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

OPINION

Pending before the Court is the MOTION OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL, AND THE MEDIA FREEDOM AND INFORMATION ACCESS CLINIC FOR THE RELEASE OF COURT RECORDS,[1] which, as is evident from the motion's title, was filed jointly by the American Civil Liberties Union ("ACLU"), the American Civil Liberties Union of the Nation's Capital ("ACLU-NC"), and the Media Freedom and Information Access Clinic ("MFIAC") (collectively "the Movants"). The Movants ask the Court to "unseal its opinions addressing the legal basis for the 'bulk collection' of data" on the asserted ground that "these opinions are subject to the public's First Amendment right of access, and no proper basis exists to keep the legal discussion in these opinions secret." Mot. for Release of Ct. Records 1. As will be explained, however, the four opinions the Movants seek were never under seal and were declassified by the Executive Branch and made public with redactions in 2014. Consequently, although characterized as a request for the release of certain

[1] Hereinafter, this motion will be referred to as the "Motion for the Release of Court Records" and cited as "Mot. for Release of Ct. Records." Documents submitted by the parties are available on the Court's public website at http://www.fisc.uscourts.gov/public-filings.

of this Court's judicial opinions, what the Movants actually seek is access to the redacted material that remains classified pursuant to the Executive Branch's independent classification authority.

As explained in Parts I and II of the following Discussion, this Court has jurisdiction over the Motion for Release of Court Records only if it presents a case or controversy under Article III of the Constitution, which in turn requires among other things that the Movants assert an injury to a legally protected interest. The Movants claim that withholding the opinions in question contravenes a qualified right of access to those opinions under the First Amendment. If, contrary to the Movants' interpretation of the law, the First Amendment does not afford a qualified right of access to those opinions, they have failed to claim an injury to a legally protected interest. For reasons explained in Part III of the Discussion, the First Amendment does not apply pursuant to controlling Supreme Court precedent so there is no qualified right of access to those opinions. Accordingly, the Court holds that the Movants lack standing under Article III and the Court therefore must dismiss the Motion for Release of Court Records for lack of jurisdiction.

By no means does this result mean that the opinions at issue, or others like them, will never see the light of day. First, the opinions at issue have already been publicly released, subject to Executive Branch declassification review and redactions that withhold portions of those opinions found to contain information that remains classified. Members of the public seeking release of other opinions (or further release of redacted text in the opinions at issue in this matter) may submit requests under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and seek review of the Executive Branch's responses to those requests in a federal district court. Finally, as noted *infra* Part V, Congress has charged Executive Branch officials—not this

Court—with releasing certain significant Court opinions to the public, subject to declassification review. Those statutory mechanisms for public release are unaffected by the determination that the Court lacks jurisdiction over the instant motion.

BACKGROUND AND PROCEDURAL POSTURE

The Movants filed the pending motion in the wake of unauthorized but widely-publicized disclosures about National Security Agency ("NSA") programs involving the bulk collection of data under the Foreign Intelligence Surveillance Act of 1978, codified as amended at 50 U.S.C. §§ 1801-1885c (West 2015) ("FISA"). The motion urges the Court to unseal its judicial opinions addressing the legality of bulk data collection on the ground that the First Amendment to the United States Constitution guarantees that the public shall have a qualified right of access to judicial opinions. Mot. for Release of Ct. Records 1, 2, 12-21. The Movants contend that this right of access applies even when national security interests are at stake. *Id.* at 17. According to the Movants, the right of access can be overcome only if the United States of America (the "Government") satisfies a "strict" test requiring evidence of a substantial probability of harm to a compelling interest and no alternative means to protect that interest. *Id.* at 3, 21-24, 25, 28. Even if the Government demonstrates a substantial probability of harm to a compelling interest, the Movants maintain that "[a]ny limits on the public's right of access must . . . be narrowly tailored and demonstrably effective in avoiding that harm." *Id.* at 3. The Movants therefore insist that the First Amendment obligates the Court to review independently any portions of the Court's judicial opinions that are being withheld from public disclosure via redaction and assess whether the redaction is sufficiently narrowly tailored to protect only a compelling interest and nothing more. *Id.* at 23.

To conduct this independent review, the Movants suggest that the Court should first invoke Rule 62 of the United States Foreign Intelligence Surveillance Court ("FISC") Rules of Procedure and order the Government to perform a classification review of all judicial opinions addressing the legality of bulk data collection.[2] *Id.* at 24. If the ordered classification review results in the Government withholding any contents of the Court's opinions by redaction, the Movants assert that the Court should schedule the filing of legal briefs to allow the Government to set forth the rationale for "its sealing request" and to accommodate the Movants' presentation of countervailing arguments regarding "any sealing they believe to be unjustified," *id.*, after which the Court should "test any sealing proposed by the government against the standard required by the First Amendment," *id.* at 27. *See also* Movants' Reply in Supp. of Their Mot. for Release of Ct. Records 2, 4. The Movants further request that the Court exercise its discretion to order a classification review pursuant to FISC Rule 62 even if the Court ultimately concludes that a First Amendment right of access does not apply in this matter. *Id.* at 27.

The Government opposes the Movants' motion principally because the four opinions that address the legal bases for bulk collection were made public in 2014 after classification reviews conducted by the Executive Branch. Gov't's Opp'n Br. 1-2. Two opinions were published by the Court:

- Memorandum, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things From [Redacted]*, Docket No. BR 13-158 (Oct. 11, 2013) (McLaughlin, J.), *available at* http://www.fisc.uscourts.gov/sites/default/files/BR%2013-158%20Memorandum-1.pdf; and

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[2] Rule 62 provides in relevant part that, after consultation with other judges of the court, the Presiding Judge of the FISC may direct that an opinion be published and may order the Executive Branch to review such opinion and "redact it as necessary to ensure that properly classified information is appropriately protected pursuant to Executive Order 13526 (or its successor)." FISC Rule 62(a).

- Amended Memorandum Opinion, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things From [Redacted]*, Docket No. BR 13-109 (Aug. 29, 2013) (Eagan, J.), *available at* http://www.fisc.uscourts.gov/sites/default/files/BR%2013-109%20Order-1.pdf.

Gov't's Opp'n Br. 2. The other two opinions were released by the Executive Branch:

- Opinion and Order, [Redacted], Docket No. PR/TT [Redacted] (Kollar-Kotelly, J.), *available at* https://www.dni.gov/files/documents/1118/CLEANEDPRTT%201.pdf; and

- Memorandum Opinion, [Redacted], Docket No. PR/TT [Redacted] (Bates, J.), *available at* https://www.dni.gov/files/documents/1118/CLEANEDPRTT%202.pdf.

Id. The Government submits that, because the Executive Branch already conducted thorough classification reviews of all four opinions before their publication and release, there is no reason for the Court to order the Government to repeat that process.[3] *Id.* The Government further argues that the motion should be dismissed for lack of the Movants' standing to advance FISC Rule 62 as a vehicle for publication because that rule permits only a "party" to move for publication of the Court's opinions. *Id.* at 3. In support, the Government cites the Court's decision in *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act*, No. Misc. 13-02, 2013 WL 5460064 (FISA Ct. Sept. 13, 2013), for the proposition that the term "party" in Rule 62 refers to a "party" to the proceeding that resulted in the opinion. Gov't's Opp'n Br. 3. The Government points out that the Movants were not such "parties" to any of the proceedings that begot the four opinions discussing the legality of bulk collection. *Id.* Finally, the Government contends that the Court should decline to exercise its own discretion to require the Executive Branch to conduct another classification review of the relevant opinions under Rule 62—or to permit the Movants to challenge the redaction of classified material—because FOIA

[3] The Movants argue that the Executive Branch's classification reviews were insufficient and resulted in the four declassified opinions being "redacted to shreds." Movants' Reply In Supp. of Their Mot. for Release of Ct. Records 8.

supplies the proper legal mechanism to seek access to classified material withheld by the Executive Branch. *Id.* at 3-4. According to the Government, the FISC is not empowered to review independently and/or override Executive Branch classification decisions, *id.* at 4-6, nor should the FISC serve as an alternate forum to duplicate the judicial review afforded by FOIA, *id.* at 3-4.

DISCUSSION

Before proceeding to consider the merits of the pending motion the Court must first establish with certainty that it has jurisdiction. Because the FISC is an Article III court,[4] it cannot exercise the judicial power to resolve the Movants' motion unless there is an actual "case or controversy" in which the Movants have standing. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (May 16, 2016) (discussing the constitutional limits on the exercise of judicial power). "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies" as set forth in Article III of the Constitution. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976). By framing the exercise of judicial power in terms of "cases or controversies," Article III recognizes:

> [T]wo complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.

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[4] *See In re Sealed Case*, 310 F.3d 717, 731 (FISA Ct. Rev. 2002) (per curiam) (indicating that "the constitutional bounds that restrict an Article III court" apply to the FISC); *In re Kevork*, 634 F. Supp. 1002, 1014 (C.D. Cal. 1985) (rejecting the assertion that the FISC "is not a proper Article III court"), *aff'd*, 788 F.2d 566 (9th Cir. 1986).

Flast v. Cohen, 392 U.S. 83, 95 (1968). As will be discussed, the separation-of-powers concern poses particular unease in this case.

"From Article III's limitation of the judicial power to resolving 'Cases' and 'Controversies,' and the separation-of-powers principles underlying that limitation, [the Supreme Court has] deduced a set of requirements that together make up the 'irreducible constitutional minimum of standing.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). This doctrine of standing is an "essential and unchanging part of the case-or-controversy requirement of Article III . . . ." *Lujan*, 504 U.S. at 560. "In fact, standing is perhaps the most important jurisdictional doctrine, and, as with any jurisdictional requisite, we are powerless to hear a case when it is lacking." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 974 (11th Cir. 2005) (internal citations and quotation marks omitted). As the Supreme Court has observed:

> In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society.
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> In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit.

Warth v. Seldin, 422 U.S. 490, 498 (1975) (internal quotation marks and citations omitted).

I.

Accordingly, at the outset, the Court is obligated to ensure that it can properly entertain the Movants' motion because they have met their burden of establishing standing sufficient to satisfy the Article III requirement of a case or controversy. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). To do so, the Movants "must clearly and specifically set forth facts sufficient to satisfy . . . Art. III standing requirements. A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore v. Arkansas*, 495 U.S. 149, 155-56 (1990). Moreover, because "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), the Movants "must demonstrate standing for each claim [they] seek[] to press" as well as "'for each form of relief sought,'" *DaimlerChrysler*, 547 U.S. at 352 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)). Ultimately, "[i]f a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler*, 547 U.S. at 341. Absent standing, the Court's exercise of judicial power "would be gratuitous and thus inconsistent with the Art. III limitation." *Simon*, 426 U.S. at 38.

Anticipating that standing might be an issue, the Movants commenced their legal arguments by first claiming that they established standing by virtue of the fact that they were denied access to judicial opinions. Mot. for Release of Ct. Records 10. The Movants assert that "[d]enial of access to court opinions alone constitutes an injury sufficient to satisfy Article III." *Id.* By footnote, the Movants also question in part the decision in *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act*, 2013 WL 5460064, to the extent that it held that a party claiming the denial of public access to judicial opinions must further show either (1) that the lack of public access impeded the party's own activities in a concrete and particular way or

(2) that access would afford concrete and particular assistance to the party in the conduct of its own activities, although the Movants alternatively argue that "even if those showings are necessary to establish standing, [they] satisfy the additional requirements." *Id.* at 11 n.27.

It appears that *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act* was the first and only occasion on which a FISC Judge expressly addressed the question of a third party's standing for the purpose of asserting a First Amendment right to access this Court's judicial opinions.[5] That was a case championed by these same Movants on the same ground that the First Amendment guarantees a qualified right of public access to judicial opinions, although in that case the Movants sought access to opinions analyzing Section 215 of the USA PATRIOT Act (as codified at 50 U.S.C. § 1861). *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act*, 2013 WL 5460064, at *1. There, the parties neglected to address standing so the Court was obliged to consider it sua sponte based on the existing record, *id.*, after impliedly taking judicial notice of public matters, *id.* at *4 (stating that "[t]he Court ordinarily would not look beyond information presented by the parties to find that a claimant has Article III standing" but "[i]n this case . . . the ACLU's active participation in the legislative and public debates about the proper scope of Section 215 and the advisability of amending that provision is obvious from the public record and not reasonably in dispute"). The Court found that the ACLU and the ACLU-NC had standing but MFIAC did not, *id.* at *4, albeit the Court later reinstated MFIAC as a party upon granting MFIAC's motion seeking reconsideration of its standing on the strength of

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[5] *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484 (FISA Ct. 2007), also involved a motion filed by the ACLU seeking the release of court documents. In that case, part of which is discussed at length *infra* Part IV, the ACLU's standing was not addressed and the cited basis for the exercise of jurisdiction was the Court's inherent supervisory power over its own records and files. *Id.* at 486-87 (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978)).

additional information regarding MFIAC's activities, Opinion & Order Granting Mot. for Recons., *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act*, No. Misc. 13-02 (Aug. 7, 2014), *available at* http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Order-6_0.pdf. The Court never reached the question of whether the First Amendment applied, however, and, instead, dismissed for comity the Movants' motion to the extent it sought opinions that were the subject of ongoing FOIA litigation in another federal jurisdiction. *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act*, 2013 WL 5460064, at *6-7. The Court then exercised its own discretion to initiate declassification review proceedings for a single opinion pursuant to Rule 62. *Id.* at *8.

Recognizing that the decision in *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act* involved the same Movants asserting, in essence, the same type of legal claim, the question of standing nevertheless must be independently examined in this case because "[t]his court, as a matter of constitutional duty, must assure itself of its jurisdiction to act in every case." *CTS Corp. v. EPA*, 759 F.3d 52, 57 (D.C. Cir. 2014). Significantly, the decision in *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act* is distinguishable because it did not reach the question of whether the First Amendment applied and, if not, whether the Movants could establish standing in the absence of an interest protected by the First Amendment. This case also is in a unique posture because the Movants seek access to judicial documents that already have been made public and declassified by the Executive Branch, unlike the documents sought in *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act.* An independent assessment of standing also is warranted in light of Article III's necessary function to circumscribe the Federal Judiciary's exercise of power, *Spokeo*, 136 S. Ct. at 1547, and given

the "highly case-specific" nature of jurisdictional standing inquiries, *Baur v. Veneman*, 352 F.3d 625, 637 (2d Cir. 2003).

Embarking on an analysis of standing in this matter, the Court is mindful that, because "[s]tanding is an aspect of justiciability," "the problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability." *Flast*, 392 U.S. at 98. Indeed, "[s]tanding has been called one of 'the most amorphous (concepts) in the entire domain of public law.'" *Id.* at 99 (quoting *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the S. Judiciary Comm.*, 89th Cong. 498 (2d Sess. 1966) (statement of Prof. Paul A. Freund)). The United States Court of Appeals for the Second Circuit has referred to standing as a "labyrinthine doctrine," *Fin. Insts. Ret. Fund v. Office of Thrift Supervision*, 964 F.2d 142, 146 (2d Cir. 1992), and even the Supreme Court has admitted that "'the concept of Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it," *Whitmore*, 495 U.S. at 155 (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982)).

Despite its nebulousness, there are several fundamental guideposts that offer direction and a general framework to evaluate standing in any given case. To begin with, while it has long been the rule that standing "in no way depends on the merits of the plaintiff's contention that particular conduct is illegal," it nonetheless "often turns on the nature and source of the claim asserted." *Warth*, 422 U.S. at 500. Supreme Court precedent "makes clear that Art. III standing requires an injury with a nexus to the substantive character of the statute or regulation at issue[.]" *Diamond v. Charles*, 476 U.S. 54, 70 (1986) (citing *Valley Forge Christian Coll.*, 454 U.S. at 472). Thus, "standing is gauged by the specific common-law, statutory or constitutional claims that a party presents." *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72,

77 (1991). "In essence, the standing question is determined by 'whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.'" *E.M. v. New York City Dep't of Educ.*, 758 F.3d 442, 450 (2d Cir. 2014) (quoting *Warth*, 422 U.S. at 500). "[A]lthough standing is an anterior question of jurisdiction, the grist and elements of [the Court's] jurisdictional analysis require a peek at the substance of [the Movants'] arguments." *Transp. Workers Union of Am., AFL-CIO v. Transp. Sec. Admin.*, 492 F.3d 471, 474-75 (D.C. Cir. 2007).

It also is well established that the doctrine of standing consists of three elements, the first of which requires the Movants to show that they suffered an "injury in fact." *Lujan*, 504 U.S. at 560. The second element requires that the injury in fact be "fairly traceable" to the defending party's challenged conduct and the third element requires that there be a likelihood (versus mere speculation) that the injury will be redressed by a favorable judicial decision. *Id.*

II.

Recently, the Supreme Court emphasized that "injury in fact" is the "'[f]irst and foremost' of standing's three elements." *Spokeo*, 136 S. Ct. at 1547 (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 103 (1998)). Importantly for the purpose of resolving the pending motion, the Supreme Court has "stressed that the alleged injury must be legally and judicially cognizable." *Raines v. Byrd*, 521 U.S. 811, 819 (1997). "This requires, among other things, that the plaintiff have suffered an invasion of a *legally protected interest* which is . . . concrete and particularized, and that the dispute is traditionally thought to be capable of resolution through the judicial process[.]" *Id.* (internal quotation marks and citations omitted, emphasis added). "[A]n injury refers to the invasion of some 'legally protected interest' arising

from constitutional, statutory, or common law." *Pender v. Bank of Am. Corp.*, 788 F.3d 354, 366 (4th Cir. 2015) (quoting *Lujan*, 504 U.S. at 578).

The meaning of the phrase "legally protected interest" has been a source of perplexity in the case law as a result, at least in part, of the Supreme Court's pronouncement that a party can have standing even if he loses on the merits. *See Warth*, 422 U.S. at 500 (stating that "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal"); *In re Special Grand Jury 89-2*, 450 F.3d 1159, 1172 (10th Cir. 2006) ("The term *legally protected interest* has generated some confusion because the Court has made clear that a plaintiff can have standing despite losing on the merits . . . ." (emphasis in original)); *Judicial Watch, Inc. v. U.S. Senate*, 432 F.3d 359, 363 (D.C. Cir. 2005) (Williams, J., concurring) (expressing "puzzlement" over the Supreme Court's use of the phrase "legally protected" as a "modifier" and examining the discordant state of the case law's treatment of the phrase); *United States v. Richardson*, 418 U.S. 166, 180-81 (1974) (Powell, J., concurring) (questioning the Supreme Court's approach in *Flast*, 392 U.S. at 99-101, on the ground that "[t]he opinion purports to separate the question of standing from the merits . . . yet it abruptly returns to the substantive issues raised by a plaintiff for the purpose of determining whether there is a logical nexus between the status asserted and the claim sought to be adjudicated" (internal quotation marks omitted)); *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 951 n.23 (9th Cir. 2013) ("The exact requirements for a 'legally protected interest' are far from clear."). The confusion is compounded by the fact that the Supreme Court has occasionally resorted to using the phrase "judicially cognizable interest" rather than, or interchangeably with, the phrase "legally protected interest." *Judicial Watch*, 432 F.3d at 364 (Williams, J., concurring) ("[T]he [Supreme] Court appears to use the 'legally protected' and 'judicially cognizable' language

interchangeably."); *ABF Freight Sys., Inc. v. Int'l Bhd. of Teamsters*, 645 F.3d 954, 959 (8th Cir. 2011) (citing *Lujan* for the proposition that "[a] 'legally protected interest' requires only a 'judicially cognizable interest'"); *Lujan*, 504 U.S. at 561-63, 575, 578 (initially stating that a plaintiff must have suffered "an invasion of a legally protected interest" to satisfy Article III but then reverting to use of the term "cognizable" to characterize the viability of that interest to establish standing); *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (stating that "standing requires: (1) that the plaintiff have suffered an 'injury in fact'—an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"); *Warth*, 422 U.S. at 514 (referring to a "judicially cognizable injury" in the context of discussing the legality of Congress expanding by statute the interests that may establish standing). Adding to the uncertainty, in some cases the Supreme Court makes no mention whatsoever of the requirement that an injury entail the invasion of either a "legally protected" or "judicially cognizable" interest. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) ("To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)); *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) ("To ensure the proper adversarial presentation, *Lujan* holds that a litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury.").

Deciphering the meaning of the phrase "legally protected interest" also is muddled by the varying approaches courts use to identify the relevant "interest" at stake. In at least one case the United States Court of Appeals for the Fourth Circuit suggested that the interest at issue could be

considered subjectively from the perspective of the party asserting standing. *Doe v. Pub. Citizen*, 749 F.3d 246, 262 (4th Cir. 2014) (intimating that litigants need only assert an interest that "in their view" was protected by the common law or the Constitution). Other courts focus objectively on whether the Constitution, a statute or the common law actually recognizes the asserted interest. *See, e.g., Sargeant v. Dixon*, 130 F.3d 1067, 1069 (D.C. Cir. 1997) (stating that "[a] legally cognizable interest means an interest recognized at common law or specifically recognized as such by the Congress").

Still other courts have examined whether the type or form of the injury is traditionally deemed to be a legal harm, such as an economic injury or an invasion of property rights, although such an inquiry can blend into the question of whether the injury is concrete and particularized. *See, e.g., Danvers Motor Co., Inc. v. Ford Motor Co.*, 432 F.3d 286, 293 (3d Cir. 2005) (stating that "[m]onetary harm is a classic form of injury-in-fact" that "is often assumed without discussion" and an invasion of property rights, "whether it sounds in tort . . . or contract . . . undoubtedly 'affect[s] the plaintiff in a personal and individual way'" (quoting *Lujan*, 504 U.S. at 560 n.1)). At least one court has found standing by analogizing to interests that were never advanced by the party asserting standing.[6] *See In re Special Grand Jury 89-2*, 450 F.3d at

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[6] It is unclear how this approach can be reconciled with the Supreme Court's admonitions that standing "is gauged by the specific common-law, statutory or constitutional claims *that a party presents*," *Int'l Primate Prot. League*, 500 U.S. at 77 (emphasis added), and a "federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing," *Whitmore*, 495 U.S. at 155-56. The Tenth Circuit opined that the Supreme Court's decision in *Bennett*, 520 U.S. at 167, presented a "new locution" according to which the substitution of the phrase "judicially cognizable interest" for "legally protected interest" signaled that the Supreme Court had abandoned *Lujan's* requirement of a "legally protected interest" in favor of a formulation that provides that "an interest can support standing even if it is not protected by law (at least, not protected in the particular case at issue) so long as it is the sort of interest that courts think to be of sufficient moment to justify judicial intervention." *In re Special Grand Jury 89-2*, 450 F.3d at 1172. The question of whether the Supreme Court intended to abandon the requirement for a "legally protected interest" seems to have been

1172-1173 (characterizing former grand jurors' requests to lift the secrecy obligation imposed by Rule 6(e) of the Federal Rules of Criminal Procedure as an interest in "stating what they know" that mirrors the First Amendment claims of litigants challenging speech restrictions and commenting that "there is no requirement that the legal basis for the interest of a plaintiff that is 'injured in fact' be the same as, or even related to, the legal basis for the plaintiff's claim, at least outside the taxpayer-standing context").

Although no universal definition of the phrase "legally protected interest" has been developed by the case law,[7] the Supreme Court and a majority of federal jurisdictions have concluded that an interest is not "legally protected" or cognizable for the purpose of establishing standing when its asserted legal source—whether constitutional, statutory, common law or

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resolved in the negative by the Supreme Court's decision in *Raines*, which was decided shortly after *Bennett* and was joined by Justice Antonin Scalia, the author of the Court's unanimous decision in *Bennett*. In *Raines*, as stated *supra*, the Supreme Court "stressed that the alleged injury must be legally and judicially cognizable" and went on to state that "[t]his requires, among other things, that the plaintiff have suffered 'an invasion of a legally protected interest which is . . . concrete and particularized.'" 521 U.S. at 819 (quoting *Lujan*, 504 U.S. at 560). The Supreme Court's recent decision in *Spokeo* also employs the locution requiring that, "[t]o establish injury in fact, a plaintiff must show that he or she suffered '*an invasion of a legally protected interest*' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560) (emphasis added).

[7] The bewildering state of the law might explain in part why one commentator has referred to the "injury in fact" requirement as "a singularly unhelpful, even incoherent, addition to the law of standing," William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 231 (1988), and another has taken what the United States Court of Appeals for the Tenth Circuit described as the "somewhat cynical view" that "'[t]he only conclusion [regarding what injuries are sufficient for standing] is that in addition to injuries to common law, constitutional, and statutory rights, a plaintiff has standing if he or she asserts an injury that the Court deems sufficient for standing purposes.'" *In re Special Grand Jury 89-2*, 450 F.3d at 1172 (second alteration in original) (quoting Erwin Chemerinsky, *Federal Jurisdiction* § 2.3.2 at 74 (4th ed.2003)).

otherwise—does not apply or does not exist. The United States Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit")[8] has offered the following explanation:

> Whether a plaintiff has a legally protected interest (and thus standing) does not depend on whether he can demonstrate that he will succeed on the merits. Otherwise, every unsuccessful plaintiff will have lacked standing in the first place. Thus, for example, one can have a legal interest in receiving government benefits and consequently standing to sue because of a refusal to grant them even though the court eventually rejects the claim. *See generally Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 109 S. Ct. 2558, 105 L.Ed.2d 377 (1989) (plaintiffs had standing to bring suit under [Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. §§ 1-15] although claim failed). Indeed, in *Lujan* the Court characterized the "legally protected interest" element of an injury in fact simply as a "cognizable interest" and, without addressing whether the claimants had a statutory right to use or observe an animal species, concluded that the desire to do so "undeniably" was a cognizable interest. *Lujan*, 504 U.S. at 562–63, 112 S. Ct. at 2137–38.
>
> On the other hand, if the plaintiff's claim has no foundation in law, he has no legally protected interest and thus no standing to sue. *See, e.g., Arjay Assocs. v. Bush*, 891 F.2d 894, 898 (Fed. Cir. 1989) ("We hold that appellants lack standing because the injury they assert is to a nonexistent right . . . ."); *ACLU v. FCC*, 523 F.2d 1344, 1348 (9th Cir. 1975) ("If ACLU's claim is meritorious, standing exists; if not, standing not only fails but also ceases to be relevant."); *United Jewish Org. of Williamsburgh v. Wilson*, 510 F.2d 512, 521 (2d Cir. 1975) ("Whether our decision on this point is cast on the merits or as a matter of standing is probably immaterial."), *aff'd*, 430 U.S. 144, 97 S. Ct. 996, 51 L.Ed.2d 229 (1977).

Claybrook v. Slater, 111 F.3d 904, 907 (D.C. Cir. 1997). Furthermore, although the question of whether a litigant's interest is "legally protected" does not depend on the merits of the claim, it nevertheless is the case that "there are instances in which courts have examined the merits of the underlying claim and concluded that the plaintiffs lacked a legally protected interest and therefore lacked standing." *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1236 (10th Cir. 2004) (citing *Skull Valley Band of Goshute Indians v. Leavitt*, 215 F. Supp. 2d 1232, 1240–41 (D. Utah 2002) (discussing cases), *Claybrook*, 111 F.3d at 907, and *Arjay Assocs.*

[8] For brevity and convenience, this opinion hereinafter will omit the phrase "United States Court of Appeals for the" from the identification of federal circuit courts of appeal.

Inc. v. Bush, 891 F.2d 894, 898 (Fed. Cir. 1989)). *Accord Martin v. S.E.C.*, 734 F.3d 169, 173 (2d Cir. 2013) (per curiam) (declining to reach the merits of a litigant's claims when standing was lacking "except to the extent that the merits overlap with the jurisdictional question").

In *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled in part on other grounds, Citizens United v. FEC*, 558 U.S. 310 (2010), the Supreme Court concluded that a group of litigants lacked Article III standing because their claims could not be deemed "legally cognizable" when the Court had never previously recognized the broadly-asserted interest and that interest was premised on a mistaken interpretation of inapplicable legal precedent. The litigants in *McConnell* consisted in part of a group of voters, organizations representing voters, and candidates who collectively challenged, among other things, the constitutionality of a particular section of the Bipartisan Campaign Reform Act of 2002 ("BCRA") that amended the Federal Election Campaign Act of 1971 ("FECA") by "increas[ing] and index[ing] for inflation certain FECA contribution limits." 540 U.S. at 226. As relevant here, the litigant group argued that, as a result of the amendments, they suffered an injury they identified as the deprivation of an "equal ability to participate in the election process based on their economic status." *Id.* at 227. The group asserted that this injury was legally cognizable according to voting-rights case law that they viewed as prohibiting "electoral discrimination based on economic status . . . and upholding the right to an equally meaningful vote." *Id.* (internal quotation marks omitted). The Supreme Court, however, disclaimed the notion that it had ever "recognized a legal right comparable to the broad and diffuse injury asserted by the . . . plaintiffs." *Id.* In addition, the group's "reliance on this Court's voting rights cases [was] misplaced" because those cases required only "nondiscriminatory access to the ballot and a single, equal vote for each voter" whereas the group had not claimed that they were denied such equal access or the right to vote. *Id.* The

Court further stated that it had previously "noted that '[p]olitical 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources,'" so the group's "claim of injury . . . is, therefore, not to a legally cognizable right." *Id.* (quoting *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986)).

In *Bond v. Utreras*, 585 F.3d 1061, 1065-66 (7th Cir. 2009), the Seventh Circuit reviewed a district court order lifting a protective order and permitting a journalist to intervene in a civil rights case involving allegations that Chicago police officers mentally and physically abused a plaintiff while performing their official duties. The journalist sought to "unseal" police department records relating to citizen complaints against Chicago police officers that the city had produced during pretrial discovery but never filed with the court. *Id.* at 1066. The journalist claimed that no good cause existed to continue the protective order under Rule 26(c) of the Federal Rules of Civil Procedure. *Id.* at 1065. Several months after dismissing the underlying lawsuit, which had settled, *id.*, the district court "reevaluated whether 'good cause' existed to keep the documents confidential, and in so doing applied a 'presumption' of public access to discovery materials," *id.* at 1067. On balance, the district court concluded that the city's interest in keeping the records confidential was outweighed by the public's interest in information about police misconduct; as a result, the court granted the journalist's request to intervene and lifted the protective order. *Id.* On appeal by the city, the Seventh Circuit characterized as a "mistake" the district court's failure to consider whether the journalist had standing in view of the fact that the underlying lawsuit had been dismissed. *Id.* at 1068. The Seventh Circuit held that a third party seeking permissive intervention to challenge a protective order after a case has been dismissed "must meet the standing requirements of Article III in addition to Rule 24(b)'s requirements for permissive intervention." *Id.* at 1072. Discussing Article III's standing requirements, *id.* at

1072-73, the Seventh Circuit noted that, "while a litigant need not definitely 'establish that a right of his has been infringed,' he 'must have a colorable *claim* to such a right' to satisfy Article III," *id.* at 1073 (emphasis in original) (quoting *Aurora Loan Servs., Inc. v. Craddieth*, 442 F.3d 1018, 1024 (7th Cir. 2006)). Because the district court's decision to lift the protective order was premised on a presumptive right of access to discovery materials, *id.* at 1067, the Seventh Circuit analyzed the legal basis of such a presumptive right and concluded that, while "most documents filed in court are presumptively open to the public," *id.* at 1073, it nevertheless is the case that "[g]enerally speaking, the public has no constitutional, statutory (rule-based), or common-law right of access to *unfiled* discovery," *id.* at 1073 (emphasis in original). The Seventh Circuit also found no support for the notion that Rule 26(c) "creates a freestanding public right of access to unfiled discovery." *Id.* at 1076. It then proceeded to consider and reject whether, alternatively, the First Amendment supplied such a right. *Id.* at 1077-78. Lacking any legal basis to assert a right to unfiled discovery, the Seventh Circuit held that the journalist "has no injury to a legally protected interest and therefore no standing to support intervention." *Id.* at 1078.

Griswold v. Driscoll, 616 F.3d 53 (1st Cir. 2010), is another instructive case. The First Circuit held that litigants lacked a legally protected interest because the source of the interest, the First Amendment, did not apply. In *Griswold*, students, parents, teachers, and the Assembly of Turkish American Associations ("ATAA") collectively challenged a decision by the Commissioner of Elementary and Secondary Education of Massachusetts to revise a statutorily-mandated advisory curriculum guide. 616 F.3d at 54-56. The Commissioner's initial revisions were motivated by political pressure to assuage a Turkish cultural organization that objected to the curriculum guide's references to the Armenian genocide as biased for failing to acknowledge an opposing contra-genocide perspective. *Id.* at 54-55. After the revised curriculum guide was

submitted to legislative officials, the Commissioner again modified it – at the request of Armenian descendants – by removing references to all pro-Turkish websites (including websites that presented the contra-genocide perspective) except the Turkish Embassy's website. *Id.* at 55. The plaintiffs sued claiming that the revisions to the curriculum guide were made in violation of their rights under the First Amendment to "inquire, teach and learn free from viewpoint discrimination . . . and to speak." *Id.* at 56. In an opinion notable for its authorship by U.S. Supreme Court Associate Justice David Souter (Ret.), sitting by designation, the First Circuit affirmed the dismissal of the ATAA's First Amendment claim as time barred and then considered whether the remaining plaintiffs had standing to assert a First Amendment right. *Id.* Remarking that "we see this as a case in which the dispositive questions of standing and statement of cognizable claim are difficult to disentangle," the First Circuit found it "prudent to dispose of both standing and merits issues together." *Id.* The First Circuit then evaluated whether the challenged advisory curriculum guide was analogous to a virtual school library—in which case the revisions to the guide would be subject to First Amendment review pursuant to the plurality decision in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853 (1982)—or whether the guide was more properly characterized as an element of curriculum over which the State Board of Education may exercise discretion. *Id.* at 56-60. The First Circuit ultimately regarded the complaint as pleading "a curriculum guide claim that should be treated like one about a library, in which case pleading cognizable injury and stating a cognizable claim resist distinction." *Id.* at 56. Declining to extend "the *Pico* plurality's notion of non-interference with school libraries as a constitutional basis for limiting the discretion of state authorities to set curriculum," the First Circuit found that the guide was an element of curriculum, *id.* at 59, so that "revisions to the Guide after its submission to legislative officials,

even if made in response to political pressure, did not implicate the First Amendment," *id.* at 60. The First Circuit therefore affirmed the lower court's judgment that the First Amendment did not apply to the challenged curriculum guide and, as a result, the plaintiffs had failed to establish either a cognizable injury or a cognizable claim. *Id.* at 56, 60.

The D.C. Circuit's decision in *Claybrook*, cited *supra*, also lends authority to the proposition that a party lacks standing when the statutory, constitutional, common law or other source of the asserted legal interest does not apply or does not exist. *Claybrook* involved a lawsuit filed by Joan Claybrook, a co-chair of Citizens for Reliable and Safe Highways ("CRASH"), who sued the Administrator of the Federal Highway Administration ("FHWA") for failing to prevent an agency advisory committee from passing a resolution that criticized CRASH's fund-raising literature. 111 F.3d at 905, 906. Claybrook claimed that the Administrator violated the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. §§ 1-15, by permitting the advisory committee to vote on and pass the challenged resolution, which Claybrook claimed was not on the committee's agenda and not within the committee's authority. *Id.* at 906. The Administrator countered by arguing that Claybrook lacked standing "because the legal duty she claims he violated does not exist." *Id.* at 907. Upon analysis of the relevant provisions of FACA, 5 U.S.C. App. §§ 9(c)(B), 10(a)(1), 10(a)(2), 10(e), 10(f), the D.C. Circuit agreed that the Act did not impose the asserted legal duty that served as a basis for Claybrook's claimed injury, the agency otherwise complied with the Act, and the decision to adjourn the advisory committee meeting was committed to the agency's discretion pursuant to 5 U.S.C. § 701(a)(2). *Id.* at 907-909. Because FACA offered no recourse to Claybrook, the D.C. Circuit held that "[i]n sum, we are left with no law to apply to Claybrook's claim and consequently Claybrook lacks standing." *Id.* at 909.

The Ninth Circuit reached a similar result in *Fleck & Assocs., Inc. v. Phoenix, an Arizona Mun. Corp.*, 471 F.3d 1100 (9th Cir. 2006). The appellant in *Fleck & Assocs.* was a "for-profit corporation that operate[d] . . . a gay men's social club in Phoenix, Arizona" where "[s]exual activities [took] place in the dressing rooms and in other areas of the club." 471 F.3d at 1102. Pursuant to a Phoenix ordinance banning the operation of live sex act businesses, a social club operated by the appellant was subjected to a police search during which two employees were questioned and detained. *Id.* at 1102-1103. The appellant was also "threatened with similar actions." *Id.* at 1103. The appellant sued the city seeking both injunctive and declaratory relief on the ground that the ordinance violated its constitutional privacy rights. *Id.* at 1102. The district court interpreted the appellant's complaint to raise one claim based on the invasion of its customers' privacy rights and a second claim based on the invasion of the appellant's rights as a corporation. *Id.* at 1103. With respect to the claim based on the customers' privacy rights, the district court found that the appellant lacked standing to pursue that claim and, alternatively, the appellants' customers had no privacy rights in the social club so dismissal was further warranted for failure to state a claim for relief. *Id.* The district court held, however, that the appellant had standing to assert its own privacy rights as a corporation, albeit "[t]he court did not . . . identify what those corporate rights might have been" and "immediately proceeded to hold that [the appellant] lacked any cognizable privacy rights and dismissed for failure to state a claim." *Id.* On appeal, the Ninth Circuit agreed with the district court that the appellant lacked associational standing[9] to assert its customers' rights but held that the district court erred by addressing the merits of the customers' privacy rights in the social club when the court lacked subject matter

[9] "Under the doctrine of 'associational' or 'representational' standing an organization may bring suit on behalf of its members whether or not the organization itself has suffered an injury from the challenged action." *Id.* at 1105.

jurisdiction. *Id.* at 1103, 1105, 1106. Discussing the appellant's claim of "traditional" Article III standing based on its asserted privacy rights as a corporation, the Ninth Circuit noted that the appellant "squarely identifie[d] the source of its supposed right as the liberty guarantee described in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)." *Id.* at 1104. The Ninth Circuit determined, however, that no corporate right to privacy emanated from that case, *id.* at 1105, 1106, and, as a result, "[b]ecause the right to privacy described in *Lawrence* is purely personal and unavailable to a corporation, [the appellant corporation] failed to allege an injury in fact sufficient to make out a case or controversy under Article III," *id.* at 1105.

In *Muntaqim v. Coombe*, 449 F.3d 371 (2d Cir. 2006) (en banc) (per curiam), the Second Circuit considered a prisoner's complaint challenging New York Election Law section 5–106 on the ground that it denied felons the right to vote in violation of section 2 of the Voting Rights Act "because it 'result[ed] in a denial or abridgement of the right . . . to vote on account of race.'" 449 F.3d at 374 (quoting 42 U.S.C. § 1973(a), transferred to 52 U.S.C. § 10301). Because the prisoner was a resident of California before he was incarcerated, *id.* at 374, and the Second Circuit concluded that "under New York law, [his] involuntary presence in a New York prison [did] not confer residency for purposes of registration and voting," *id.* at 376, the court found that "his inability to vote in New York arises from the fact that he was a resident of California, not because he was a convicted felon subject to the application of New York Election Law section 5–106," *id.* As a result, the Second Circuit held that that the prisoner "suffered no 'invasion of a legally protected interest.'" *Id.* (quoting *Lujan*, 504 U.S. at 560).

Other federal circuits similarly have concluded that, when the source of the legal interest asserted by a litigant does not apply or does not exist, the litigant has not established a colorable claim to a right that is "legally protected" or "cognizable" for the purpose of establishing an

injury in fact that satisfies Article III's standing requirement. *See, e.g., 24th Senatorial Dist. Republican Comm. v. Alcorn*, 820 F.3d 624, 633 (4th Cir. 2016) (finding that "[b]ecause neither Virginia law nor the Plan [of Organization that governs the Republican Party of Virginia] gives [the litigant] 'a legally protected interest' in determining the nomination method in the first place, he fails to make out 'an *invasion* of a legally protected interest,' i.e. actual injury, in this case" (quoting *Lujan*, 504 U.S. at 560) (emphasis in original)); *Spirit Lake Tribe of Indians ex rel. Comm. of Understanding and Respect v. Nat'l Collegiate Athletic Ass'n*, 715 F.3d 1089, 1092 (8th Cir. 2013) (noting that injury resulting from a college ceasing to use a Native American name, "even if . . . sufficiently concrete and particularized . . . does not result from the invasion of a legally protected interest"); *White v. United States*, 601 F.3d 545, 555 (6th Cir. 2010) (stating that the plaintiffs "must demonstrate an injury-in-fact to a legally protected interest" but failed to do so because "none of the purported 'constitutional' injuries actually implicates the Constitution"); *Pichler v. UNITE*, 542 F.3d 380, 390-92 (3d Cir. 2008) (affirming dismissal on the ground that litigants failed to establish an injury to a "legally protected interest" because the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721–2725, was interpreted to apply only to an individual whose personal information was contained in a motor vehicle record and not to spouses who might share that same personal information but were not the subject of the motor vehicle record); *Bochese*, 405 F.3d at 984 (litigant was not an intended beneficiary of a contract amendment so he "had no 'legally cognizable interest' in that agreement and therefore lack[ed] standing to challenge its rescission"); *Aiken v. Hackett*, 281 F.3d 516, 519-20 (6th Cir. 2002) (appellants who claimed they were denied a benefit in violation of the Equal Protection Clause but did not allege that they would have received the benefit under a race-neutral policy lacked standing because they "failed to allege the invasion of a right that the law

protects"); *Arjay Assocs.*, 891 F.2d at 898 (stating that "[b]ecause appellants have no right to conduct foreign commerce in products excluded by Congress, they have in this case no right capable of judicial enforcement and have thus suffered no injury capable of judicial redress").

III.

Several considerations favor the above-described understanding of the injury in fact requirement, the first of which is its inherent logic. For an interest to be deemed "legally" protected or cognizable it must have some foundation in the law. *Claybrook*, 111 F.3d at 907 (stating, as quoted above, that "if the plaintiff's claim has no foundation in the law, he has no legally protected interest"). Thus, if the interest underlying a litigant's claimed injury is premised on a law that does not apply or does not exist, it directly follows that the litigant does not possess an interest that is "legally protected." *Cf. Pender*, 788 F.3d at 366 (indicating that a legally protected interest "aris[es] from constitutional, statutory, or common law" (citing *Lujan*, 504 U.S. at 578)).

Another consideration is the degree to which the approach taken by the majority of jurisdictions remains faithful to the proper role of standing as an element of Article III's constitutional limit on the exercise of judicial power. As the Supreme Court has said, "the Constitution extends the 'judicial Power' of the United States only to 'Cases' and 'Controversies'" and the Court "ha[s] always taken this to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co.*, 523 U.S. at 102. "Such a meaning is fairly implied by the text, since otherwise the purported restriction upon the judicial power would scarcely be a restriction at all." *Id.* Declining to exercise jurisdiction to entertain a litigant's claim for which no law can be properly invoked and, as a result, no legally protected interest can be said to have been wrongfully invaded, comports with standing's role as a limitation on judicial power. A contrary approach to standing would effect an expansion of

judicial power without due regard for the autonomy of co-equal branches of government or the way in which the exercise of judicial power "can so profoundly affect the lives, liberty, and property of those to whom it extends," *Valley Forge Christian Coll.*, 454 U.S at 473.[10]

Most importantly, this matter poses separation-of-powers concerns. The Supreme Court has observed that the "standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines*, 521 U.S. at 819-20. The Movants bring a constitutional claim that implicates the authorities of co-equal branches of the government. First, the decisions the Movants seek have been classified by the Executive Branch in accordance with its constitutional authorities and the portions of the opinions that the Executive Branch has declassified have already been released. The Supreme Court has stressed that "[t]he President, after all, is the 'Commander in Chief of the Army and Navy of the United States'" and "[h]is authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant." *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988). Accordingly, "[f]or 'reasons . . . too obvious to call for enlarged discussion,' *CIA v. Sims*, 471 U.S. 159, 170, 105 S.Ct. 1881, 1888, 85 L.Ed.2d 173 (1985), 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." *Egan*, 484 U.S. at 529.

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[10] Some might object that litigants should have an opportunity to develop the facts before a court assesses the scope or applicability of an asserted right. *E.g.*, *Judicial Watch*, 432 F.3d at 363 (Williams, J., concurring) (stating that "the use of the phrase 'legally protected' to require showing of a substantive right would thwart a major function of standing doctrine—to avoid premature judicial involvement in resolution of issues on the merits"). This case does not implicate those concerns. No amount of factual development would alter the outcome of the question of whether the First Amendment applies and affords a qualified right of access to classified, ex parte FISA proceedings.

"[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Id.* In this case, the Movants seek access to information contained in this Court's opinions that the Executive Branch has determined is classified national security information.

Second, in the exercise of its constitutional authorities to make laws, *see United States v. Kebodeaux*, 133 S. Ct. 2496, 2502 (2013) (discussing Congress's broad authority to make laws pursuant to the Constitution's Necessary and Proper Clause), Congress has directed by statute that "[t]he record of proceedings under [FISA], including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence," 50 U.S.C. § 1803(c). While Congress has also established means by which certain opinions of this Court are to be subject to a declassification review and made public, it has made Executive Branch officials acting independently of the Court responsible for these actions. *See infra* Part V.

To be clear, the classified material the Movants' seek is not subject to sealing orders entered by this Court. *See* Movants' Reply In Supp. of Their Mot. for Release of Ct. Records 16 (requesting that the Court "unseal" the judicial opinions and release them "with only those redactions essential to protect information that the Court determines, after independent review, to warrant continued sealing"). No such orders were imposed in the cases in which the sought-after judicial opinions were issued; consequently, no question about the propriety of a sealing order is at play in this matter. The entirety of the information sought by the Movants is classified information redacted from public FISC opinions that is being withheld by the Executive Branch pursuant to its independent classification authorities and remains subject to the statutory mandate that the FISC maintain its records under the aforementioned security procedures. Adjudication

of the Movants' motion could therefore require the Court to delve into questions about the constitutionality, pursuant to the First Amendment, of the Executive Branch's national security classification decisions or the scope and constitutional validity of the statute's mandate that this Court maintain material under the required security procedures.

Together, these considerations commend the path paved by the majority of jurisdictions, which have held that an interest is not "legally protected" for the purpose of establishing standing when the constitutional, statutory or common-law source of the interest does not apply or does not exist. It bears emphasizing that the only interest the Movants identify to establish standing in this case is a qualified right to access judicial opinions. Mot. for Release of Ct. Records 1, 2, 10. The Movants claim that this interest is legally protected by the First Amendment. *Id.* at 10. The Movants further assert that this legally protected interest—that is, the qualified right to access judicial documents as protected by the First Amendment—was invaded when they were denied access to this Court's judicial opinions addressing the legality of bulk data collection, thereby causing injury. *Id.* Accordingly, the question for the Court is whether the First Amendment applies.

IV.

Access to judicial records is not expressly contemplated by the First Amendment, which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I. The Supreme Court, however, has inferred that, in conjunction with the Fourteenth Amendment, "[t]hese expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (plurality opinion). The Supreme Court has further explained that "[i]n guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to these explicit guarantees" and "[w]hat this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted." *Id.*

In *Richmond Newspapers*, the Supreme Court "firmly established for the first time that the press and general public have a constitutional right of access to criminal trials." *Globe Newspaper Co v. Superior Court*, 457 U.S. 596, 603 (1982). The Supreme Court has advised, however, that, "[a]lthough the right of access to criminal trials is of constitutional stature, it is not absolute," *id.* at 607, but "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest," *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*"). The Supreme Court has extended this qualified First Amendment right of public access only to

criminal trials, *Richmond Newspapers*, 448 U.S. at 580, the voir dire examination of jurors in a criminal trial, *Press-Enterprise I*, 464 U.S. at 508-13, and criminal preliminary hearings "as they are conducted in California," *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 13 (1986) ("*Press-Enterprise II*"). Most circuit courts, though, "have recognized that the First Amendment right of access extends to civil trials and some civil filings." *ACLU v. Holder*, 673 F.3d 245, 252 (4th Cir. 2011). To date, however, the Supreme Court has never "applied the *Richmond Newspapers* test outside the context of criminal judicial proceedings or the transcripts of such proceedings." *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 935 (D.C. Cir. 2003). Nor has "the Supreme Court . . . ever *indicated* that it would apply the *Richmond Newspapers* test to anything other than criminal judicial proceedings." *Id.* (emphasis in original).

"In *Press–Enterprise II*, the Supreme Court first articulated what has come to be known as the *Richmond Newspapers* 'experience and logic' test, by which the Court determines whether the public has a right of access to 'criminal proceedings.'"[11] *Id.* at 934. The "experience" test questions "whether the place and process have historically been open to the press and general public." *Press-Enterprise II*, 478 U.S. at 8. The "logic" test asks "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.*

This is not the first occasion on which the Court has confronted the question of whether a qualified First Amendment right of access applies to this Court's judicial records. Nearly a decade ago, the ACLU sought by motion the release of this Court's "orders and government

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[11] In addition to the *Richmond Newspapers* "experience and logic" tests, the Second Circuit has also "endorsed" a "second approach" that holds that "the First Amendment protects access to judicial records that are 'derived from or a necessary corollary of the capacity to attend the relevant proceedings.'" *In re N.Y. Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 409 (2d Cir. 2009) (quoting *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004)).

pleadings regarding a program of surveillance of suspected international terrorists by the National Security Agency (NSA) that had previously been conducted without court authorization." *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 485. Assuming, for the sake of argument, that a qualified First Amendment right of access might extend to judicial proceedings other than criminal proceedings, the Court applied the requisite "experience" and "logic" tests acknowledged by the Supreme Court in *Press-Enterprise II* to determine whether such a right attached to the FISA electronic surveillance proceedings in which the sought-after orders and pleadings were filed. *Id.* at 491-97.

Considering the "experience" test first, the Court in *In re Motion for Release of Court Records* noted that "[t]he FISC ha[d] no . . . tradition of openness"; it "ha[d] never held a public hearing in its history"; a "total of two opinions ha[d] been released to the public in nearly three decades of operation"; the Court "ha[d] issued literally thousands of classified orders to which the public has had no access"; there was "no tradition of public access to government briefing materials filed with the FISC" or FISC orders; and the publication of two opinions of broad legal significance failed to establish a tradition of public access given the fact that "the FISC ha[d] . . . issued other legally significant decisions that remain classified and ha[d] not been released to the public . . . ." 526 F. Supp. 2d at 492-93. Accordingly, the Court determined that "the FISC is not a court whose place or process has historically been open to the public" and the "experience" test was not satisfied. *Id.* at 493.

As far as the "logic" test was concerned, although the Court in *In re Motion for Release of Court Records* agreed that public access might result in a more informed understanding of the Court's decision-making process, provide a check against "mistakes, overreaching or abuse," and benefit public debate, *id.* at 494, it found that "the detrimental consequences of broad public

access to FISC proceedings or records would greatly outweigh any such benefits" and would actually imperil the functioning of the proceedings:

> The identification of targets and methods of surveillance would permit adversaries to evade surveillance, conceal their activities, and possibly mislead investigators through false information. Public identification of targets, and those in communication with them, would also likely result in harassment of, or more grievous injury to, persons who might be exonerated after full investigation. Disclosures about confidential sources of information would chill current and potential sources from providing information, and might put some in personal jeopardy. Disclosure of some forms of intelligence gathering could harm national security in other ways, such as damaging relations with foreign governments.

Id. The Court cautioned that "[a]ll these possible harms are real and significant, and, quite frankly, beyond debate," *id.*, and "the national security context applicable here makes these detrimental consequences even more weighty," *id.* at 495. In addition, after rejecting the ACLU's argument that the Court should conduct an independent review of the Executive Branch's classification decisions under a non-deferential standard, the Court identified numerous ways that "the proper functioning of the FISA process would be adversely affected if submitting sensitive information to the FISC could subject the Executive Branch's classification [decisions] to a heightened form of judicial review":

> The greater risk of declassification and disclosure over Executive Branch objections would chill the government's interactions with the Court. That chilling effect could damage national security interests, if, for example, the government opted to forgo surveillance or search of legitimate targets in order to retain control of sensitive information that a FISA application would contain. Moreover, government officials might choose to conduct a search or surveillance without FISC approval where the need for such approval is unclear; creating such an incentive for government officials to avoid judicial review is not preferable. *See Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) (noting strong Fourth Amendment preference for searches conducted pursuant to a warrant and adopting a standard of review that would provide an incentive for law enforcement to seek warrants). Finally, in cases that are submitted, the free flow of information to the FISC that is needed for an ex parte proceeding to result in sound decision[-]making and effective oversight could also be threatened.

Id. at 496. Finding that the weight of all these harms counseled against public access, the Court adopted the reasoning of other courts that "have found that there is no First Amendment right of access where disclosure would result in a diminished flow of information, to the detriment of the process in question," *id.*, and remarked that this reasoning "compels the conclusion that the 'logic test' . . . is not satisfied here," *id.* at 497.

Because both the "experience" and "logic" tests were "unsatisfied," the Court concluded that "there [was] no First Amendment right of access to the requested materials." *Id.* The Court also declined to exercise its own discretion to "undertake the searching review of the Executive Branch's classification decisions requested by the ACLU, because of the serious negative consequences that might ensue . . . ." *Id.* The Court noted, however, that "[o]f course, nothing in this decision forecloses the ACLU from pursuing whatever remedies may be available to it in a district court through a FOIA request addressed to the Executive Branch." *Id.*

In the motion that is now pending, the Movants acknowledge the decision in *In re Motion for Release of Court Records* but argue that the decision erred by (1) "limiting its analysis to whether two previously published opinions of this Court 'establish a tradition of public access'" and (2) "concluding that public access would 'result in a diminished flow of information, to the detriment of the process in question.'" Mot. for Release of Ct. Records 21 (quoting *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 493, 496). Taking these two arguments in order, the first argument is premised on a misreading of the Court's analysis and an overly broad framing of the legal question. While examining the experience prong of *Richmond Newspapers*, the Court did not "limit" its analysis to two previously-published opinions; to the contrary, the Court made clear that its rationale for holding that there was no tradition of public access to FISC electronic surveillance proceedings was demonstrated by, as stated above, the lack of any

public hearing in the (at that point) approximately 30 years in which the FISC had been operating and the fact that, with *the exception of* only two published opinions, the entirety of the court's proceedings, which consisted of the issuance of thousands of judicial orders, was classified and unavailable to the public. *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 492. In other words, at that time, a minimum of 99.98% of FISC proceedings was classified and nonpublic. It would be an understatement to say that such a percentage reflected a tradition of no public access. Indeed, the Court found 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.* at 493.

The Movants gain no traction challenging *In re Motion for Release of Court Records* by suggesting that the framing of the "experience" test should be enlarged to posit whether public access historically has been available to any "judicial opinions interpreting the meaning and constitutionality of public statutes," Mot. for Release of Ct. Records 14, rather than focusing on whether *FISC proceedings* historically have been accessible to the public. Such an expansive framing of the type or kind of document or proceeding at issue plainly would sweep too broadly because it would encompass grand jury opinions, which often interpret the meaning and constitutionality of public statutes but arise from grand jury proceedings, which are a "paradigmatic example" of proceedings to which no right of public access applies, *In re Boston Herald, Inc.*, 321 F.3d 174, 183 (1st Cir. 2003) (quoting *Press-Enterprise II*, 478 U.S. at 9), and a "classic example" of a judicial process that depends on secrecy to function properly, *Press-Enter. II*, 478 U.S. at 9. As demonstrated by the decision in *Press-Enterprise II*, the Supreme Court certainly contemplated the consideration of narrower subsets of legal documents and proceedings in light of the fact that it entertained the question of whether the First Amendment

right of access applied to a subset of judicial hearing transcripts—i.e., "the transcript of a preliminary hearing growing out of a criminal prosecution," 478 U.S. at 3—and never intimated that its analysis should (or could) extend to transcripts of *all* judicial hearings growing out of a criminal prosecution. Furthermore, to the extent the Movants take issue with the Court's formulation of the "experience" test on the ground that it focused too narrowly on FISC practices, Mot. for Release of Ct. Records 21 (arguing that the experience test "does not look to the particular practice of any one jurisdiction"), the fact of the matter is that FISA mandates that the FISC "shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States," 50 U.S.C. § 1803(a)(1), so the FISC's virtually-exclusive[12] jurisdiction over such proceedings is a construct of Congress and, thereby, the American people.[13] The Movants offer no authority to support a suggestion that the concentration of FISC proceedings in one judicial forum detracts from the legitimacy or correctness of applying the "experience" test to FISC proceedings rather than a broader range of proceedings. Accordingly, *In re Motion for Release of Court Records* properly framed the "experience" test to examine whether FISC proceedings—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.

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[12] *See* 50 U.S.C. §§ 1803(a), 1823(a), 1842(b)(1), 1861(b)(1)(A), 1881b(a), 1881c(a)(1). Although applications seeking pen registers, trap-and-trace devices, or certain business records for foreign intelligence purposes may be submitted by the government to a United States Magistrate Judge who has been publicly designated by the Chief Justice of the United States to have the power to hear such applications, FISA makes clear that the United States Magistrate Judge will be acting "on behalf of" a judge of the FISC. 50 U.S.C. §§ 1842(b)(2), 1861(b)(1)(B). In practice, no United States Magistrate Judge has been designated to entertain such applications.

[13] Although FISC proceedings occur in a single judicial forum, the district court judges designated to comprise the FISC are from at least seven of the United States judicial circuits across the country. 50 U.S.C. § 1803(a)(1).

Attending to the "logic" prong of the constitutional analysis, the Movants argue that the Court "erred in concluding that public access would 'result in a diminished flow of information, to the detriment of the process in question.'" Mot. for Release of Ct. Records 21 (quoting *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 496). The Movants neglect, however, to explain why they believe this conclusion was flawed; nor do they otherwise refute the Court's identification of the detrimental effects that could cause a diminished flow of information as a result of public access, *see In re Motion for Release of Court Records*, 526 F. Supp. 2d at 494-96. Instead, the Movants offer the conclusory statement that "disclosure of the requested opinions would serve weighty democratic interests by informing the governed about the meaning of public laws enacted on their behalf." Mot. for Release of Ct. Records 21. While it undoubtedly is the case that access to judicial proceedings and opinions plays an important, if not imperative, role in furthering the public's understanding about the meaning of public laws, the Movants cannot ignore the Supreme Court's instruction that, "[a]lthough many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly." *Press-Enter. II*, 478 U.S. at 8-9. *In re Motion for Release of Court Records* identified detrimental consequences that could be anticipated if the public had access to open FISC proceedings, some of which the Court noted were "comparable to those relied on by courts in finding that the 'logic' requirement for a First Amendment right of access was not satisfied regarding various types of proceedings and records" and the others were described as "distinctive to FISA's national security context." 526 F. Supp. 2d at 494. These detrimental consequences, which are quoted above, were deemed to outweigh any benefits public access would add to the functioning of such proceedings, *id.*, and the Court emphasized that "the national security

context applicable here makes these detrimental consequences even more weighty," *id.* at 495. Because the Movants made no attempt to dispute or discredit these detrimental effects, the resulting diminished flow of information that public access would have on the functioning of FISC proceedings, or the weight the Court gave to the detrimental effects, this Court is left to view their argument as simply a generalized assertion that they disagree with *In re Motion for Release of Court Records.*[14] That disagreement being duly noted, the Movants have not made a persuasive case that the result was wrong. Consequently, this Court has no basis to disclaim the conclusion in *In re Motion for Release of Court Records* that the 'logic' test was "not satisfied[,]" *id.* at 497, and, indeed, agrees with it.

Although the records to which the ACLU sought access in *In re Motion for Release of Court Records* implicated only electronic surveillance proceedings pursuant to 50 U.S.C. §§ 1804-1805, *id.* at 486, the analysis applying *Richmond Newspapers'* "experience" and "logic" tests involved reasoning that more broadly concerned all classified, ex parte FISC proceedings regardless of statutory section. *Id.* 491-97. Notwithstanding the passage of time, that analysis retains its force and relevance.[15] The Court also sees no meaningful difference between the

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[14] The Movants specify four ways public access to FISC judicial opinions is "important to the functioning of the FISA system," Mot. for Release of Ct. Records 17-20; however, the Movants never discuss these benefits vis-à-vis the detrimental effects identified by *In re Motion for Release of Court Records.*

[15] Although there have been several public proceedings since *In re Motion for Release of Court Records* was decided, *see, e.g.*, Misc. Nos. 13-01 through 13-09, *available at* http://www.fisc.uscourts.gov/public-filings, the statistical significance of those public proceedings makes no material difference to the question of whether FISA proceedings historically have been open to the public, especially when considered in light of the many thousands more classified and ex parte proceedings that have occurred since that case was concluded. Furthermore, by and large, those public proceedings have been in the nature of this one whereby, in the wake of the unauthorized disclosures about NSA programs, private parties moved the Court for access to judicial records or for greater transparency about the number of orders issued by the FISC to providers. They are therefore distinguishable from the type of

application of the "experience" and "logic" tests to FISC proceedings versus the application of these tests to sealed wiretap applications pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20. Like FISC proceedings, Title III wiretap applications are "subject to a statutory presumption *against* disclosure,"[16] "have not historically been open to the press and general public," and are not subject to a qualified First Amendment right of access, *In re N.Y. Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 409 (2d Cir. 2009) (emphasis in original). Accordingly, persuaded by *In re Motion for Release of Court Records*, this Court adopts its analysis and, for the reasons stated therein, as well as those discussed above, holds that a First Amendment qualified right of access does not apply to the FISC proceedings that resulted in the issuance of the judicial opinions the Movants now seek, which consist of proceedings pursuant to 50 U.S.C. § 1842 (pen registers and trap and trace devices for foreign intelligence and international terrorism investigations) and 50 U.S.C. § 1861 (access to certain business records for foreign intelligence and international terrorism investigations).

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proceedings relevant to the instant motion and to *In re Motion for Release of Court Records*, namely ex parte proceedings involving classified government requests for authority to conduct electronic surveillance or other forms of intelligence collection.

[16] Title III mandates that wiretap "[a]pplications made and orders granted under this chapter shall be sealed by the judge." 18 U.S.C. § 2518(8)(b). As discussed *supra*, FISA mandates that "[t]he record of proceedings under this chapter, including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence." 50 U.S.C. § 1803(c).

V.

As already noted, the only law the Movants cite as the source for their claimed right of public access to FISC judicial opinions is the First Amendment. If any other legal bases existed to secure constitutional standing for these Movants, they were obligated to present them. Because the First Amendment qualified right of access does not apply to the FISC proceedings at issue in this matter, the Movants have no legally protected interest and cannot show that they suffered an injury in fact for the purpose of meeting their burden to establish standing under Article III.[17]

To be sure, the Court does not reach this result lightly. However, application of the Supreme Court's test to determine whether a First Amendment qualified right of access attaches to the FISC proceedings at issue in this matter leads to the conclusion that it does not. Absent some other legal basis to establish standing, this means the Court has no jurisdiction to consider causes of action such as this one whereby individuals and organizations who are not parties to FISC proceedings seek access to classified judicial records that relate to electronic surveillance, business records or pen register and trap-and-trace device proceedings. Notably, the D.C. Circuit has advised that "[e]ven if holding that [the litigant] lacks standing meant that no one could initiate" the cause of action at issue "it would not follow that [the litigant] (or anyone else) must have standing after all. Rather, in such circumstance we would infer that 'the subject matter is committed to the surveillance of Congress, and ultimately to the political process.'" *Sargeant*,

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[17] The Court's decision involves scrutiny of whether the First Amendment qualified right of access applies, but only as part of the assessment of whether the Movants have standing under Article III. Because they do not, the Court dismisses their Motion for lack of jurisdiction without, strictly speaking, ruling on the merits of their asserted cause of action. Moreover, in the absence of jurisdiction, the Court may not consider any other legal arguments or requests for relief that were advanced in the motion.

130 F.3d at 1070 (quoting *Richardson*, 418 U.S. at 179). Indeed, "[t]he assumption that if [the litigants] have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

Evidence that public access to opinions arising from classified, ex parte FISC proceedings is best committed to the political process is demonstrated by Congress's enactment of the Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015 ("USA FREEDOM Act of 2015"), Pub. L. 114-23, 129 Stat. 268 (2015), which, after considerable public debate, made substantial amendments to FISA. One such amendment, which is found in § 402 of the USA FREEDOM Act and codified at 50 U.S.C. § 1872(a), added an entirely new provision for the public disclosure of certain FISC judicial opinions. Consequently, FISA now states that "the Director of National Intelligence, in consultation with the Attorney General, shall conduct a declassification review of each decision, order, or opinion issued by the Foreign Intelligence Surveillance Court . . . that includes a significant construction or interpretation of any provision of law, including any novel or significant construction or interpretation of the term 'specific selection term', and, consistent with that review, make publicly available to the greatest extent practicable each such decision, order, or opinion." 50 U.S.C. § 1872(a). Although the Movants characterize the enactment of this provision of the USA FREEDOM Act as evidence that "favors disclosure of FISC opinions" and bolsters their argument that "public access would improve the functioning of the process in question," Notice of Supplemental Authority 2 (Dec. 4, 2015), the Court does not believe that this provision alters the First Amendment analysis. FISC proceedings of the type at issue historically have not been, nor presently will be, open to the press and general public given that no amendment to FISA altered the statutory mandate for such proceedings to occur ex parte and

pursuant to the aforementioned security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence. Furthermore, although Congress had the opportunity to do so, it made no amendment to FISA that established a procedure by which the public could seek or obtain access to FISC records directly from the Court. Rather, after informed debate, Congress deemed public access as contemplated by 50 U.S.C. § 1872(a) to be the means that, all things considered, best served the totality of the American people's interests. Accordingly, the USA FREEDOM Act enhances public access to significant FISC decisions, as provided by § 1872(a), and ensures that the public will have a more informed understanding about how FISA is being construed and implemented, which appears to be at the heart of the Movants' interest. Mot. for Release of Ct. Records 2 (stating that "Movants' current request for access to opinions of this Court evaluating the legality of bulk collection seeks to vindicate the public's overriding interest in understanding how a far-reaching federal statute is being construed and implemented, and how constitutional privacy protections are being enforced").

CONCLUSION

For the foregoing reasons, the Court will dismiss for lack of jurisdiction the pending MOTION OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL, AND THE MEDIA FREEDOM AND INFORMATION ACCESS CLINIC FOR THE RELEASE OF COURT RECORDS. A separate order will accompany this Opinion.

January 25th, 2017

Rosemary M Collyer

ROSEMARY M. COLLYER
Presiding Judge, United States Foreign Intelligence Surveillance Court

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

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

ORDER

For the reasons set forth in the accompanying Opinion, it hereby is **ORDERED** that the MOTION OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL, AND THE MEDIA FREEDOM AND INFORMATION ACCESS CLINIC FOR THE RELEASE OF COURT RECORDS is **DISMISSED** for lack of jurisdiction.

SO ORDERED.

January 25th, 2017

Rosemary M Collyer

ROSEMARY M. COLLYER
Presiding Judge, United States Foreign
Intelligence Surveillance Court