5:00 P.M.

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

IN RE CERTIFICATION OF QUESTIONS OF LAW TO THE FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW	Docket No. FISCR 18-01

[PROPOSED] BRIEF OF *AMICUS CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF MOVANTS

Bruce D. Brown
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1250
Washington, D.C. 20005
(202) 795-9300
bbrown@rcfp.org
Counsel for *Amicus Curiae*

February 23, 2018

CORPORATE DISCLOSURE

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

SUMMARY OF THE ARGUMENT

Amicus Curiae the Reporters Committee for Freedom of the Press has written previously in this case to emphasize the public's First Amendment interest in access to the judicial records requested by the ACLU, the ACLU of the Nation's Capital, and the Yale Media Freedom and Information Access Clinic (collectively, "Movants"). The Reporters Committee writes again to reiterate those concerns and to emphasize a new point: that the separation of the standing and merits analyses is particularly important in the context of First Amendment right-of-access claims, which are often brought by the press as a surrogate for the public.

The First Amendment right of access is critical in a wide range of contexts and to a wide range of potential plaintiffs, including Movants and the news media. The public, and the press as a surrogate for the public, have a long tradition of asserting the constitutional right of access to court proceedings and records, and rarely have courts considered standing in addressing these claims. Requiring Movants to show that the records sought have historically been open to the public to demonstrate standing would conflate the analysis of their standing with the analysis of the merits of their claim and is inconsistent with the longstanding recognition by courts that the public has a broad First Amendment right to intervene for access to judicial records. Such a requirement may stifle novel access claims in particular, as well as access claims brought by news organizations the early stages of a judicial proceeding, when it may be difficult, if not impossible, to demonstrate historical practice.

Even if it were appropriate to examine the merits — *i.e.*, the history of access — at the standing stage, however, the First Amendment right of access does apply to judicial opinions of the Foreign Intelligence Surveillance Court ("FISC"). The First Amendment right of access is broad, and the merits analysis accordingly requires courts to look to analogous proceedings and

records when examining the history of access. Courts have overwhelmingly found a history of public access to written judicial opinions, and FISC opinions should be treated no differently.

Finally, there is a strong public interest in learning about the FISC's judicial activities. This interest has only increased since the revelations about government surveillance that led to Movants' present requests. Moreover, as the FISC's docket expands, its decisions become more newsworthy. Disclosure of the requested decisions would allow the press to educate the public about the FISC's work and thus serve to improve understanding of the FISC as a judicial body.

ARGUMENT

I. Conflating the merits and standing analyses is contrary to the established broad right of access to judicial proceedings and records and would inhibit the public's First Amendment right of access to government proceedings.

The Article III injury-in-fact requirement stems from the precept that individuals may raise challenges only to legally protected interests that are "concrete and particularized" and "actual or imminent." *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations and quotation omitted). As the *en banc* decision below explains, the "legally-protected-interest test" is concerned only with "whether the interest asserted by the plaintiff is of the type that 'deserve[s] protection against injury.'" *In re Opinions & Orders of This Court Addressing Bulk Collection of Data under the Foreign Intelligence Surveillance Act*, No. 13-mc-08, 2017 WL 5983865, at *5 (Foreign Intel. Surv. Ct. Nov. 9, 2017) ("*In re Opinions & Orders*") (quoting 13 Charles Alan Wright, Arthur R. Miller, et al., Federal Practice & Procedure § 3521.4 (3d ed. 2008)). The interest asserted here — *i.e.*, the First Amendment right of access to judicial records — is an interest regularly asserted by news media parties seeking to report on judicial proceedings and educate the public about the justice system. It is a classic type of legal interest that deserves protection against injury.

A. The press has a broad right to bring First Amendment claims in furtherance of newsgathering, including First Amendment right-of-access claims.

The First Amendment arises from "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). This commitment extends from the government to the people: "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969). When the press, as a surrogate for the public, asserts a First Amendment right of access to judicial proceedings and records, courts routinely find standing without requiring the news media to prove the merits of the claim at the outset. As the U.S. Court of Appeals for the Third Circuit stated, "[T]o establish standing, it is not necessary for litigants to demonstrate they will prevail on the merits of their claim," because even a mere "obstacle to the Newspapers' attempt to obtain access" to a judicial record is sufficient. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777 (3d Cir. 1994).

Recognizing that the First Amendment requires "breathing space," the Supreme Court has held that standing requirements in cases alleging First Amendment claims should be, if anything, relaxed. *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 611–12 (1973) (explaining that standing rules are relaxed in First Amendment challenge to overly broad statute, and litigants can sue for violations of the protected speech or expressive rights of third parties). Thus, the Courts of Appeals have adopted a permissive approach to standing when considering First Amendment challenges by the news media to confidentiality orders prohibiting litigants from speaking to the press. Far from requiring the news media to demonstrate success on the merits, in determining standing in such cases, courts customarily ask only whether the claims are "arguably" protected by the First Amendment. *See, e.g., Davis v. East Baton Rouge Parish*

School Bd., 78 F.3d 920, 926–27 (5th Cir. 1996) (finding news agencies had standing to challenge confidentiality orders governing participants in litigation where a court's orders "impede the news agencies' abilities to gather the news and to receive protected speech, abilities which are arguably protected by the First Amendment"); *Radio & Television News Ass'n v. U.S. Dist. Court*, 781 F.2d 1443, 1446 (9th Cir. 1986) (finding that a news organization had standing to challenge a gag order restraining participants in a criminal trial from making extrajudicial statements because "[a]lthough we conclude otherwise on the merits, the RTNA asserts an interest that is at least 'arguably' protected by the [F]irst [A]mendment"); *CBS Inc. v. Young*, 522 F.2d 234, 237–38 (6th Cir. 1975) (finding standing to challenge order restraining parties to litigation from discussing case with news media or public because a court order, "in denying to petitioner [CBS] access to potential sources of information, at least arguably impairs rights guaranteed to the petitioner by the First Amendment").

The broad nature of First Amendment standing extends to claims of a constitutional right of access to judicial proceedings and records. Thus, the U.S. Court of Appeals for the Fifth Circuit held that reporters had standing to assert a right of access to exhibits in a criminal trial because "the district court's determinations [denying their request to examine the documents] *arguably* affected appellants' rights under the First Amendment." *United States v. Gurney*, 558 F.2d 1202, 1206 (5th Cir. 1977) (citation omitted) (emphasis added). Similarly, the U.S. Court of Appeals for the Fourth Circuit found an injury-in-fact sufficient to establish the standing of public interest organizations to challenge a sealing order that allowed "the entire litigation—from filing to judgment—to occur behind closed doors" because the organizations were denied access to "documents they allege a right to inspect." *Doe v. Public Citizen*, 749 F.3d 246, 252, 264 (4th Cir. 2014); *see also Am. Civil Liberties Union v. Holder*, 652 F. Supp. 2d 654, 667, 667 n.7 (E.D.

Va. 2009), *aff'd*, 673 F.3d 245 (4th Cir. 2011) (finding that "[a]s members of the public, plaintiffs clearly have standing to seek redress for an alleged infringement of their First Amendment rights to access a sealed qui tam complaint" and observing, in a separate discussion about litigating the rights of third parties, that "[t]he standing inquiry is somewhat relaxed in the First Amendment context").

Indeed, the seminal Supreme Court First Amendment access rulings do not even pause to examine standing, so self-evident is it that standing requirements had been satisfied. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*"); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). Similarly, the Courts of Appeals commonly reach the merits without finding it necessary to address standing when news media parties assert a constitutional right of access to judicial proceedings or court records. *See, e.g., Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004) (reviewing an organization's First Amendment right of access claim on the merits without addressing standing); *United States v. Peters*, 754 F.2d 753 (7th Cir. 1985) (same); *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982) (same).

The implicit findings of standing in these decisions is based on a recognition that a right-of-access claim can be brought by any member of the public. *See Gannett*, 443 U.S. at 370 (framing the issue as whether "members of the public" can attend pre-trial proceedings); *Press-Enterprise I*, 464 U.S. at 508 (finding that "everyone in the community" can attend *voir dire*); *see also In re Access to Jury Questionnaires*, 37 A.3d 879, 885 (D.C. 2012) ("The right of public access is 'a right that any member of the public can assert[.]" (citation omitted)). As the *en banc* decision below recognized, "[C]ourts have uniformly found standing to bring First Amendment

right-of-access suit so long as plaintiffs allege an invasion related to judicial proceedings," and "[t]hat is so no matter how novel or meritless the claim may be." *In re Opinions & Orders*, 2017 WL 5983865, at *11; *see also Carlson v. United States*, 837 F.3d 753, 757–61 (7th Cir. 2016) (finding that a historian had standing to assert a common law right-of-access claim to sealed grand jury materials).

B. Broad standing is necessary to allow courts to resolve novel First Amendment right of access claims on their merits.

A long line of cases demonstrates the importance of permitting access claims of first impression to reach the merits, rather than refusing to consider them based on standing. As the U.S. Court of Appeals for the Sixth Circuit has recognized, the First Amendment right of access test set out in *Richmond Newspapers* can be used "to determine whether a First Amendment right of access exists in a wide variety of other contexts." *In re Search of Fair Fin.*, 692 F.3d 424, 429 (6th Cir. 2012). After *Richmond Newspapers*, the Courts of Appeals recognized First Amendment access rights in a number of judicial contexts outside of criminal trials. *See, e.g., United States v. DeJournett*, 817 F.3d 479, 484–85 (6th Cir. 2016) (plea agreements); *Wash. Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991) (plea agreement); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (documents filed in connection with motion for summary judgment in civil proceedings); *Westmoreland v. CBS, Inc.*, 752 F.2d 16, 23 (2d Cir. 1985) (civil proceedings); *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984) (civil proceedings); *Matter of Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1309 (7th Cir. 1984) (civil proceedings); *In re Globe Newspaper Co.*, 729 F.2d 47, 52 (1st Cir. 1984) (bail proceedings); *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir.1983) (contempt hearings); *United States v. Chagra*, 701 F.2d 354, 364 (5th Cir. 1983) (bail reduction hearings); *Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983) (civil proceedings related to release of

convicted of prisoners); *United States v. Brooklier*, 685 F.2d 1162, 1167, 1170 (9th Cir. 1982) (*voir dire* and pretrial suppression hearings).

Courts have also reached the merits in First Amendment access claims brought by journalists and news media groups totally unrelated to access to courts. *See, e.g, Houchins v. KQED, Inc.*, 438 U.S. 1, 7–15 (1978) (finding no First Amendment right of access to county jail); *Flynt v. Rumsfeld*, 355 F.3d 697, 702 (D.C. Cir. 2004) (finding that a magazine publisher had standing but ultimately holding that there is no First Amendment right of access to active military units); *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002) (finding First Amendment right of access to execution proceedings); *United States v. Miami Univ.*, 294 F.3d 797 (6th Cir. 2002) (finding no First Amendment right of access to university disciplinary proceedings); *Leigh v. Salazar*, 954 F. Supp. 2d 1090 (D. Nev. 2013) (finding First Amendment right of access to wild horse roundups by Bureau of Land Management). In these and similar cases, courts have generally presumed that denial of access to government activity is itself an injury-in-fact at least arguably within the First Amendment's broad zone of protection. *See, e.g., Flynt*, 355 F.3d at 702 (D.C. Cir. 2004) (despite a "dearth of case law" concerning the asserted access right, the court found standing because the media organizations "asked for immediate access to accompany U.S. troops in combat, which they contend is their constitutional right, and that access was not granted").

The fact that a First Amendment right-of-access claim raises a matter of first impression has not deterred courts from finding standing. *See, e.g., Courthouse News Service v. Planet*, 750 F.3d 776, 788–89 (9th Cir. 2014) (finding that a news organization alleged a cognizable injury by asserting that it was denied timely access to newly filed complaints even though it was "an important issue of first impression"). In many cases, the analysis of whether a First Amendment

right of access exists can be accomplished through analogy to other government proceedings or records. *See infra* Section II. However, in some cases, the party requesting access may need to develop a factual record to satisfy the "experience and logic" test of *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"), to determine whether the First Amendment right of access applies to a particular proceeding or record.[1] Thus, requiring the party requesting access to show at the standing stage that the information they seek has "been historically open to the public and arise[s] from a trial-like setting," *In re Opinions & Orders*, 2017 WL 5983865 at *17 (Collyer, J., dissenting), would prevent some matters of first impression from proceeding to the merits and effectively freeze the constitutional right of access in place.

C. Broad standing to challenge court closure is critical to the role of the press in asserting the right of access as a third-party intervenor and surrogate for the public.

In exercising its right to gather news, the press routinely intervenes in cases of public interest to assert First Amendment access claims. News media organizations will often intervene in high-profile cases at an early stage, before the record is developed and all access issues have emerged. Thus, requiring the news media to demonstrate Article III standing by showing a history of access to proceedings or records, before it is even known what judicial proceedings may occur and what judicial records may be filed, could preclude right of access claims in cases that are of the greatest interest to the public.

---

[1] The "experience and logic" test asks courts to consider "whether the place and process have historically been open to the press and general public" and "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 8.

Throughout the pendency of a case, an intervening news organization might seek access to several different types of judicial records and proceedings, such as trial exhibits, briefs filed under seal, juror questionnaires, declarations, and hearing testimony. To ensure timely access, the press may assert a First Amendment right of access to judicial proceedings before they have occurred and judicial records before they have been filed. *See, e.g., Gurney*, 558 F.2d at 1206 (newspapers and reporters sought to inspect seven categories of documents and exhibits, not all of which were in evidence yet). Courts routinely find that news organizations may intervene to assert access claims, even at the early stages of litigation and during ongoing trials. *See In re Access to Jury Questionnaires*, 37 A.3d at 884 (recognizing that "it is when the trial is unfolding that the public's interest is greatest"); *Mokhiber v. Davis*, 537 A.2d 1100, 1105 (D.C. 1988) ("To the extent that [a common law and First Amendment right of access] exists, it exists today for the records of cases decided a hundred years ago as surely as it does for lawsuits now in the early stages of motions litigation.").

For example, a news media organization first moved to intervene for the purpose of reporting on the high-profile case of *United States v. Moussaoui*, involving a defendant accused of conspiring in the September 11 attacks, as early as December 2001, just days after the defendant's initial appearance. *See* Courtroom Television Network LLC's Motion for Leave to Record and Telecast Pretrial and Trial Proceedings, *United States v. Moussaoui*, No. 01-cr-0455-LMB ("*Moussaoui*") (filed Dec. 21, 2001), ECF No. 11. In that motion, Court TV asserted a First Amendment right of access to the defendant's criminal trial and all pretrial proceedings, before it was even known what pretrial proceedings might take place. *Id.* The district court granted Court TV's motion to intervene shortly thereafter, Order, *Moussaoui* (E.D. Va. filed

Dec. 26, 2001), ECF No. 17, but later denied the motion on its merits, Order, *Moussaoui* (E.D. Va. filed Jan. 18, 2002), ECF No. 46.[2]

A heightened standing requirement at the outset may have precluded intervention by the news media to assert a right of access in the early stages of *Moussaoui* or placed an administrative burden on the district court by requiring it to address the news media's standing before the record was fully formed and the issues fully developed. If the right of access is to allow the public and the press to "report[]on a trial as it unfolds," a party seeking to intervene to assert the right of access to future proceedings or records must not be prevented from doing so by a heightened standing analysis that requires the party to show that the experience and logic test has been met. *In re Access to Jury Questionnaires*, 37 A.3d at 884. Because courts and parties cannot foresee each and every access issue that will arise during the pendency of a case, it would be imprudent and impractical to require third-party intervenors to prove the merits of their access claims for the purpose of intervening before the record has been fully developed.

---

[2] News media organizations filed various other motions for access to specific records in the case. *See, e.g.,* Motion for Access to Certain Portions of the Record, *Moussaoui* (filed April 3, 2003), ECF No. 811; Motion for Access to Certain Portions of the Record, *Moussaoui* (filed Feb. 17, 2006), ECF No. 1571. The district court granted some of these motions and denied others. *See* Order, *Moussaoui* (E.D. Va. filed Sept. 27, 2002), ECF No. 579 (granting intervenors' motion for access); Order, *Moussaoui* (E.D. Va. filed May 16, 2003), ECF No. 929 ("find[ing] merit in the Intervenors' argument" and accordingly ordering the government to review pleadings, orders, opinions, and transcripts for redactions and unsealing); Order, *Moussaoui* (E.D. Va. filed Mar. 10, 2006), ECF No. 1670 (denying intervenors' motion for contemporaneous access to some exhibits and transcripts of bench conferences). In one instance, the Fourth Circuit granted in part and denied in part a writ of mandate brought by news organizations in *Moussaoui* to compel contemporaneous access to exhibits entered into evidence and transcripts of bench conferences. *See In re Associated Press*, No. 06-1301, 2006 WL 752044 at *4–5 (4th Cir. Mar. 22, 2006) (holding that petitioners were entitled to contemporaneous access to some exhibits and that petitioners were not entitled to access to transcripts of bench conferences).

II. Even if it were appropriate to evaluate the merits at the standing stage, access to FISC opinions is analogous to access to other judicial opinions.

This Court is asked only to decide the narrow issue of whether Movants established an injury-in-fact sufficient for standing. *See In Re: Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review*, No. 18-01 (FISCR filed Jan. 9, 2018) (certifying to this Court the question of whether the FISC "has jurisdiction to consider the merits of a motion" invoking the First Amendment right of public access "to request that the FISC 'unseal' and release information redacted from four declassified FISC judicial opinions."). For the reasons explained above, the Court should not consider the merits of Movants' First Amendment right of access claim to determine their standing. But even assuming, *arguendo*, that it is appropriate to evaluate "whether classified FISC judicial opinions and proceedings have been historically open to the public and arise from a trial-like setting," *In re Opinions & Orders*, 2017 WL 5983865 at *17 (Collyer, J., dissenting) (citing *Richmond Newspapers*), that question should be answered in the affirmative.

As discussed earlier, *see supra* Section I(b), courts evaluating the "experience" prong of the experience and logic test examine whether the "place and process have historically been open to the press and general public." *Press-Enterprise II*, 478 U.S. at 8, 9. As the D.C. Circuit has recognized, when considering the history of access to a proceeding or record, "[a] new procedure that substituted for an older one would presumably be evaluated by the tradition of access to the older procedure." *United States v. El-Sayegh*, 131 F.3d 158, 161 (D.C. Cir. 1997); *see also Chagra*, 701 F.2d at 363 (stating that "[b]ecause the first amendment must be interpreted in the context of current values and conditions, . . . the lack of an historic tradition of open bail reduction hearings does not bar our recognizing a right of access to such hearings" (citing *Criden*, 675 F.2d at 555; *Red Lion Broad. Co.*, 395 U.S. at 386–95)). The Tenth Circuit has

similarly found that the "experience" prong may be satisfied by establishing a history of access to information "reasonably analogous" to the information sought. *United States v. Gonzales*, 150 F.3d 1246, 1256 (10th Cir. 1998). In short, when analyzing the First Amendment right of access to a new procedure or record — or, in this case, to the rulings of a new court — it is appropriate to consider the issues in the context of historical equivalents. Thus, even on the merits, courts do not demand that movants identify historical precedent that is factually identical to the case at hand before finding that the First Amendment right of access applies to the records sought.

Movants seek access to the FISC's opinions. Numerous Courts of Appeals have found a First Amendment right of access to judicial opinions. *See United States v. Index Newspapers LLC*, 766 F.3d 1072, 1093 (9th Cir. 2014) (finding that the public had a First Amendment right of access to a court order finding a grand jury witness in contempt); *Public Citizen*, 749 F.3d at 267–68 (holding that the First Amendment right of access applies to judicial opinions ruling on a summary judgment motion); *see also Hartford Courant Co.*, 380 F.3d at 96 (holding that the First Amendment provides a right of access to court dockets). The opinions of the FISC should be treated no differently. The FISC is an Article III court composed of Article III judges. Even though the FISC is specifically tasked with reviewing records containing classified information and issuing opinions that may contain classified information, other Article III courts do the same and balance national security concerns against the public's interest in judicial transparency. *See, e.g.*, *United States v. Aref*, 533 F.3d 72, 82–83 (2d Cir. 2008) (affirming a district court's sealing of a court order where the government had demonstrated that the dissemination of classified information in the order outweighed the public's constitutional right of access to the materials). Even if the Court concludes that FISC opinions are unique in some ways, judicial opinions of trial and appellate courts throughout the federal judiciary are a close analogy to FISC opinions,

as all are records that explain a court's reasoning and legal analysis in a particular case. Accordingly, this Court can rely on the history of access to opinions of other federal courts to satisfy the "experience" prong of the *Press-Enterprise II* test.[3] For these reasons, the First Amendment right of access applies to FISC opinions.

III. There is a strong public interest in access to the FISC's precedential opinions, and openness will strengthen the FISC's legitimacy.

The public interest in openness of judicial proceedings in grounded in the axiom that access strengthens democracy by giving citizens a better understanding of the justice system and the ability to engage in informed debate. *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring). Openness and public scrutiny are critical to the correct functioning of adjudicatory proceedings. "Without publicity, all other checks are insufficient: in comparison to publicity, all other checks are of small account." *In re Oliver*, 333 U.S. 257, 271 (1948) (quoting 1 Jeremy Bentham, Rationale of Judicial Evidence 524 (1827)).

The news media plays a critical role in ensuring and spreading the benefits of open judicial proceedings. *See United States v. Morison*, 84 F.2d 1057, 1081 (4th Cir. 1988) (Wilkinson, J., concurring) ("We have placed our faith in knowledge, not in ignorance, and for most, this means reliance on the press."). As the Supreme Court recognized, "With respect to judicial proceedings in particular, the function of the press serves to . . . bring to bear the

---

[3] The Reporters Committee does not address the "logic" prong of the test here because the dissenting *en banc* opinion below focused only on the "experience" prong in evaluating whether Movants had asserted a legally cognizable interest. *See In re Opinions & Orders*, 2017 WL 5983865, at *13 (Collyer, J., dissenting) (framing the issue as whether Movants presented "an interest in judicial proceedings and related documents involving places and processes that have been historically public"). However, because public scrutiny of FISC opinions would promote the independence and proper functioning of the judiciary, *see infra* Section III, the logic prong would also be satisfied.

beneficial effects of public scrutiny upon the administration of justice." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975).

The rewards of public access to judicial proceedings accrue not only to the public, but also to the judiciary. Access to judicial proceedings "enhances the quality and safeguards the integrity" of courts and "fosters an appearance of fairness, thereby heightening public respect for the judicial process." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982); *see also Richmond Newspapers*, 448 U.S. at 600 (Stewart, J., concurring) ("[A] trial courtroom is a place where representatives of the press and of the public are not only free to be, but where their presence serves to assure the integrity of what goes on."). In contrast, secrecy diminishes the legitimacy of the judiciary because "[p]ublic confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to public . . ." *Gannett Co.*, 443 U.S. at 429 (Blackmun, J., concurring in part and dissenting in part) (citation omitted).

The interest in fostering an appearance of fairness may be particularly acute for the FISC, because of the lack of an adversarial process and the fact that its opinions concern requests by a coordinate branch of government. *See Aref*, 533 F.3d at 83 (finding that openness is particularly important "when a judicial decision accedes to the requests of a coordinate branch, lest the ignorance of the basis for the decision cause the public to doubt that 'complete independent of the courts of justice . . .'") (citation omitted).

Like other Article III courts, the FISC has a broad impact on U.S. citizens, which underscores the need for public access to the opinions sought by Movants. For example, Americans have learned that orders from the FISC authorized the collection of certain information about their email messages. Joseph Menn, *Secret U.S. Court Approved Wider NSA*

Spying Even After Finding Excesses, Reuters (Nov. 19, 2013), *available at* http://reut.rs/I1AmGn. Similarly, a FISC opinion served as precedent for allowing collection of Americans' communications data. *See* Secondary Order, *In Re Application of the FBI for an Order Requiring the Production of Tangible Things from Verizon Bus. Network Servs., Inc., on Behalf of MCI Commc'n Servs., Inc. d/b/a/ Verizon Bus. Servs.*, No. BR 13-80 (FISC Apr. 25, 2013), *available at* http://bit.ly/11FY393. The public interest includes not only understanding what kind of surveillance the FISC authorizes, but also apprehending the nature of the relationship between the FISC and the executive branch. *See* Charlie Savage & Scott Shane, *Secret Court Rebuked N.S.A. on Surveillance*, N.Y. Times (Aug. 21, 2013), http://nyti.ms/15aSPIr.[4] Knowledge of the FISC is relevant to even the most basic literacy in how American democratic processes work: for example, recent news stories reported that the FISC approved warrants as part of an investigation into Russian interference in the 2016 Presidential election. *See, e.g.*, Emily Tillett, *Rep. Adam Schiff: FBI followed "correct procedures" on Carter Page warrant*, CBS News (Feb. 11, 2018), http://cbsn.ws/2sI1Jl2; Daniel S. Alter, *The Nunes Memo Attacks the Legitimacy of the Foreign Intelligence Surveillance Court. It Should Act to Repair the Damage*, TIME (Feb. 6, 2018), http://ti.me/2GyrK8D. The public has a powerful interest in learning about this FISC approval of government surveillance and data collection, and public access to the FISC's opinions Movants seek will promote public faith in the impartiality and independence of its actions.

[4] The Reporters Committee provided additional examples of the public interest in access to precedential opinions of the FISC, including information about how data collection sanctioned by the FISC impacts reporter-source communication, in its *amicus* briefs filed with the FISC in this case. *See* Brief of *Amicus Curiae* of the Reporters Committee for Freedom of the Press et al., filed July 15, 2013, at 13–17, and Brief of *Amicus Curiae* of the Reporters Committee for Freedom of the Press et al., filed November 26, 2013, at 10–13.

Public access to the FISC's opinions also becomes even more important as its docket expands. Congress has repeatedly expanded the Foreign Intelligence Surveillance Act since it was enacted, increasing the FISC's authority and allowing the FISC to "quietly become almost a parallel Supreme Court." Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, N.Y. Times (Jul. 6, 2013), https://nyti.ms/2k2kB55; *see also* Byron Tau, *What Is FISA? The Surveillance Law Behind the Memo*, Wall Street Journal (Feb. 2, 2018), http://on.wsj.com/2EMRRZ1. In addition, executive branch officials have moved to dismiss First Amendment cases brought in conventional Article III courts on the grounds that they should be resolved by the FISC. *See, e.g.,* Jenna Ebersole, *Feds Want Twitter's DOJ Surveillance Suit Tossed*, Law360 (Jan. 19, 2016) (explaining that the Justice Department argued that issues presented by a lawsuit in federal court in California would be more appropriate for decision by the FISC).

The fact that cases heard by the FISC involve classified or secret material does not change the importance of public access in promoting openness. As the U.S. Court of Appeals for the Seventh Circuit has said, "Any step that withdraws an element of the judicial process from public view makes the ensuring decision look more like fiat and requires rigorous justification. . . . The Supreme Court issues public opinions in all cases, even those said to involve state secrets." *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006) (Easterbrook, J.)).[5]

[5] When courts issue opinions related to state secrets or containing confidential information, national security concerns can often be met by redaction by the court. *See In re Providence Journal Co., Inc.*, 293 F.3d 1, 15 (1st Cir. 2002) ("Courts have an obligation to consider all reasonable alternatives to foreclosing the constitutional right of access. . . . Redaction constitutes a time-tested means of minimizing any intrusion on that right." (internal citation omitted)). The court, rather than the government party to the case, should review the redactions to ensure they shield public scrutiny of judicial action no more than necessary. *See Aref*, 533 F.3d at 83 (emphasizing that transparency is "pivotal" to the public's perception of the judiciary's independence, especially where a judicial decision concerns the executive branch).

This Court should consider the value — to the public, to the functioning of democratic processes, and to the FISC's independence — of permitting access challenges by the press and similarly situated parties seeking disclosure of FISC opinions. Access to these opinions will educate the public about the FISC's decision-making processes and promote public faith in the judicial system.

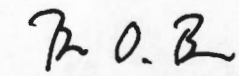
CONCLUSION

For the reasons stated above, the Court should affirm the *en banc* decision.

***

Pursuant to FISCR R.P. 9(d) and 19, the Reporters Committee for Freedom of the Press respectfully submits the following information: Bruce D. Brown is a member in good standing of the United States District Court for the District of Columbia (#457317), admitted September 12, 2011. Additionally, Brown is a member of good standing of the bar of the Commonwealth of Massachusetts (#629541) and the District of Columbia (#426092). Pursuant to FISCR R.P. 9(e), *amicus* further certifies that the Reporters Committee's responsible officers and employees and the undersigned do not currently hold a security clearance.

Respectfully submitted,



Bruce D. Brown
The Reporters Committee for
Freedom of the Press
1156 15th St. NW, Suite 1250
Washington, DC 20005
Phone: (202) 795-9300
bbrown@rcfp.org
Counsel for *Amicus Curiae*

CERTIFICATE OF SERVICE

I, Bruce D. Brown, certify that on February 23, 2018, a copy of this brief of *amicus curiae* was served on the following by email and U.S. Mail:

Jeffrey M. Smith
U.S. Department of Justice
National Security Division
950 Pennsylvania Ave., NW
Washington, DC 20530
Jeffrey.smith5@usdoj.gov

I further certify that this motion and the accompanying brief were served on the following by electronic mail:

Patrick Toomey
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
ptoomey@aclu.org

David A. Schulz
Media Freedom and Information Access Clinic
Yale Law School
P.O. Box 208215
New Haven, CT 06520
schulzd@ballardspahr.com

Arthur B. Spitzer
American Civil Liberties Union of the Nation's Capital
4301 Connecticut Avenue, NW, Suite 434
Washington, DC 20008
artspitzer@aclu-nca.org

Alex Abdo
Knight First Amendment Institute at Columbia University
535 West 116th Street
314 Low Library
New York, NY 10027
alex.abdo@knightcolumbia.org

Counsel for Movants

Bruce D. Brown