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

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

THE UNITED STATES' LEGAL BRIEF TO THE EN BANC COURT
IN RESPONSE TO THE COURT'S ORDER OF MARCH 22, 2017

The Presiding Judge's opinion in this case persuasively explains that, because movants have not established an injury to a *legally protected* interest that is applicable here, movants lack Article III standing, and therefore this Court lacks jurisdiction over this action. While two prior opinions of this Court have found jurisdiction over similar actions, neither of those opinions analyzed the question addressed here. The Presiding Judge's opinion is the first from this Court to address this issue, and it does so thoroughly and correctly. The en banc Court should similarly find that there is no Article III jurisdiction here.

BACKGROUND

It is well-settled that there is no First Amendment public right of access to the proceedings, records, and rulings of this Court. *See In re Opinions & Orders of this Court Addressing Bulk Collection of Data under the Foreign Intelligence Surveillance Act*, 2017 WL 427591, at *19-21 (FISA Ct. Jan. 25, 2017); *In re Orders of this Court Interpreting Section 215 of the Patriot Act*, 2014 WL 5442058, at *4 n.10 (FISA Ct. Aug. 7, 2014); *In re Proceedings Required by § 702(i) of the FISA Amendments Act of 2008*, 2008 WL 9487946, at *3 (FISA Ct. Aug. 27, 2008); *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 492-97 (FISA Ct. 2007). Indeed, the en banc Court in this case recognized this principle in the course of

ordering briefing. *See* Order 1, Mar. 22, 2017 (ordering briefing on "the question of whether Movants established Article III standing notwithstanding that a First Amendment qualified right of access does not apply to the judicial opinions they seek"). This conclusion stems from a straightforward application of the Supreme Court's decision in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986). *See also Dhiab v. Trump*, __ F.3d __, 2017 WL 1192911, at *5 (D.C. Cir. Mar. 31, 2017) (Op. of Randolph, J.) (observing that "from the beginning of the republic to the present day, there is no tradition of publicizing secret national security information involved in civil cases, or for that matter, in criminal cases," as the "tradition is exactly the opposite").

This case, however, is the first in which the Court has considered the related but distinct question of whether, given that it is plain under this Court's precedent that they lack any First Amendment right of access or other legal right to the material they seek, movants may nonetheless claim an injury to a "legally protected right" as is necessary for Article III standing and thus subject-matter jurisdiction.

I. Prior Decisions of the Court

The first time this Court addressed an argument that the First Amendment provided a right of access to its proceedings and records, the Court rejected the movant's argument on the merits without addressing the question of Article III standing. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d 484 (FISA Ct. 2007). Applying the standards set forth in *Press-Enterprise*, the Court found both that the movant's claim ran "counter to a long-established and virtually unbroken practice of excluding the public from FISA applications and orders," 526 F. Supp. 2d at 493, and that access would not be logical because the "detrimental consequences" from public access "would greatly outweigh any" benefits, *id.* at 494. The Court's opinion in that case includes a jurisdictional analysis, but that analysis addresses only whether the FISC's

specialized jurisdiction, as delineated by Congress in the Foreign Intelligence Surveillance Act, permitted it to adjudicate the case. *Id.* at 486-87. The opinion in that case did not address Article III standing.

In a subsequent case, in which three movants claimed a First Amendment right to certain opinions of this Court, the Court addressed a different aspect of Article III standing than the one being considered here, namely whether the movants' claimed injuries were sufficiently concrete and particularized. *See In re Orders of this Court Interpreting Section 215 of the Patriot Act*, 2013 WL 5460064, at *2-4 (FISA Ct. Sept. 13, 2013). The Court found that two of the movants had sufficiently particularized injuries because "access to the [opinions] would assist" them in public debates. *Id.* at *4. The Court dismissed the third movant because the record contained "no information as to how the release of the opinions would aid [that entity's] activities, or how the failure to release them would be detrimental." *Id.* at *4 n.13.[1] The Court did not address whether any injury that may have existed was an injury to a legally protected interest.

II. Procedural Background

In the instant case, three movants sought access to "opinions addressing the legal basis for the 'bulk collection' of data." Mot. for the Release of Court Records 1, Nov. 6, 2013. Movants argued that they had Article III standing because they had "a concrete and particularized injury." *Id.* at 10. They asserted a First Amendment right of access to the opinions, notwithstanding earlier decisions from this Court holding that there is no First Amendment right of access to FISC proceedings and rulings. *See id.* at 12-24. Finally, they

[1] Subsequently, the third movant provided a declaration that explained how the documents sought would advance its mission, and the Court reinstated it as a party. *See* Opinion and Order at 10, *In re Orders of this Court Interpreting Section 215 of the Patriot Act*, Misc. 13-02 (FISA Ct. Aug. 7, 2014), available at http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Order-6_0.pdf.

argued that, in implementing the purported constitutional right of access, the Court should first invoke FISC Rule 62(a), order a declassification review, and then set up another round of briefing to adjudicate the government's classification decisions. *Id.* at 24-25.

In its responsive brief, the government noted that the opinions sought by movants had all been identified (there were four) and publicly released, with only classified material redacted. United States' Opp'n to Mot. 1-2, Dec. 6, 2013. The government argued that the movants lacked standing to seek an additional classification review or FISC publication because Rule 62(a) provided the movants with no rights. *Id.* at 2-4. The government further observed that both FISC Rule 3 and the FISC's own holdings preclude the Court from ordering the release of information that the executive branch has deemed classified. *Id.* at 4-7. The government noted that Congress has provided a mechanism for judicial review of classification decisions in the Freedom of Information Act ("FOIA"), pursuant to which appropriate review occurs in a district court. *Id.* at 4.

In reply, movants once again asserted their First Amendment arguments, characterizing both Rule 62(a) and FOIA as not "adequate." Reply 3, Dec. 20, 2013.

In an extensive opinion written by the Presiding Judge, the Court addressed for the first time the question of whether, in the absence of any First Amendment or other right of access to FISC opinions, movants can establish an injury to a legally protected interest as is required for Article III standing. Surveying numerous cases from the Supreme Court and circuit courts, this Court observed that "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 otherwise—does not apply or does not exist." 2017 WL 427591, at *8. As this Court has previously held

that there is no First Amendment right of access to this Court's proceedings, records, and rulings, and movants had identified no other legal right to the classified material sought, movants could identify no injury to a legally protected interest and thus lacked Article III standing. *Id.* at *9-15.

Movants filed a motion to alter or amend the Court's judgment. Movants' Mot. to Alter or Amend the J. & for Joint Briefing with Case No. Misc. 16-01, Feb. 17, 2017 ("Mot. to Alter or Amend"). They argued that the Presiding Judge's opinion "runs contrary to previous decisions of this Court," *id.* at 4, although the two previous decisions movants cited had not considered the legal question at issue here. *See supra* Part I. Movants further appeared to argue that, even if their First Amendment claim is meritless, they should be able to use their assertion of such a claim as a basis for Article III standing, and then use the resultant jurisdiction to ask the court to release the material sought as a matter of "discretion[]." *Id.* at 5-6.

While the Court has not ruled on the Motion to Alter or Amend, it issued an order calling for en banc review "on the ground that it is necessary to secure or maintain uniformity of the court's decisions." Order 1, Mar. 22, 2017. The Court's en banc order states that it will only be reconsidering the standing question and will not be revisiting the line of cases that have consistently held that there is no First Amendment right of access to FISC proceedings, records, and rulings. *Id.* at 1 n.1.

ARGUMENT

It has long been recognized that "[n]o 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." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976). The doctrine of standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560

(1992). To establish standing, movants must establish three elements, one of which is injury in fact. "To establish injury in fact, a plaintiff must show [*inter alia*] that he or she suffered 'an invasion of a legally protected interest.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560).

I. Movants Lack Standing to Assert a First Amendment Claim

As the Presiding Judge's opinion correctly holds, "when the source of the legal interest . . . 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." 2017 WL 427591, at *13 (citing cases). Thus, because this Court has previously held that there is no First Amendment right of access to the proceedings, records, or rulings of this Court, movants have no "legally protected interest" that has been injured. Without an injury to a legally protected interest, they lack Article III standing.

While the fact that a litigant may ultimately lose on the merits does not preclude a finding of standing, a litigant must do more than cite a rule of law and identify some relief it would like in order to establish jurisdiction. Rather, there must be an actual legal right that could plausibly apply under the circumstances alleged or presented. As the Seventh Circuit has explained, "the Supreme Court's standing doctrine requires litigants to establish an injury to an interest that the law protects when it is *wrongfully* invaded, and this is quite different from requiring them to establish a *meritorious* legal claim." *Bond v. Utreras*, 585 F.3d 1061, 1073 (7th Cir. 2009) (internal quotation marks omitted) (emphasis in original). In other words, to establish standing, a plaintiff need not establish wrongfulness – *i.e.*, that its legal right was unlawfully invaded – but it must establish that there exists an applicable legal right that might plausibly have been invaded.

Thus, a plaintiff invoking the Freedom of Information Act to obtain government agency records will generally have standing even if it ultimately turns out that the documents are properly exempt from disclosure; by contrast, a plaintiff who invokes FOIA to demand original artwork from the National Gallery of Art would lack standing, as the rights conveyed by FOIA plainly do not apply to such artwork. Similarly, a plaintiff asserting a First Amendment right to protest on a public sidewalk near a government building would likely have standing, while a plaintiff asserting a First Amendment right to sit inside the Oval Office or to attend a Supreme Court deliberative conference would not.

The application of this principle here is straightforward. The movants lack an injury to a legally protected interest because they base their claim on a First Amendment right of access that simply does not exist in this context. To be sure, the First Amendment provides rights to movants. And those rights include a right of access to certain places. But, as this Court has repeatedly held, the First Amendment right of access does not extend to proceedings or rulings of the FISC. *See* Order 1, Mar. 22, 2017 ("[A] First Amendment qualified right of access does not apply to the judicial opinions [the Movants] seek."). Where, as here, a movant's claim "has no foundation in law, he has no legally protected interest and thus no standing to sue." *Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir. 1997).

Movants are similarly situated to the plaintiffs in the cases described in the Presiding Judge's opinion in this case, in which courts found a lack of any legally protected interest, and therefore a lack of Article III standing. *See* 2017 WL 427591, at *9-13. For example, in *McConnell v. FEC*, certain plaintiffs sought to advance an equal protection right that applied in some circumstances, but not in the circumstances at issue in that case. 540 U.S. 93, 227 (2003), *overruled in part on other grounds*, *Citizens United v. FEC*, 558 U.S. 310 (2010). The Supreme

Court examined "'the nature and source of the claim asserted,'" and found that because the asserted right did not apply, the claim of injury was "not to a legally cognizable right." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). Thus, those plaintiffs lacked standing. *Id.*

In *Bond v. Utreras*, an intervenor asserted an interest similar to the one asserted by movants here, namely a right of access to documents related to a judicial proceeding. *See* 585 F.3d 1061 (7th Cir. 2009). The Seventh Circuit acknowledged the existence of a "general right of public access to judicial records," but found that, because that right did not extend to the records sought by the intervenor (unfiled discovery documents), the intervenor had "no injury to a legally protected interest and therefore no standing." *Id.* at 1074, 1078. Similarly, in *Griswold v. Driscoll*, plaintiffs, like movants here, alleged a violation of their First Amendment rights. 616 F.3d 53 (1st Cir. 2010). In an opinion by Retired Justice Souter, the court held that because the First Amendment did not apply to the material at issue, the plaintiffs established neither standing nor a claim. *Id.* at 56, 60.

McConnell v. FEC, *Bond v. Utreras*, and *Griswold v. Driscoll* are just three of the many cases that, as this Court correctly found, support the holding in the Presiding Judge's opinion. In their motion to alter or amend the judgment, movants cited two cases that they contend are contrary. *See* Mot. to Alter or Amend 5.[2] But these cases are consistent with the Presiding Judge's opinion. In each of the cases relied on by movants, the court found that the asserted right did exist and did apply. *See Carlson v. United States*, 837 F.3d 753, 759 (7th Cir. 2016); *Doe v. Public Citizen*, 749 F.3d 246, 264 (4th Cir. 2014). It was on this basis that the court in *Carlson* distinguished *Bond v. Utreras.* See 837 F.3d at 760. *Carlson* and *Doe* are likewise

[2] Movants also argued that their injury "is concrete and particularized." Mot. To Alter or Amend 4 (citing cases). This argument is a *non sequitur*. Movants injury is insufficient, not because it is generalized or abstract, but because it is not an injury to a legally protected interest.

distinguishable from this case because here, movants have not asserted a right that exists and applies in these circumstances.

II. To the Extent They Assert Any Other Claims, Movants Lack Both Standing and a Cause of Action

In its order inviting en banc briefing, the Court observed that "the First Amendment qualified right of access was the only ground on which Movants asserted standing." Order 1 n.1, Mar.22, 2017. The government agrees with this observation, but it appears that movants may not. In their motion to alter or amend, movants referred to "all of Movants' claims," and challenged what they described as the Court's conclusion that "in the absence of a viable First Amendment claim, Movants also lack standing to seek relief under Rule 62 [of this Court's rules] and the Court's inherent supervisory powers over its own records." Mot. to Alter or Amend 1, 5. The arguments that movants put forward in this regard are wrong.

Because "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), movants "must demonstrate standing for each claim [they] seek[] to press" and "for each form of relief" they seek. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (quotation marks omitted). Thus, whether or not movants have standing to assert their First Amendment claim (and they do not), they have to separately establish standing for each additional claim they might assert in this or any case. Because neither this Court's inherent supervisory powers nor Rule 62 provide any cause of action or legal rights to movants, neither provides a legally protected interest as would be necessary for Article III standing.

The Court's inherent supervisory powers obviously provide no rights to movants (or anyone else) and cannot support a suit or motion by movants. An opposite conclusion would mean that anyone could file an action in any court to ask the court to take nearly any action with regard to its employees or cases. Movants rely on *In re Motion for Release of Court Records*,

526 F. Supp. 2d 484 (FISA Ct. 2007), but that case provides no support to their position. There, the Court held that it had inherent "jurisdiction in the first instance to adjudicate a claim of right to the court's" records even though no statute provided such jurisdiction. *Id.* at 487. The inherent jurisdiction was thus jurisdiction to adjudicate a claim of right, but this inherent jurisdiction did not supply either the claim or the right.[3]

Rule 62 similarly grants movants no rights and no cause of action. That rule provides:

> The Judge who authored an order, opinion, or other decision may *sua sponte* or on motion by a party request that it be published. Upon such request, the Presiding Judge, after consulting with other Judges of the Court, may direct that an order, opinion or other decision be published. Before publication, the Court may, as appropriate, direct the Executive Branch to review the order, opinion, or other decision 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).

Movants, of course, are neither the authoring judge of any opinion nor parties to any of the underlying cases at issue. *See In re Orders*, 2013 WL 5460064, at *5 (holding that "the term 'party' in Rule 62(a) refers to a party to the proceeding that resulted in the 'opinion, order, or other decision' being considered for publication"). Thus, movants can claim no "legally protected interest" stemming from Rule 62. Without such an interest, they can have no standing to invoke the rule. Additionally, the rule does not provide them with any cause of action.

Movants' argument that this Court's holding in this case "render[s] the relief afforded by Rule 62 all but illusory," Mot. to Alter or Amend 6, misunderstands the nature of Rule 62. It is a rule of procedure for litigation pending before the Court, not a substantive right for the general

[3] Notably, the Court in that case specifically declined to rule on whether it possessed "residual discretion" to release any records. The Court held that even if it had such discretion, it would decline to exercise it "because of the serious negative consequences that might ensue." 526 F. Supp. 2d at 497. The Court ruled against the movants as to all claims. *See id.*

public. Like most rules of procedure, it governs the parties in cases and does not provide rights or a cause of action to other individuals or entities.

Movants also argue that this Court's holding is "in tension with the canon of constitutional avoidance, because it would require the FISC to resolve constitutional questions (as it did here) before considering the non-constitutional ground for relief presented by Movants." *Id.* But there is no "non-constitutional ground for relief" here, because Rule 62 does not provide any rights or cause of action to movants. Moreover, the canon of constitutional avoidance does not allow a court to assert jurisdiction in instances where Article III of the Constitution does not permit it.[4]

[4] There is an additional basis for rejecting any "claim" for discretionary dissemination. All of the unclassified material sought in this case has been released. The only remaining responsive material is classified. This Court does not release classified material to the public. FISC Rule 3; *cf. Dhiab*, 2017 WL 1192911, at *5 ("One may be confident that over many years none of the members of our court, past or present, ever supposed that in complying with [rules governing handling of classified material], we were somehow violating the Constitution.").

Of course, "there is no role for this Court independently to review, and potentially override, Executive Branch classification decisions." *Motion for Release*, 526 F. Supp. 2d at 491; *accord Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988) ("For reasons too obvious to call for enlarged discussion, the protection of classified information must be committed to the broad discretion of the agency responsible.") (citation, quotation marks, and alteration omitted); *Bismullah v. Gates*, 501 F.3d 178, 187-88 (D.C. Cir. 2007) ("[I]t is within the role of the executive to acquire and exercise the expertise of protecting national security [and] [i]t is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role.").

CONCLUSION

For the foregoing reasons, and the reasons stated in the Presiding Judge's opinion in this case, movants lack Article III standing, and this action should be dismissed for want of jurisdiction.

April 17, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served by the Government via first class mail on this 17th day of April 2017, addressed to:

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