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

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

MOVANTS' EN BANC REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR THE RELEASE OF COURT RECORDS

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I. The government improperly conflates standing and the merits.

The government commits the same error as the Opinion under review by analyzing Movants' standing based on the merits of their underlying claims. As Movants explained in their opening brief, that approach contradicts settled law. *See* Movants' Br. 11–14. The Supreme Court has repeatedly cautioned lower courts not to conflate standing and the merits, *see, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998), and it has clearly instructed that "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal," *Warth v. Selden*, 422 U.S. 490, 500 (1975).

To establish standing, Movants need demonstrate only that the injury they complain of is to a "judicially cognizable interest." *Bennett v. Spear*, 520 U.S. 154, 167 (1997). The type of injury alleged must be one that courts have recognized as an injury at common law, pursuant to an act of Congress, or under the Constitution. *See, e.g.*, *Sargeant v. Dixon*, 130 F.3d 1067, 1069 (D.C. Cir. 1997); *see also Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 152–53 (1951) (Frankfurter, J., concurring). A claimant need not prevail in its claim in order to establish standing—it need only assert a concrete and particularized harm that the law regards as an injury-in-fact. Thus, for instance, loss of money is an injury, bodily harm is an injury, and trespass on property is an injury, *see, e.g.*, *Clinton v. City of N.Y.*, 524 U.S. 417, 432–33 (1998), regardless of whether a claimant is ultimately entitled to relief for those injuries. *See generally Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.").

There is no question that the denial of access to records is an injury-in-fact, one recognized at common law, by acts of Congress, and under the Constitution. *See, e.g.*, *Nixon v. Warner Comm'ns Inc.*, 435 U.S. 589, 597–98 (1978) (injury supporting common-law claims); *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 449 (1989) (injury supporting statutory claims); *Press-Enterprise Co. v. Superior Court* ("*Press-Enterprise II*"), 478 U.S. 1, 5–6 (1986) (injury supporting constitutional claims). Indeed, with almost complete uniformity, the courts have recognized that the denial of access to judicial documents—such as those Movants seek—is an injury to a "judicially cognizable interest" and thus confers standing. *See* Movants' Br. 6–11; *see also Nixon*, 435 U.S. at 597–98 ("The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, and in a newspaper publisher's intention to publish information concerning the operation of government." (citations omitted)); *Carlson v. United States*, 837 F.3d 753, 758–61 (7th Cir. 2016) (explaining that "[t]he denial at the threshold of the right to petition for access inflicts an 'injury-in-fact'"); *Doe v. Pub. Citizen*, 749 F.3d 246, 264 (4th Cir. 2014) (holding that intervenors' injury "is formed by their inability to access judicial documents and materials filed in the proceedings below").

For this reason, courts have regularly adjudicated the merits of First Amendment claims of access even where they ultimately denied those claims on the merits. *See, e.g.*, *Pub. Citizen*, 491 U.S. at 449–50; *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974); *In re U.S. for an Order Pursuant to 18 U.S.C. Sec. 2703(d)*, 707 F.3d 283, 290–92 (4th Cir. 2013); *In re Search of Fair Fin.*, 692 F.3d 424 (6th Cir. 2012); *In re N.Y. Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 409–11 (2d Cir. 2009); *Flynt v. Rumsfeld*, 355 F.3d 697 (D.C. Cir. 2004); *N.J. Media Grp., Inc. v. Ashcroft*, 308 F.3d 198 (3d

Cir. 2002); *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64–65 (4th Cir. 1989); *Times Mirror Co. v. United States*, 873 F.2d 1210, 1212–18 (9th Cir. 1989); *Nat'l Broad. Co. v. DOJ*, 735 F.2d 51, 55 (2d Cir. 1984). That is true even where courts had *previously* denied a First Amendment right to access the class of judicial records sought. *See, e.g.*, *In re Documents 1, 2, 3 Search Warrant and Supporting Affidavits Relating to Kaczynski*, MCR 96-6-H-CCL, 1996 WL 343429 (D. Mont. Apr. 10, 1996) (news organizations had standing to seek warrant materials despite prior ruling in *Times Mirror Co.* that no First Amendment right attaches to such materials).

The government ignores this precedent and fixates, instead, on the term "legally protected interest." Gov't Br. 7. That term appears occasionally in Supreme Court cases, but it does not mean that a plaintiff must establish a legal entitlement to relief to have standing. The Supreme Court has rejected that notion many times. Rather, a "legally protected interest"—also known, more accurately, as a "judicially cognizable interest," *Bennett*, 520 U.S. at 167; *see Judicial Watch, Inc. v. U.S. Senate*, 432 F.3d 359, 363–64 (D.C. Cir. 2005) (Williams, J., concurring)—means an interest recognized by courts or by law, such as injuries to common-law rights under property, contract, and tort law, *see, e.g.*, *Servicios Azucareros de Venez., C.A. v. John Deere Thibodeaux, Inc.*, 702 F.3d 794, 800 (5th Cir. 2012), or injuries to rights bestowed by the Constitution, *see, e.g.*, *Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 931 (9th Cir. 2008). This requirement serves to distinguish injuries society recognizes as judicially cognizable, which give rise to a "case or controversy," from those never thought fit for judicial resolution—such as wholly subjective, generalized, or abstract harms. *See Spokeo*, 136 S. Ct. at 1548–49.

Here, the government does not dispute the fact that numerous courts, including the Supreme Court, have long recognized an interest in accessing judicial records. Nor does it

dispute that the injury to that interest in this case is both concrete and particularized. *See* Gov't Br. 3. Accordingly, Movants have shown the type of injury necessary to satisfy standing. Whether their constitutional rights have been violated is another matter.

The three cases on which the government principally relies are not to the contrary. *Griswold v. Driscoll* did not involve a denial of access to judicial records—which courts have recognized as an Article III injury for decades—or for that matter to any kind of records at all. 616 F.3d 53 (1st Cir. 2010). Instead, the plaintiffs asserted a novel theory of harm, claiming that they had been deprived of an educational curriculum reflecting diverse political viewpoints. *Id.* at 55–56. *McConnell v. Federal Election Commission* involved a similarly ungrounded claim of harm: the court held that the "broad and diffuse" standing theory presented by plaintiffs—"curtailment of the scope of their participation in the electoral process"—failed because the purported right had *never* been legally recognized. 540 U.S. 93, 227 (2003). The only reason these cases analyzed standing and the merits together was that, in the absence of a recognized concrete injury, the plaintiffs had to rely on their constitutional claim for both the substance of their claims and the basis for alleging that they had suffered injuries at all. *See generally Spokeo*, 136 S. Ct. at 1549 (recognizing that some intangible harms are defined by the Constitution itself). By contrast, in right-of-access cases, courts have consistently found that a lack of access to court records and proceedings is concrete, particular, and judicially cognizable. *See* Movants' Br. 6–8.[1]

[1] The government's third case—*Bond v. Utreras*, 585 F.3d 1061 (7th Cir. 2009)—explicitly recognized that members of the public have standing to seek access to "judicial records," which is precisely what Movants seek here. *Id.* at 1073–74. To the extent that *Bond* suggests that courts may collapse standing and the merits in right-of-access cases, Movants submit that it is at odds with the Supreme Court's decisions and those of other circuit courts.

II. This Court's prior rejection of a right of access to its opinions does not affect its jurisdiction to entertain Movants' motion.

The government appears to believe that the Court lacks jurisdiction to consider a claim that it has previously rejected on the merits. Gov't Br. 6–7. This, too, is incorrect. The jurisdictional rule the government posits does not exist.

When presented with a right-of-access claim to the Court's own records, the FISC possesses subject-matter jurisdiction if the claim "will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." *Bell v. Hood*, 327 U.S. 678, 685 (1946). This is so even when a party fails to state a claim on which relief may be granted. Dismissal for failure to state a claim is a judgment on the merits that may issue only "after and not before [a] court has assumed jurisdiction over [a] controversy." *Id.* at 682.

The Supreme Court has, in rare circumstances, held jurisdiction to be lacking for truly outlandish claims or for claims that the Supreme Court itself has squarely foreclosed. *See Oneida Indian Nation v. Cty. of Oneida*, 414 U.S. 661, 666–67 (1974). If a claim "clearly appears to be immaterial, wholly insubstantial and frivolous or otherwise so devoid of merit as not to involve a federal controversy," it may be dismissed for lack of subject-matter jurisdiction. *Steel Co.*, 523 U.S. at 89. But here, the government does not contend that Movants' right-of-access claim is truly outlandish or wholly insubstantial, and Judge Collyer did not find it to be so. The government contends only that this Court has previously rejected similar claims on the merits. *See* Gov't Br. 7. But the fact that a lower court has previously denied a claim on the merits has never been enough to trigger this exceedingly narrow exception.

In order for a claim to be so completely foreclosed that the courts lack jurisdiction altogether, an issue must, at a minimum, have been definitively resolved by the Supreme Court.

See Steel Co., 523 U.S. at 89; *Bell*, 327 U.S. at 684; *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 849–50 (D.C. Cir. 2010). Even then, claims are squarely foreclosed if—and only if—their "unsoundness so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Hagans v. Lavine*, 415 U.S. 528, 538 (1974). "[P]revious decisions that merely render claims of doubtful or questionable merit" do not squarely foreclose them. *Id.* In other words, the claim must be "essentially fictitious, wholly insubstantial, obviously frivolous, and obviously without merit." *Id.* at 537 (internal citations omitted). In practice, this limitation has applied extraordinarily infrequently—and for good reason. To read the "squarely foreclosed" limitation any more broadly would suggest that the federal courts lacked jurisdiction over Oliver Brown's challenge to the segregation of public schools in Topeka, Kansas, given the Supreme Court's earlier decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896).[2]

While foreclosure might be appropriate in very rare instances, this is plainly not one. There is no Supreme Court decision rendering Movants' claim obviously and wholly without merit; to the contrary, dozens of federal courts have concluded that existing precedent permits federal courts to entertain the merits of claims just like the one Movants present here.

Indeed, the right-of-access claims in this proceeding illustrate why a prior loss on the merits does not, and should not, deprive the Court of jurisdiction. Because the merits of Movants' claim turn in significant part on a factual analysis of the history of access to the types of records they seek, *see Press-Enterprise II*, 478 U.S. at 8, 10–11; *see also* Movants' Br. 14, it would be incongruous to rule, categorically, that they lack standing to attempt to show what that

[2] *Cf. Lawrence v. Texas*, 539 U.S. 558 (2003), overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had stated that the "claim that a right to engage in such [homosexual] conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." *Id.* at 194.

history teaches. Future movants may make different showings, not least because the relevant history may change over time. *See N.Y. Civil Liberties Union v. N.Y. City Transit Auth.*, 684 F.3d 286, 299 (2d Cir. 2012) (Public-access cases "focus not on formalistic descriptions of the government proceeding but on the kind of work the proceeding actually does and on the First Amendment principles at stake. . . . [C]hanges in the organization of government do not exempt new institutions from the purview of old rules. Rather, they lead us to ask how the new institutions fit into existing legal structures."). The question of whether those changing factual presentations alter the outcome of the case is one for the merits, not for standing.[3]

Conclusion

For the foregoing reasons, Movants have standing to seek access to this Court's opinions.

[3] The government also argues that the Court may not consider a request to publish its opinions under FISC Rule 62 because Movants lack standing. Gov't Br. 9–11. Movants did not address this issue in their opening brief because it is beyond the scope of the Court's en banc briefing order. But the government is wrong for two reasons. First, Movants need not establish standing to request that the Court exercise its discretion, under Rule 62 and its inherent supervisory powers, to seek publication of its own opinions. As Judge Saylor observed in *In re Orders of this Court Interpreting Sec. 215 of the Patriot Act*, it would make little sense to hold that the Court cannot so much as consider such requests for publication. No. Misc. 13-02, 2013 WL 5460064, at *5 (FISC Sept. 13, 2013). Second, even if Movants did have to establish Article III standing to support a request under Rule 62, the fact that Movants have been deprived of access to the Court's opinions would, again, constitute a "judicially cognizable interest" sufficient to support their request.

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Respectfully submitted,

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* This memorandum has been prepared with the assistance of Yale Law School students, Regina Wang and Andrew Udelsman. This brief does not purport to present the institutional views of Yale Law School, if any.

CERTIFICATE OF SERVICE

I, John Langford, certify that on this day, May 1, 2017, a copy of the foregoing brief was served on the following persons by the methods indicated:

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