions." Suppl. Op. and Amend. to Primary Order at *3-4, *[REDACTED]* (FISA Ct.) (Bates, J.), (FISCR Am. App. G 614). In *EFF v. DOJ*, the court rejected the FBI's standard minimization procedures (SMP) interpretation, stating "The technique in question results in an overbroad acquisition of communications." Order at 24, *[REDACTED]*, (FISA Ct.), https://www.dni.gov/files/documents/icotr/EFF-FOIA-Jan-31-Doc-6.pdf. On

another occasion Judge John Bates reflected on the implications of government interpretations, stating,

> The current application relies on this prior framework, but also seeks to expand authorization in ways that test the limits of what the applicable FISA provisions will bear. It also raises issues that are closely related to serious compliance problems that have characterized the government's implementation of prior FISC orders.

Memorandum Opinion, *[REDACTED]*, No. PR/TT [REDACTED] (FISA Ct.) (Bates, J.), https://www.dni.gov/files/documents/1118/CLEANEDPRTT 2.pdf).

The logic test requires that the court consider whether the release of the judicial documents will have a significant positive role. Because of their overwhelming importance for constitutional doctrine, their direct impact on citizens' rights, their revelation of government failure to comply with the law, and their efforts to apply the law to new and significant areas, FISC opinions meet the logic test of *Press-Enterprise II.*

C. Under the First Amendment, the FISC must ensure that the withholding of any opinion or portion thereof is narrowly tailored to meet the demands of national security.

Once the First Amendment right of access attaches, there is a strong presumption of access; however, it is *not* absolute. "Broad and general findings by the trial court...are not sufficient to justify closure." *In re N.Y. Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987). A First Amendment right of access can be denied only by proof of a "compelling governmental interest" and proof that the denial is "narrowly tailored

to serve that interest." *Globe Newspaper,* 457 U.S. at 606-07. *See also Press-Enterprise v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 510 (1984) (quoting and citing *Globe Newspaper Co.*, 457 U.S. at 606-07); *United States v. Smith*, 776 F.2d 1104 (3d Cir. 1985); *In re N.Y. Times Co.*, 828 F.2d at 116 ("[D]ocuments may be sealed if specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest.") (internal quotes omitted).

There is no question that U.S. national security is a compelling governmental interest. Just because FISC opinions deal with classification, national security matters, or interpretations of FISA, however, is not enough to put them beyond public reach.

In 2008, newspapers sought access to search warrants, warrant applications, supporting affidavits, court orders, and returns for all warrants that the government requested in relation to its anthrax investigation. *In re Application of N. Y. Times Co. for Access to Certain Sealed Court Records*, 585 F. Supp. 2d at 88. Judge Royce C. Lamberth, also (former) presiding judge of the FISC, held that there was a First Amendment qualified right of access to the material. While the government had a compelling interest in not disclosing the identity of informants, that interest could be protected simply by redacting the names. 585 F. Supp. 2d at 91.

The response brief fails to address the myriad cases in which the courts push back against executive branch classification decisions. Numerous opinions detail the scope and legality of intelligence collection under FISA. *See, e.g.*, *United States v. U.S. Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297 (1972) (considering constitutionality of warrantless wiretapping program conducted by the government to "protect the national security"); *United States v. Duggan*, 743 F.2d 59, 72-74, 77 (2d Cir. 1984) (analyzing FISA's original "purpose" requirement, and holding that "FISA does not violate the probable cause requirement of the Fourth Amendment"); *Jewel v. NSA*, 673 F.3d 902, 905 (9th Cir. 2011) (reversing dismissal of lawsuit challenging "widespread warrantless eavesdropping in the United States"); *In re Application for Pen Register & Trap/Trace Device with Cell Site Location Auth. (In re PR/IT with CSLI),* 396 F. Supp. 2d 747, 748-49 (S.D. Tex. 2005) (refusing government request to seal opinion "because it concerns a matter of statutory interpretation" and the issue explored "has serious implications for the balance between privacy and law enforcement, and is a matter of first impression").

It is entirely feasible for this court to determine what materials should be withheld and which matters of law should be published. FISC's own rules of procedure support this fact. *See* FISC R. of P. 62. But in making its decisions, the FISC must meet the demands of the First Amendment public right of access, which requires specificity and has a strong presumption in favor of public access. The FISC is not

alone: although the response brief does not directly respond, as noted at length in the amicus opening brief, Courts regularly subject executive branch national security and classification assertions to scrutiny.

The court itself has already successfully applied the First Amendment right of public access test. In 2013, after a third party motion for FISC records and under direction from the court, the government identified a single opinions as being neither subject to FOIA nor to FISC's 62(a) process. Submission of the United States, filed on Oct. 4, 2013, at 2, *In re Orders of This Court Interpreting § 215 of the Patriot Act*, Misc. No. 13-02, 2013 WL 5460064 (FISA Ct. Sept. 13, 2013), *8 (Saylor, J.). Initially, the DOJ determined that the opinion should be withheld in full. Second Submission of the United States, filed on Nov. 18, 2013, at 2. The court disagreed. Judge Saylor wrote "the government has provided no explanation of this conclusion," and ordered the DOJ to submit "a detailed explanation of its conclusion that the Opinion is classified in full and cannot be made public, even in a redacted form." Order issued on Nov. 20, 2013, at 2. The court directed DOJ to provide an unclassified or redacted version which, "at a minimum, must clearly articulate the government's legal arguments." *Id.*

The government responded to the court's order, saying that the reason the material could not be made publicly available was because it was pertinent to an ongoing criminal case. Submission of the United States, filed on Dec. 20, 2013, at

2–3. Nevertheless, the government offered to publish a redacted version. *Id.* The court was not satisfied. It questioned the breadth of suggested redactions and "members of the Court's legal staff met with attorneys" from NSD in January 2014 to convey the concerns. *In re Orders of this Court Interpreting Section 215 of Patriot Act*, Aug. 7, 2014, *3.

The government then filed a second submission Feb. 6, 2014, stating, "'[i]n response to questions from the Court's staff, and upon further review of the [Feb. 19, 2013] Opinion, the government has determined that certain additional information in the Opinion is not classified and the release of that additional information would not jeopardize the ongoing investigation.'" *In re Orders of this Court Interpreting Section 215 of Patriot Act*, Aug. 7, 2014, *3. The court accepted the Second Redaction Proposal. *Id.*

That process met the individualized test required by the First Amendment and laid out by Movants—namely, that the material withheld: (a) identifie[d] an individual who was the subject of an ongoing counterterrorism investigation or discussed in detail certain activities of the subject; (b) describe[d] the records or other tangible things that the government sought to have produced in the related Section 215 application, including the identity of the producing party and how those records relate to the subject; and (c) identifie[d] certain associates of the subject and describe[d] certain relevant activities of those associates; and describe[d] specific

intelligence sources and methods, as well as particular information obtained through those sources and methods." *4. The court was further satisfied that "compelling government interests—specifically, the strong government interest in effectively pursuing an ongoing counterterrorism investigation and protecting undisclosed intelligence sources and methods—support[ed] the withholding of information in the February 19, 2013 Opinion." *4. In addition, "each proposed redaction within the text of that opinion [was] narrowly tailored to protect those compelling government interests." *4. The court ensured that the legal reasoning was reasonably "segregated from properly classified facts." *5. And the end result, according to the court, did not confuse or obscure the decision. To the contrary, it enhanced "public understanding of the court's reasoning as to the legal issues presented." *5. The case demonstrated, in vivid relief, that it is not only plausible for the FISC to apply the First Amendment public right of access to FISC opinions, but that it is beneficial for the court to do so.

IV. THE FLOODGATES ARGUMENT FLOATING IN THE BACKGROUND IS A RED HERRING.

In the background section of the Government's response brief, hints of the "floodgates of litigation" argument infuse the discussion of efforts underway to obtain FISC opinions. Gov't Resp. Br. at 4-5 ("this Court's docket has swollen to include a new category of cases in which it is being asked by parties to adjudicate

requests for the release of records.") (internal quotations and citations omitted). If the FISC were to find that a First Amendment right of public access applies to their opinions, such an argument might run, then *anyone* could ask to see them. The FISC is a court of limited resources, and the result could be overwhelming. This argument it a red herring. It, and three critical rebuttals, should be brought to the surface.

First, *of course* the public wants to know what these opinions say. This is *precisely* the kind of information that the public *ought* to know. They should know what the law is, how it is being interpreted, and how the government implements its measures when individual rights are on the line. It is distinctly the province of the Courts to say what the law is. *Marbury*, 5 U.S. at 177. And it is the solemn responsibility of the judiciary to provide this information to the People. Without that, there is no rule of law.

Second, by making its opinions publicly available, the FISC fulfills a number of important interests, foremost amongst which is ensuring its own legitimacy. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Press-Enterprise II*, 478 U.S. at 13 (quotations omitted). The administration of justice must not just be fair but be perceived to be fair. *Globe Newspaper*, 457 U.S. at 606. "For a civilization founded upon principles of ordered liberty to survive and flourish, its members must share the conviction that they are governed equitably. That necessity...mandates a

system of justice that demonstrates the fairness of the law to our citizens." *Richmond Newspaper*, 448 U.S. at 594.

Courts are traditionally completely open.[27] The fact that the FISC operates in so much secrecy thus places it in a precarious position. *See United States v. Aref*, 533 F.3d 72, 83 (2d Cir. 2008) ("Transparency is pivotal to public perception of the judiciary's legitimacy and independence."). One hardly need elaborate in the current environment how important this is in staving off the politicization of the judiciary and allowing the court to focus on the administration of justice. The FISC further protects its independence by pushing back on efforts by the executive to control judicial records. The judiciary has staved off such efforts in the past. In the 19th century case of *Drawbaugh*, for instance, the Patent Office moved the court to preserve the files in secrecy. The court responded,

> [I]t must be recollected that the Patent Office is a branch of one of the executive departments of the government, and that this is a public court of record, governed by very different principles and considerations, in respect to its records and proceedings, from those that apply to an executive department. The rules of the Patent Office have no application to the proceedings of this court...They may be very necessary and proper for conducting the affairs of that office...but it does not follow that similar rules should be adopted and enforced as applicable in an appellate court of record."

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[27] *See, e.g.*, *Ex parte Drawbaugh*, 2 App. D.C. at 407-408 ("any attempt to maintain secrecy, as to the records of the court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access, and to its records, according to long established usage and practice.")

Ex parte Drawbaugh, 2 App. D.C. 404, 405, 1894 WL 11944 (D.C. Ct. App. 1894). As was noted in the amicus opening brief, the courts regularly push back on classification decisions and subject government claims to scrutiny. Am. Br. at 24-29; Am. App. at 71-98. Doing so matters not just for the rights in question, but for the court's legitimacy as an independent body committed to the administration of justice.

Publishing opinions also provides the FISC with valuable opportunities for public inspection—scrutiny with which the FISA judges are otherwise familiar. There is a significant amount of case law that supports this public feedback purpose behind the First Amendment public right of access to judicial records. *See, e.g.*, *Richmond Newspapers*, 448 U.S. at 582 (Stevens, J. (concurring)). As the Second Circuit has explained,

> The presumption of access is based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice. Federal courts exercise powers under Article III that impact upon virtually all citizens, but judges, once nominated and confirmed, serve for life unless impeached through a process that is politically and practically inconvenient to invoke. Although courts have a number of internal checks, such as appellate review by multi-judge tribunals, professional and public monitoring is an essential feature of democratic control. Monitoring both provides judges with critical views of their work and deters arbitrary judicial behavior. Without monitoring, moreover, the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings. Such monitoring is not possible without access to testimony and documents that are used in the performance of Article III functions.

Amodeo II, 71 F.3d at 1048. *See also Scheiner v. Wallace*, No. 93-cv-0062, 1996 WL 633226, at *1 (S.D.N.Y. Oct. 31, 1996) ("The public interest in an accountable judiciary generally demands that the reasons for a judgment be exposed to public scrutiny." (citing *Amodeo II*, 71 F.3d at 1048-49); *United States v. Burka*, 289 A.2d 376, 379 (D.C. Ct. App. 1972) ("we deem it highly inappropriate and unwise for trial judges ever to 'go off the record'...Not just the need for public scrutiny, but also the possibility of appellate review, demands that everything said in court while in litigation be recorded and reported except in the most unusual circumstances.").

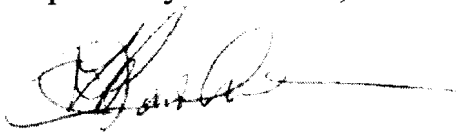
Third, to the extent that the floodgates argument persists, it is overblown. In a world in which the FISC strives to make its legal interpretations as public as possible, there will be no need for this type of litigation. The court will simply submit its opinions to the appropriate First Amendment analysis. Once considering any challenge that may arise, the decision will apply to other efforts to get the same information. This is the system regularly followed by other courts in requests for the unsealing of records. Once addressed, the court's opinion controls other such inquiries. Resources play a further role in limiting such motions: organizations and individuals are not going to waste time re-litigating matters that are already settled by the court.

CONCLUSION

For the foregoing reasons, the FISC properly has jurisdiction over the motion. Movants also have a common law and a First Amendment right of access to this court's opinions. In applying the common law, the court must consider articulable facts, not broad assertions of national security implications. A more stringent standard accompanies the First Amendment right of access: the FISC must ensure that any withholding of any opinion or portion thereof is narrowly tailored to ensure that the demands of national security are met.

It may be that the court's final determination leaves the redactions in the four opinions exactly as they now stand. But that determination can only come after the FISC applies the correct standard and makes the determination for itself.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August 2018, I provided one original and three copies of the amicus reply brief to Ms. LeeAnn Hall, Clerk of Court, Foreign Intelligence Surveillance Court, who has informed me that the Litigation Security Group will deliver a copy of the brief to:

United States Department of Justice
National Security Division
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I also sent one copy of the amicus reply brief via Federal Express to each of the following parties:

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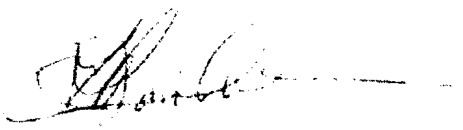

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