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

THE UNITED STATES' RESPONSE TO
MOVANT'S EN BANC OPENING BRIEF

The question before the en banc Court is "whether Movants established Article III standing notwithstanding that a First Amendment right of access does not apply to the judicial opinions they seek." Order 1 (Mar. 22, 2017). The answer is straightforward: movants have not established Article III standing because they cannot identify a *legally protected* interest given that the right they claim does not apply. Movants seek to resist this obvious conclusion by suggesting that their underlying argument – that there is a First Amendment right of public access to Foreign Intelligence Surveillance Court (FISC) proceedings and records, including the classified material at issue in this case – is open for debate. But as the question before the en banc Court makes clear, movants' First Amendment argument, which was never colorable, is foreclosed. As such, they have no legally protected interest and thus no standing.

I. Movants Lack an Injury to a Legally Protected Interest

As movants concede, *see* Movants' Br. 10, the Supreme Court has held that there is no federal jurisdiction over a claim that is "insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (quotation marks omitted). Thus, to have standing, movants must establish "an injury to an interest that the law protects when it is wrongfully invaded." *Bond v. Utreras*, 585 F.3d 1061, 1073 (7th Cir. 2009) (emphasis omitted). Movants have not established

such a legally protected interest. Rather, the interest they posit – a supposed First Amendment right of access to proceedings, records, and rulings of this Court – is implausible in light of binding Supreme Court caselaw and is foreclosed by prior opinions of this Court. Indeed, that claim's lack of merit is part of the premise pursuant to which this Court accepted en banc review.

Movants rely on *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986), but that opinion provides for a First Amendment right of access to judicial proceedings only where both (1) "the place and process have historically been open to the press and general public" (the "experience" test), and (2) "public access plays a significant positive role in the functioning of the particular process in question" (the "logic" test). *Id.* at 8. Any claim that there is a tradition of public access to "proceedings that relate to applications made by the Executive Branch for the issuance of court orders approving authorities covered exclusively by" the Foreign Intelligence Surveillance Act ("FISA"), *In re Opinions & Orders of this Court Addressing Bulk Collection of Data under the Foreign Intelligence Surveillance Act*, 2017 WL 427591, at *19 (FISA Ct. Jan. 25, 2017), is both baseless and foreclosed. And any argument that it would be logical to open up to the public classified proceedings or documents concerning foreign intelligence gathering is insubstantial, given the prospect of harms to national security that "are real and significant, and, quite frankly, beyond debate." *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 494 (FISA Ct. 2007).

The insubstantiality of movants' First Amendment argument has been explained by this Court multiple times. The Court first rejected this argument a decade ago when one of the movants here, the American Civil Liberties Union (ACLU), asserted it in an effort to obtain public access to FISC proceedings and rulings, including rulings that "'include legal analysis and legal rulings concerning the meaning of FISA.'" *Id.* at 493 (quoting brief of ACLU). This Court

explained that "the ACLU's First Amendment claim runs counter to a long-established and virtually unbroken practice of excluding the public from FISA applications and orders." *Id.* The Court further explained that the public access sought by the ACLU failed the "logic" test because it could assist adversaries in avoiding surveillance, seriously harm those targeted for surveillance, chill cooperation with investigators, damage relations with foreign governments, "chill the government's interactions with the Court," and threaten "the free flow of information to the FISC that is needed for an ex parte proceeding to result in sound decisionmaking and effective oversight." *Id.* at 494-96; *accord In re Motion for Release of Court Records*, Misc. 07-01, at 6-7 (FISA Ct. Feb. 8, 2008); *In re Proceedings Required by § 702 of the FISA Amendments Act of 2008*, 2008 WL 9487946, at *3-4 (FISA Ct. Aug. 27, 2008).

Even before the Presiding Judge's opinion in this case, it was clear and established that the purported First Amendment right of access to FISC proceedings and records did not exist. In that opinion, the Presiding Judge explained that movant's attempt to resist the Court's earlier holdings was "premised on a misreading of the Court's analysis and an overly broad framing of the legal question." *In re Opinions & Orders*, 2017 WL 427591, at *19. The Presiding Judge further explained that the correct framing of the "experience" test was whether "proceedings that relate to applications made by the Executive Branch for the issuance of court orders approving authorities covered exclusively by FISA" have "historically been open to the press and general public." *Id.* They have not; indeed, the record "reflect[s] a tradition of no public access." *Id.* Regarding the "logic" test the Presiding Judge noted that movants have failed "to explain why they believe [the Court's earlier] conclusion was flawed" and failed to "refute the Court's identification of the detrimental effects that could cause a diminished flow of information as a

result of public access," instead offering only "a generalized assertion that they disagree." *Id.* at *20 (citing *Motion for Release*, 526 F. Supp. 2d at 494-96).

Movants' underlying First Amendment argument was insubstantial from its inception, and it is now foreclosed. The question before the *en banc* Court is whether, given that it is established that there is no First Amendment right of access to FISC proceedings, records, and rulings, movants have nevertheless established "'an invasion of a *legally protected* interest.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)) (emphasis added). They have not because the interest they assert – public access to FISC proceedings and records – is not *legally protected. See In re Opinions & Orders*, 2017 WL 427591, at *16-21.

Movants cite to the D.C. Circuit's recent decision in *Dhiab v. Trump*, __ F.3d __, 2017 WL 1192911 (D.C. Cir. Mar. 31, 2017). That case further undermines movants' First Amendment argument. *See id.* at *5 (Op. of Randolph, S.J.) (observing that "from the beginning of the republic to the present day, there is no tradition of publicizing secret national security information involved in civil cases, or for that matter, in criminal cases," as the "tradition is exactly the opposite"). Movants point out that in *Dhiab*, the request for classified material was rejected on the merits, not for lack of standing. Movant's Br. 8. True, but that is because the claim in *Dhiab* was not clearly foreclosed by *Press-Enterprise* and other precedent, as the claim here is. *Cf. Bond*, 585 F.3d at 1073 (explaining that "the Supreme Court's standing doctrine requires litigants to establish an injury to an interest that the law protects when it is *wrongfully* invaded, and this is quite different from requiring them to establish a *meritorious* legal claim") (quotation marks omitted).

In light of *Press-Enterprise* and this Court's line of cases described above, Movants' asserted First Amendment right of access to FISC proceedings, records, and rulings "has no foundation in law." *Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir. 1997). As such, movants have "no legally protected interest and thus no standing to sue." *Id.*

Movants' appeal to what they call "compelling legal and practical reasons" to reject their claim on the merits rather than on jurisdictional grounds, *see* Movants' Br. 13, fares no better. The canon of constitutional avoidance has no application here. Both the question of Article III jurisdiction and the scope of the First Amendment are constitutional questions, and both must be addressed. As the government explained in its opening brief, there are no nonconstitutional bases for relief here. *See* Gov't Br. 9-11. Nor is the "burden of proof" a relevant consideration. The question whether movants' First Amendment claim is insubstantial or foreclosed is a purely legal one on which neither party bears a burden to prove disputed facts.

II. Movants' Misunderstand the Constitutional Power To Classify and To Protect Sensitive National Security Information

Movants' contention that Executive Branch classification should have no "significance" to the judiciary, Movant's Br. 18, is dangerously misguided. The Executive Branch has an inherent constitutional power "to classify and control access to information bearing on national security." *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988). And "[f]or 'reasons too obvious to call for enlarged discussion, the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it.'" *Id.* at 529 (quoting *CIA v. Sims*, 471 U.S. 159, 170 (1985)) (alteration omitted). Preventing access to properly classified information is a "compelling interest." *Id.* at 527 (quotation marks omitted). This executive branch constitutional prerogative is routinely and uniformly respected by the judiciary, and rightly so. *See, e.g., NCRI v. Dep't of*

State, 251 F.3d 192, 209-10 (D.C. Cir. 2001) (determinations about access to classified information are "within the privilege and prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect"). Apart from the deferential standard applied in cases such as those brought pursuant to the Freedom of Information Act ("FOIA"), courts have long recognized that classification decisions are committed to the executive branch. *See, e.g.*, *Egan*, 484 U.S. at 529; *Bismullah v. Gates*, 501 F.3d 178, 187-88 (D.C. Cir. 2007); *McGehee v. Casey*, 718 F.2d 1137, 1147-50 & n.22 (D.C. Cir. 1983) (holding that the court's role was limited to "merely . . . determin[ing] that the CIA properly classified the deleted items," as the court "cannot second-guess" the executive branch's national security judgments).

The cases relied on by movants are not to the contrary. In *In re Washington Post Co.*, the court imposed procedural requirements for closing a sentencing hearing and sealing documents in a criminal case after determining that those procedures would *not* "create an unacceptable risk" of the "inappropriate disclosure of classified information," an important consideration given that such "disclosure of classified information could endanger the lives of both Americans and their foreign informants." 807 F.2d 383, 391 (4th Cir. 1986). In *United States v. Rosen*, the court recognized that, "[o]f course, classification decisions are for the Executive Branch," but held that the presence of classified information in a case would not justify "effectively clos[ing] portions" of a jury trial. 487 F. Supp. 2d 703, 717, 720 (E.D. Va. 2007). In neither case did the court overrule any classification decision or order the release of any classified information, and both courts observed that classified court records and rulings could be sealed from the public. *See Washington Post*, 807 F.2d at 391; *Rosen*, 487 F. Supp. 2d at 706, 720.

CONCLUSION

For the reasons stated above, those stated in the government's April 17, 2017 submission, and those explained in the Presiding Judge's opinion in this case, movants lack Article III standing, and this action should be dismissed for want of jurisdiction.

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