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	No. Misc. 13- _____

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

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PRELIMINARY STATEMENT

Pursuant to the First Amendment and Rule 62 of the Foreign Intelligence Surveillance Court's Rules of Procedure, the American Civil Liberties Union and the American Civil Liberties Union of the Nation's Capital (together, the "ACLU") and the Media Freedom and Information Access Clinic at Yale Law School ("MFIAC") (collectively, "Movants") respectfully move the Foreign Intelligence Surveillance Court ("FISC") to unseal its opinions addressing the legal basis for the "bulk collection" of data by the United States government under the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1801 *et seq*., including but not limited to 50 U.S.C. § 1842. 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.[1]

In June 2013, government officials acknowledged the existence of an ongoing, seven-year program of bulk collection of the call-detail records of nearly every telephonic communication in the country. The program was approved by this Court pursuant to a provision of FISA amended by Section 215 of the Patriot Act, 50 U.S.C. § 1861.[2] Days after this call-tracking program was first revealed, Movants asked this Court to disclose its opinions addressing the meaning, scope, and constitutionality of Section 215 and the legality of the call-tracking

[1] Movants use the term "bulk collection" in this motion in the same way this Court used it in *In re Application of the FBI for an Order Requiring the Production of Tangible Things from [Redacted]*, No. BR 13-109, 2013 WL 5741573 (FISA Ct. Aug. 29, 2013).

[2] "The Patriot Act" is the common name for the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001). Section 215 amended FISA in part and empowers the Director of the FBI to obtain secret orders from this Court compelling third parties to produce "any tangible things" upon a showing that there are "reasonable grounds to believe that the tangible things sought are relevant" to an authorized foreign-intelligence or terrorism investigation. *Id.* § 1861(a)(1), (b)(2)(A). The orders are accompanied by a gag order forbidding recipients from disclosing having received the order. *See id.* § 1861(c)–(d).

program.[3] This Court granted that motion in part, and the government is now undertaking a declassification review of one of the Court's opinions in response.[4]

Since Movants filed that motion, however, it has become clear that other critical opinions of this Court approving the bulk collection of Americans' information remain secret. Movants seek access to those opinions for two reasons. First, some of those opinions pertain to other forms of bulk collection that the government has now acknowledged, such as the bulk collection of internet metadata and cell-site location information. The public is entitled to know the legal bases for those programs, but those bases have not yet been disclosed. Second, some of those opinions predate the call-tracking program and apparently supply the original legal analysis necessary to understand this Court's later authorization of the call-tracking program. For example, it appears that one of the earlier bulk-collection opinions provides the Court's most comprehensive discussion both of the constitutionality of bulk collection under the Fourth Amendment and of the meaning of the term "relevant" as it appears in various FISA provisions.

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. The First Amendment guarantees the public a qualified right of access to those opinions because judicial opinions interpreting constitutional and statutory limits on governmental authorities—including those relevant to foreign-intelligence surveillance—have

[3] *See* Motion of ACLU & MFIAC for the Release of Court Records, *In re Orders of this Court Interpreting Section 215 of the Patriot Act*, No. Misc. 13-02 (FISA Ct. June 12, 2013), http://1.usa.gov/15dJTjx.

[4] *See In re Orders of this Court Interpreting Section 215 of the PATRIOT Act* (*In re Section 215 Orders*), No. Misc. 13-02, 2013 WL 5460064, at *7 (FISA Ct. Sept. 13, 2013); *see also* Order, *In re Section 215 Orders*, No. Misc. 13-02 (FISA Ct. Oct. 8, 2013), http://1.usa.gov/18MXSQg (ordering declassification review of February 19, 2013 FISC opinion).

always been available for inspection by the public, and because their release is so manifestly fundamental in a democracy committed to the rule of law. Public disclosure serves to improve the functioning of the Court itself, to enhance its perceived fairness and independence, and to educate citizens about the Court's role in ensuring the integrity of the FISA system. This First Amendment guarantee of public access may be overcome only if the government is able to demonstrate a substantial probability of harm to a compelling interest and the absence of any alternative means to protect that interest. Any limits on the public's right of access must then be narrowly tailored and demonstrably effective in avoiding that harm.

The Court should acknowledge the public's First Amendment right of access to these opinions and order their prompt publication. Because the opinions are of critical importance to the ongoing public debate about the legitimacy of the government's surveillance activities, Movants respectfully request that the Court publish the opinions as quickly as possible, with only those redactions justified under the stringent First Amendment standard. Alternatively, the Court should exercise its discretion to publish the opinions expeditiously in the public interest.

FACTUAL BACKGROUND

In June 2013, *The Guardian* disclosed a previously secret order issued by this Court compelling Verizon Business Network Services, a major U.S. telecommunications provider, to produce to the National Security Agency ("NSA") "all call detail records or 'telephony metadata'" of its customers over a ninety-day period.[5] Soon thereafter, the government disclosed that the Secondary Order belongs to a broader NSA program that has been in place for seven

[5] Secondary Order at 2, *In Re Application of the FBI for an Order Requiring the Production of Tangible Things from Verizon Bus. Network Servs., Inc. on Behalf of MCI Commc'n Servs., Inc.*, No. BR 13-80 (FISA Ct. Apr. 25, 2013) ("Secondary Order"), https://s3.amazonaws.com/s3.documentcloud.org/documents/709012/verizon.pdf; *see* Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, Guardian, June 5, 2013, http://gu.com/p/3gc62.

years involving the bulk collection of metadata—including the times and durations of calls—concerning virtually every phone call, domestic and international, made or received in the United States.[6]

In the months following the government's acknowledgment of the NSA's call-tracking program, the public learned that the government's bulk collection of records has not been limited to *call* records. In late June 2013, an administration official acknowledged a now-discontinued government surveillance program that involved the collection of Americans' internet metadata in bulk.[7] The Director of National Intelligence ("DNI"), James R. Clapper, later reiterated that acknowledgment.[8] Additional releases of documents by the government have provided more details, specifying the apparent legal basis for the internet-metadata program.[9]

Indeed, several recent disclosures suggest that the government's bulk-collection activities go beyond even telephony and internet metadata. During a hearing before the Senate Judiciary Committee in early October, DNI Clapper disclosed that the NSA "conducted a secret pilot project in 2010 and 2011 to test the collection of bulk data about the location of Americans'

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[6] *See* Administration White Paper: Bulk Collection of Telephony Metadata Under Section 215 of the USA PATRIOT Act at 1 (Aug. 9, 2013), http://big.assets.huffingtonpost.com/Section215.pdf; Dep't of Justice, *Report on the National Security Agency's Bulk Collection Programs for USA PATRIOT Act Reauthorization* at 3 (Feb. 2, 2011), http://1.usa.gov/1cdFJ1G.

[7] *See* Glenn Greenwald & Spencer Ackerman, *How the NSA Is Still Harvesting Your Online Data*, Guardian, June 27, 2013, http://gu.com/p/3gqmz.

[8] *See* James R. Clapper, DNI, Cover Letter Announcing Document Release (Aug. 21, 2013), http://1.usa.gov/1bU8Cgt.

[9] *See, e.g.*, Memorandum from Vito T. Potenza, General Counsel, NSA, to Staff Director, House Permanent Select Committee on Intelligence (Feb. 25, 2009), http://1.usa.gov/1cplAa9 (stating that bulk collection of internet metadata was based on FISA's pen-register provision, 50 U.S.C. § 1841); *see also, e.g.*, Letter from Ronald Weich, Assistant Attorney General, to Rep. Bobby Scott, House Committee on the Judiciary, at 1 (Dec. 17. 2009), http://1.usa.gov/1dk3hQO (referring to "bulk collection of telephony metadata" under Section 215 and a "similar collection program conducted under the pen register/trap and trace authority of FISA").

cellphones."[10] Though DNI Clapper told Congress that the government is no longer engaged in the bulk collection of location information under Section 215, officials have elsewhere stated that the government is authorized to obtain location information in bulk under the Secondary Order.[11] On April 1, 2011, the NSA's Office of General Counsel informed the Senate Select Committee on Intelligence that the Department of Justice ("DOJ") had advised the NSA in February 2010 that obtaining cell-site location information for "testing purposes was permissible based upon the current language of the [FISC's] BR FISA order requiring the production of 'all call detail records,'" and that the DOJ had "orally advised the FISC" only after the acquisition of this information.[12] Under questioning from lawmakers, various government officials have declined to deny that the government is currently collecting Americans' location information in bulk, stating only that such information is not being collected "under this program"—*i.e.*, the call-tracking program already acknowledged under Section 215.[13]

There are reasons to believe that the government is engaged in the bulk collection of other records as well. In a statement issued this summer, Senators Ron Wyden and Mark Udall—both members of the Senate Select Committee on Intelligence—warned that:

> [T]he Patriot Act's surveillance authorities are not limited to phone records. In fact, section 215 of the Patriot Act can be used to collect any type of records whatsoever. The fact that Patriot Act authorities were used for the bulk collection of email records as well as phone records *underscores our concern that this*

[10] Charlie Savage, *In Test Project, N.S.A. Tracked Cellphone Locations*, N.Y. Times, Oct. 2, 2013, http://nyti.ms/18OAlz2.

[11] *See* Siobhan Gorman & Julian E. Barnes, *Officials: NSA Doesn't Collect Cellphone-Location Records*, Wall St. J., June 16, 2013, http://on.wsj.com/16RpQNF.

[12] *See* Letter from [Redacted], Attorney, Office of General Counsel, NSA, to Senate Select Committee on Intelligence at 1 (Apr. 1, 2011), http://1.usa.gov/1gWqiy0.

[13] *See, e.g.*, Letter from James R. Clapper, DNI, to Senator Ron Wyden, at 1 (July 26, 2013), http://1.usa.gov/1acgiHi; *Oversight of the Administration's Use of FISA Authorities: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. at 29:33–36:00 (July 17, 2013), http://cs.pn/1bpUHRJ (statement of John C. Inglis, Deputy Director, NSA).

> *authority could be used to collect other types of records in bulk as well*, including information on credit card purchases, medical records, library records, firearm sales records, financial information and a range of other sensitive subjects. These other types of collection could clearly have a significant impact on Americans' constitutional rights.[14]

Senator Wyden expanded on this warning in a speech given later in July 2013, suggesting that the government's view of its bulk-collection authority is "essentially limitless":

> Especially troubling is the fact that there is nothing in the Patriot Act that limits this sweeping bulk collection to phone records. The government can use the Patriot Act's business records authority to collect, collate and retain all sorts of sensitive information, including medical records, financial records, or credit card purchases. They could use this authority to develop a database of gun owners or readers of books and magazines deemed subversive. *This means that the government's authority to collect information on law-abiding American citizens is essentially limitless.* If it is a record held by a business, membership organization, doctor, or school, or any other third party, it could be subject to bulk collection under the Patriot Act.[15]

Additionally, this Court has confirmed that it has addressed the legality of bulk collection of Americans' data outside the context of the call-tracking program. On September 17, 2013, the Court published a partially redacted opinion issued on August 29, 2013 ("August 2013 FISC Opinion") explaining its renewal of the NSA's call-tracking program.[16] In its opinion, the Court relied upon earlier unpublished FISC opinions that apparently addressed the "issue of relevance for bulk collections" under another provision of FISA and, presumably, the constitutionality of

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[14] Sen. R. Wyden & Sen. M. Udall, *Wyden, Udall Statement on the Disclosure of Bulk Email Records Collection Program* (July 2, 2013), http://1.usa.gov/121Flua (emphasis added).

[15] Sen. R. Wyden, *Remarks as Prepared for Delivery for the Center for American Progress Event on NSA Surveillance* (July 23, 2013), http://www.americanprogress.org/wp-content/uploads/2013/07/7232013WydenCAPspeech.pdf (emphasis added).

[16] *In re Application of the FBI for an Order Requiring the Production of Tangible Things from [Redacted]*, No. BR 13-109, 2013 WL 5741573, at *1 (FISA Ct. Aug. 29, 2013).

the bulk collection of metadata under the Fourth Amendment.[17] The Court did not summarize or otherwise expand upon the previous, still-secret FISC opinions addressing the government's bulk collection of Americans' data.

Thus, despite the government's and this Court's publication of some information concerning the legal basis for the call-tracking program and other government surveillance activities, crucial aspects of that legal basis remain secret—in particular, this Court's original analysis of the constitutionality of bulk data collection under the Fourth Amendment and the Court's interpretation of the term "relevant" under 50 U.S.C. § 1842.[18]

Last month, *The Washington Post* reported that various current and former government officials have called for the declassification and release of "the original—and still classified—judicial interpretation that held that the bulk collection of Americans' data was lawful."[19] The officials expressed concern that despite the disclosures made by the government and this Court over the past three months, the public has still not been provided with the original, complete

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[17] *Id.* at *6 ("This Court has previously examined the issue of relevance for bulk collections. *See* [Redacted]. While those matters involved different collections from the one at issue here, the relevance standard was similar." (citing 50 U.S.C. § 1842(c)(2))); *see id.* at *2 ("This Court had reason to analyze this distinction [between individual and bulk collection] in a similar context in [Redacted].").

[18] In addressing the Fourth Amendment implications of the call-tracking program, the August 2013 FISC Opinion concludes that "[t]he production of telephone service provider metadata is squarely controlled by the U.S. Supreme Court decision in *Smith v. Maryland*, 442 U.S. 735 (1979)." 2013 WL 5741573, at *2. A more recent FISC opinion renewing the call-tracking program concurs and also considers the program's constitutionality in light of the Supreme Court's decision in *United States v. Jones*, 132 S. Ct. 945 (2012). *See* Memorandum at 4–6, *In re Application of the FBI for an Order Requiring the Production of Tangible Things from [Redacted]*, No. BR 13-158 (FISA Ct. Oct. 11, 2013), http://1.usa.gov/19QvFam. However, no published FISC opinion to date has addressed the compatibility of the Fourth Amendment with the bulk collection of other kinds of metadata, and the Court's original discussion of *Smith* and related authorities with respect to bulk collection remains secret.

[19] Ellen Nakashima & Carol D. Leonnig, *Effort Underway to Declassify Document that Is Legal Foundation for NSA Phone Program*, Wash. Post, Oct. 12, 2013, http://wapo.st/17reSyy (revealing the existence of a FISC opinion authored by then–Presiding Judge Kollar-Kotelly).

legal basis for the FISC's approval of the call-tracking program. As one former administration official put it:

> If the question is, "How was this program authorized and what type of legal analysis first took place?" the [August 2013 FISC Opinion] is just not responsive. . . . It's hard for me to imagine, with all that's already out there, that highly classified intelligence material would be so deeply entwined in the legal analysis in that original interpretation that they couldn't somehow release it.[20]

And Senators Patrick Leahy and Ron Wyden both issued statements to the *Post* expressing their firm support for the release of the FISC's original legal analysis of the call-tracking program.[21]

The sum of the disclosures and releases of information over the past several months have generated a sustained and profound debate about the use of the government's surveillance authorities and, in particular, the NSA's collection of Americans' data in bulk. Since early June 2013, Congress has held more than ten hearings to question government officials about NSA surveillance. Lawmakers have introduced legislation to end such bulk collection.[22] And the government itself has initiated various reviews of its collection activities and authorities.[23]

This Court, too, has recognized the immense public interest in the ongoing debate. In *In re Section 215 Orders*, the Court acknowledged the important values served by the disclosure of these opinions. It noted that previous public disclosures had "engendered considerable public interest and debate" and that further "[p]ublication of FISC opinions . . . would contribute to that debate."[24] The Court also underscored the assertions by legislators of the "value of *public*

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[20] *Id.*

[21] *See id.*

[22] *See, e.g.*, Uniting and Strengthening America by Fulfilling Rights and Ending Eavesdropping, Dragnet-collection, and On-line Monitoring Act ("USA FREEDOM Act"), H.R. 3361, 113th Cong. (2013), http://1.usa.gov/1dnrXb3.

[23] *See* Paul Lewis, *NSA Review Panel to Present Obama with Dossier on Surveillance Reforms*, Guardian, Oct. 28, 2013, http://gu.com/p/3kv3p.

[24] *In re Section 215 Orders*, 2013 WL 5460064, at *7.

information and debate in representing their constituents and discharging their legislative responsibilities," and affirmed that "[p]ublication would also assure citizens of the integrity of this Court's proceedings."[25] Likely for the same reason, the Court's Presiding Judge published his correspondence with Congress explaining the FISC's operating procedures and detailing certain statistics concerning the Court's approval of government applications, including under Section 215.[26]

Despite the extraordinary public interest in the surveillance programs authorized by the Court, an unknown number of legal opinions evaluating the constitutionality of and statutory basis for the bulk collection of Americans' data remain secret.

JURISDICTION

As an inferior federal court established by Congress under Article III, this Court possesses inherent powers, including "supervisory power over its own records and files . . . ." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978); *accord Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) ("It has long been understood that [c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution." (quotation marks omitted)). As this Court has previously determined, the FISC therefore has "jurisdiction in the first instance to adjudicate a claim of right to the court's very own records and files." *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 487 (FISA Ct. 2007).

[25] *Id.*; *see* Memorandum, *In re Application of the FBI for an Order Requiring the Production of Tangible Things from [Redacted]*, No. BR 13-158 (FISA Ct. Oct. 11, 2013), http://1.usa.gov/19QvFam; *In re Application of the FBI for an Order Requiring the Production of Tangible Things from [Redacted]*, 2013 WL 5741573.

[26] *See* Letter from Hon. Reggie B. Walton, Presiding Judge, FISC, to Hon. Patrick J. Leahy, Chairman, Comm. on the Judiciary (Oct. 11, 2013), http://1.usa.gov/19FoYrJ; Letter from Hon. Reggie B. Walton, Presiding Judge, FISC, to Hon. Patrick J. Leahy, Chairman, Comm. on the Judiciary (July 29, 2013), http://1.usa.gov/1a1oM6n.

ARGUMENT

I. MOVANTS HAVE STANDING TO BRING THIS PUBLIC-ACCESS MOTION.

To demonstrate Article III standing, a party seeking judicial action must show "(1) that it has suffered an 'injury in fact'; (2) that the injury is caused by or fairly traceable to the challenged actions of the defendant; and (3) that it is likely that the injury will be redressed by a favorable decision." *Ethyl Corp. v. EPA*, 306 F.3d 1144, 1147 (D.C. Cir. 2002) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). Each element is met here.

Denial of access to court opinions alone constitutes an injury sufficient to satisfy Article III. As the Supreme Court recognized in *Globe Newspaper Co. v. Superior Court for County of Norfolk*, 457 U.S. 596 (1982), the First Amendment right of access "serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." *Id.* at 604; *see Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (The First Amendment prohibits "the government from limiting the stock of information from which members of the public may draw." (quotation marks omitted)). The right extends to organizations, and not just individuals. *See N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 294–95 (2d Cir. 2011).

Accordingly, when a court closes its proceedings or seals records that are subject to the First Amendment right, any person denied access to the proceeding or record suffers a concrete and particularized injury. The injury is concrete because the party seeking access is in fact being deprived of information, and it is particular because the party specifically sought and was denied the material. Thus, in a case challenging a district court's exclusion of the press and public from plea and sentencing hearings and from access to court documents, the Fourth Circuit had no trouble summarily holding that a newspaper whose reporter was denied access "meets the standing requirement because it has suffered 'an injury that is likely to be redressed by a

favorable decision.'" *In re Wash. Post*, 807 F.2d 383, 388 n.4 (4th Cir. 1986) (alteration omitted) (quoting *Cent. S.C. Chapter, Soc'y of Prof'l Journalists v. Martin*, 556 F.2d 706, 707–08 (4th Cir. 1977)); *see also, e.g.*, *N.Y.C. Transit Auth.*, 684 F.3d at 295 (concluding that "exclusion from at least some . . . hearings" sufficed to "establish[] . . . an actual injury"); *Huminski v. Corsones*, 396 F.3d 53, 83–84 (2d Cir. 2005) (holding that the right of access can be "asserted by an identified excluded individual" and that "any member of the public—not only members of the public selected by the courts themselves—may come and bear witness to what happens beyond the courtroom door").[27]

Movants also satisfy the second and third prongs of the standing analysis: causation and redressability. There can be no doubt that Movants' inability to inspect this Court's opinions "fairly can be traced to" this Court's denial of public access to them. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 472 (1982). It is likewise clear that there is a "'substantial probability' that a favorable outcome would redress [Movants'] injuries." *Town of Barnstable v. FAA*, 659 F.3d 28, 31 (D.C. Cir. 2011). By releasing the

[27] In the recent request by Movants for access to the opinions of this Court interpreting Section 215, Judge Saylor imposed a heightened burden upon parties seeking to assert a right of access, requiring a showing that the denial of access to this Court's opinions "impedes [access-seekers'] own activities in a concrete, particular way" or that gaining access "would be of concrete, particular assistance to them in their own activities." *In re Section 215 Orders*, 2013 WL 5460064, at *2. MFIAC has moved for reconsideration of the Court's holding in that proceeding that it did not have standing to assert the right of access, *see id.* at *4, and contends that these additional showings are not properly part of the standing analysis. *See* Mem. of Law in Supp. of Mot. by MFIAC for Recons. of this Court's Sep. 13, 2013 Op. on the Issue of Article III Standing, *In Re Section 215 Orders*, No. Misc. 13-02 (FISA Ct. Oct. 11, 2013), http://1.usa.gov/1aTGGa4 ("MFIAC Recons. Br."). But even if those showings are necessary to establish standing, both the ACLU and MFIAC satisfy the additional requirements. *See In re Section 215 Orders*, 2013 WL 5460064, at *4 (holding that the ACLU has standing to assert a right of access to FISC records); MFIAC Recons. Br. at 15–16; Decl. of Maxwell S. Mishkin in Supp. of MFIAC Recons. Br., Ex. to MFIAC Recons. Br. (describing the litigation, advocacy, and educational activities of MFIAC).

requested portions of its opinions on bulk data collection, this Court would enforce the right of access that Movants assert.

II. THE FIRST AMENDMENT REQUIRES THE RELEASE OF THIS COURT'S OPINIONS CONCERNING THE LEGALITY OF THE GOVERNMENT'S BULK COLLECTION OF AMERICANS' DATA.

A. The First Amendment right of access attaches to judicial opinions, including the opinions of this Court concerning the bulk collection of Americans' data.

That the judicial process should be as open to the public as possible is a principle enshrined in both the Constitution and the common law. *See Richmond Newspapers*, 448 U.S. at 564–73; *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006) ("The common law right of public access to judicial documents is firmly rooted in our nation's history."); *cf.* Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 *Writings of James Madison* at 103 (G. Hunt ed. 1910) ("A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."). Under the Supreme Court's "experience and logic" test, the First Amendment right of public access attaches to judicial proceedings and records where (a) the type of judicial process or record sought has historically been available to the public, and (b) public access plays a "significant positive role" in the functioning of the process itself. *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*), 478 U.S. 1, 9, 11 (1986); *see Globe Newspaper*, 457 U.S. at 605–07; *Wash. Post v. Robinson*, 935 F.2d 282, 287–92 (D.C. Cir. 1991). Proceedings and records to which the right of access attaches are presumptively open to the public and may be closed only where there is a substantial probability of harm to a compelling government interest, and where no alternative to a narrow limitation of access can effectively protect against that harm. *N.Y.C. Transit Auth.*, 684 F.3d at 296. In other words, the right of access is qualified but may not be denied "without sufficient justification." *Id.*

Here, there is a nearly unbroken tradition of public access to judicial rulings and opinions interpreting the Constitution and the laws governing the American people. Moreover, public access to such rulings and opinions allows the public to function as an essential check on its government and improves judicial decisionmaking. Those interests are particularly acute in the context of this Court's opinions interpreting the reach and constitutionality of the government's surveillance authorities. Access would enhance the functioning of this Court and the FISA system by: facilitating effective public oversight, increasing the legitimacy and independence of this Court, subjecting this Court's legal opinions to scrutiny within our common-law system, and permitting Congress, subject-matter experts, and the broader public to evaluate this Court's legal interpretations as they consider changes to the law. For these reasons, and as explained more fully below, the constitutional right of access extends to the opinions of this Court concerning the legality of the bulk collection of Americans' data.

1. "Experience"

The Supreme Court has instructed that the experience prong of its two-part test "does not look to the particular practice of any one jurisdiction, but instead 'to the experience in that *type* or *kind* of hearing throughout the United States . . . .'" *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 150 (1993) (per curiam) (quoting *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 323 (1st Cir. 1992)). In other words, the proper focus of the "experience" analysis is the *type* of governmental process or record to which a petitioner seeks access, not the past practice of the specific forum. *See, e.g.*, *N.Y.C. Transit Auth.*, 684 F.3d at 301 (rejecting view that "*Richmond Newspapers* test looks . . . to the formal description of the forum"); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 94 (2d Cir. 2004) (examining First Amendment right of access to court "docket sheets and their historical counterparts," beginning with early English courts); *In re Bos.*

Herald, Inc., 321 F.3d 174, 184 (1st Cir. 2003) (experience test includes examination of "analogous proceedings and documents").

Under this approach, in assessing the past experience of access to a *new* forum whose secrecy is being challenged, it is inappropriate to analyze only the history of that forum itself. Because there will never be a tradition of public access in new forums, this approach would permit Congress to circumvent the constitutional right of access altogether—even as to, say, criminal trials—simply by providing that such trials henceforth be heard in a newly created forum. *See, e.g.*, *N.Y.C. Transit Auth.*, 684 F.3d at 296 ("Immunizing government proceedings from public scrutiny by placing them in institutions the Framers could not have imagined . . . would make avoidance of constitutional protections all too easy."); *In re Copley Press, Inc.*, 518 F.3d 1022, 1027 (9th Cir. 2008). The proper approach, therefore, is to examine whether the type of proceeding or record at issue—here judicial opinions interpreting the meaning and constitutionality of public statutes—has historically been available to the public. *See, e.g., N.Y.C. Transit Auth.*, 684 F.3d at 299.

No type of judicial record enjoys a more uninterrupted history of openness than judicial opinions. As explained by the Third Circuit:

> As ours is a common-law system based on the "directive force" of precedents, its effective and efficient functioning demands wide dissemination of judicial decisions. . . . Even that part of the law which consists of codified statutes is incomplete without the accompanying body of judicial decisions construing the statutes. Accordingly, under our system of jurisprudence the judiciary has the duty of publishing and disseminating its decisions.

Lowenschuss v. W. Pub. Co., 542 F.2d 180, 185 (3d Cir. 1976) (quoting Benjamin N. Cardozo, *The Nature of the Judicial Process* 20, 21–22 (1963)); *see Scheiner v. Wallace*, No. 93 Civ. 0062, 1996 WL 633226, at *1 (S.D.N.Y. Oct. 31, 1996) ("The public interest in an accountable

judiciary generally demands that the reasons for a judgment be exposed to public scrutiny." (citing *United States v. Amodeo*, 71 F.3d 1044, 1048–49 (2d Cir. 1995))).

Given this history, courts have customarily disclosed opinions dealing with the government's authority to conduct investigations and gather information about U.S. citizens. For example, the First Amendment right of access has been held to apply to judicial opinions construing the government's search and seizure powers. *See In re Application of N.Y. Times Co. for Access to Certain Sealed Court Records*, 585 F. Supp. 2d 83, 88 (D.D.C. 2008). And federal courts have routinely published their opinions interpreting the scope and constitutionality of intelligence collection permitted under FISA and related authorities—the very type of opinions Movants seek here. *See, e.g.*, *United States v. U.S. Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297 (1972) (considering constitutionality of warrantless-wiretapping program conducted by the government to "protect the national security"); *United States v. Duggan*, 743 F.2d 59, 72–74, 77 (2d Cir. 1984) (analyzing FISA's original "purpose" requirement, and holding that "FISA does not violate the probable cause requirement of the Fourth Amendment"); *Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 905 (9th Cir. 2011) (reversing dismissal of lawsuit challenging "widespread warrantless eavesdropping in the United States"); *In re Application for Pen Register & Trap/Trace Device with Cell Site Location Auth.* (*In re PR/TT with CSLI*), 396 F. Supp. 2d 747, 748–49 (S.D. Tex. 2005) (refusing government request to seal opinion "because it concerns a matter of statutory interpretation" and the issue explored "has serious implications for the balance between privacy and law enforcement, and is a matter of first impression"); *see also, e.g.*, Defs.' Mem. in Opp. at 32–59, *Amnesty Int'l USA v. McConnell*, 646 F. Supp. 2d 633 (S.D.N.Y. 2009) (ECF No. 10) (public, unredacted arguments of the government defending the constitutionality of the FISA Amendments Act).

2. "Logic"

Just as fundamentally, the "significant positive role" of *public* judicial decisionmaking in a democracy is so essential that it is hardly ever questioned. Courts have repeatedly recognized that public access to judicial opinions serves a vital function:

> The decisions and opinions of the justices are the authorized expositions and interpretations of the laws, which are binding upon all the citizens. They declare the unwritten law, and construe and declare the meaning of the statutes. Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this, or to suppress and keep from the earliest knowledge of the public the statutes, or the decisions and opinions of the justices. *Such opinions stand, upon principle, on substantially the same footing as the statutes enacted by the legislature*. It can hardly be contended that it would be within the constitutional power of the legislature to enact that the statutes and opinions should not be made known to the public . . . . The policy of the state always has been that the opinions of the justices, after they are delivered, belong to the public.

Nash v. Lathrop, 142 Mass. 29, 35–36 (1886) (emphasis added) (cited by *Banks v. Manchester*, 128 U.S. 244, 253–54 (1888) (Blatchford, J.)); *see also Lowenschuss*, 542 F.2d at 185. The importance of public access to judicial opinions flows from two bedrock principles: (1) the public's right to know what the law is, as a condition of democratic governance; and (2) the founding recognition that, in our political system, it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Because courts determine what the law means—and therefore what the law is—the societal need for access to judicial opinions is paramount.

The value in making judicial opinions available to the public only increases where, as here, the opinions concern both the power of the executive branch and the constitutional rights of citizens. *See FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) (access to court files "accentuated" where "the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch"); *In re*

PR/TT with CSLI, 396 F. Supp. 2d at 748–49 (refusing government request to seal order that "has serious implications for the balance between privacy and law enforcement").

This principle applies with equal force in the context of national security, where the courts routinely recognize and give effect to the public's right of access to judicial orders and opinions. *See, e.g.*, *United States v. Aref*, 533 F.3d 72, 82–83 (2d Cir. 2008); *In re Wash. Post*, 807 F.2d at 393; *United States v. Rosen*, 487 F. Supp. 2d 703, 710, 716–17 (E.D. Va. 2007). In fact, where matters of national security are at stake, the role of public evaluation of judicial decisions takes on an even weightier role. *See, e.g.*, *In re Wash. Post*, 807 F.2d at 393; *United States v. Ressam*, 221 F. Supp. 2d 1252, 1262 (W.D. Wash. 2002). Moreover, public access to the opinions of *this* Court is important to the functioning of the FISA system in several respects.

First, public access to the opinions of this Court will promote public confidence in the integrity, reliability, and independence of the FISC and the FISA system. Access to the reasoning and actions of this Court will allow the public to evaluate for itself the operation of the FISA system and the legal bases for the government's actions. As the Supreme Court has explained, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Press-Enterprise II*, 478 U.S. at 13 (quotation marks omitted). *See, e.g.*, *Globe Newspaper*, 457 U.S. at 606 (public access to court documents and proceedings "fosters an appearance of fairness, thereby heightening public respect for the judicial process"); *Aref*, 533 F.3d at 83 ("Transparency is pivotal to public perception of the judiciary's legitimacy and independence."); *In re Orion Pictures Corp.*, 21 F.3d 24, 26 (2d Cir. 1994) (public access "helps safeguard the integrity, quality, and respect in our judicial system, and permits the public to keep a watchful eye on the workings of public agencies" (quotation marks and citations omitted)); *Ressam*, 221 F. Supp. 2d at 1263 (explaining

that "the general practice of disclosing court orders to the public not only plays a significant role in the judicial process, but is also a fundamental aspect of our country's open administration of justice").

Second, allowing the public to review and assess the reasoning of the opinions of this Court will support more refined decisionmaking in future cases. For example, since the recent release of some of the Court's orders construing Section 215, there has already been a proliferation of highly sophisticated legal debate over the foundations of the program. *See, e.g.*, David S. Kris, *On the Bulk Collection of Tangible Things*, Lawfare Res. Paper Series (Sep. 29, 2013), http://www.lawfareblog.com/wp-content/uploads/2013/09/Lawfare-Research-Paper-Series-No.-4-2.pdf; Marty Lederman, *The Kris Paper, and the Problematic FISC Opinion on the Section 215 "Metadata" Collection Program*, Just Security (Oct. 1, 2013 5:25 PM), http://justsecurity.org/2013/10/01/kris-paper-legality-section-215-metadata-collection; Laura K. Donohue, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 Harv. J. L. & Pub. Pol'y (forthcoming 2014), http://justsecurity.org/wp-content/uploads/2013/10/Just-Security-Donohue-PDF.pdf. This kind of detailed public discussion, which can only benefit the FISA system, was impossible prior to the release of this Court's opinions.

Third, publishing this Court's opinions of broad legal significance will contribute to the body of decisional law essential to the functioning of our common-law system. Article III courts have always built upon the work of their predecessors by refining, reworking, or even, at times, abandoning decisions issued in the past. *See, e.g.*, *Penny v. Little*, 4 Ill. (3 Scam.) 301, 304 (1841) (Douglass, J.) ("The common law is a beautiful system; containing the wisdom and experience of ages."). This iterative process lies at the foundation of our legal system but has been stunted by the continued secrecy of this Court's significant legal opinions. Other courts

should have access to this Court's determinations relating to bulk collection so that they may rely on, respond to, or distinguish this Court's reasoning.[28]

Fourth, access to this Court's opinions will educate citizens about the functioning of the FISA system and improve democratic oversight. Because the information released to date does not adequately explain the constitutional and statutory bases for bulk collection, the release of the requested opinions would permit the public—and Congress itself—to more fully understand these programs and to contribute to the ongoing debate. *See generally* Br. of Amici Curiae U.S. Representatives Amash et al. in Support of the Motion of the ACLU and MFIAC for the Release of Court Records, *In re Section 215 Orders* (June 28, 2013), http://1.usa.gov/13mI1HL. Members of Congress have acknowledged the importance of proper oversight, but that oversight has been impeded by the secrecy surrounding the authority this Court has construed the government to possess. *See, e.g.*, Letter from Sens. Dianne Feinstein, Jeff Merkley, Ron Wyden, & Mark Udall to Hon. John Bates, Presiding Judge, FISC (Feb. 13, 2013), http://www.fas.org/irp/agency/doj/fisa/fisc-021313.pdf; Rep. Jim Sensenbrenner, *How Obama Has Abused the Patriot Act*, L.A. Times, Aug. 19, 2013, http://lat.ms/17AIdiU. Indeed, members of this Court have recognized the value of public disclosure of its opinions construing the government's surveillance authority. *See, e.g.*, *In re Section 215 Orders*, 2013 WL 5460064, at *7; *cf.* Nakashima & Leonnig, *supra* (Judge "Kollar-Kotelly told associates this summer that she

[28] *See also, e.g.*, *California v. Carney*, 471 U.S. 386, 400–01 (1985) (Stevens, J., dissenting) ("The only true rules governing search and seizure have been formulated and refined in the painstaking scrutiny of case-by-case adjudication. Consideration of this matter by the lower courts in a series of litigated cases would surely have facilitated a reasoned accommodation of the conflicting interests. To identify rules that will endure, we must rely on the state and lower federal courts to debate and evaluate the different approaches to difficult and unresolved questions of constitutional law. Deliberation on the question over time winnows out the unnecessary and discordant elements of doctrine and preserves 'whatever is pure and sound and fine.'" (quoting Benjamin Cardozo, *The Nature of the Judicial Process* 179 (1921))).

wanted her legal argument out, according to two people familiar with what she said. Several members of the intelligence court want more transparency about the court's role to dispel what they consider a misperception that the court acted as a rubber stamp for the administration's top-secret spying programs."). As the Supreme Court noted in *Richmond Newspapers*, "'[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.'" 448 U.S. at 569 (quoting Jeremy Bentham, *Rationale of Judicial Evidence* 524 (1827)).

For these reasons, public disclosure of this Court's opinions addressing the constitutionality of the government's bulk collection of data and construing the meaning of "relevance" in FISA would contribute to the functioning of the FISA system and benefit the public interest. *Cf. In re Section 215 Orders*, 2013 WL 5460064, at *7 ("[M]ovants and *amici* have presented several substantial reasons why the public interest might be served by the[] publication" of FISC opinions interpreting Section 215.). In particular, release of the opinions requested in this proceeding would shed further light on the Court's interpretation of the statutory term "relevant," and it would provide the public with the Court's original Fourth Amendment analysis of whether and under what conditions the bulk collection of Americans' data complies with the Constitution. As Senator Wyden has urged,

> The original legal interpretation that said that the Patriot Act could be used to collect Americans' records in bulk should never have been kept secret and should be declassified and released. . . . This collection has been ongoing for years and the public should be able to compare the legal interpretation under which it was originally authorized with more recent documents.

Nakashima & Leonnig, *supra*; *see also id.* (Sen. Leahy: The release of "'any additional legal analysis' related to the phone records program . . . 'is exactly the sort of transparency we need in order to have a full and open debate about whether this program is legal and appropriate or needed.'").

* * *

In sum, because there is a longstanding American tradition of public access to judicial opinions; because such access positively contributes to the integrity of the judicial process, the democratic legitimacy of this Court, and the public understanding of laws passed in its name; and because the release of opinions addressing bulk collection would illuminate crucial gaps in the public knowledge about the breadth of its government's surveillance activities under the statute, the public's First Amendment right of access attaches to the Court's legal opinions relating to the bulk collection of Americans' data.

This Court erred in concluding otherwise in denying a 2007 public-access motion brought by the ACLU. First, by limiting its analysis to whether two previously published opinions of this Court "establish a tradition of public access," the Court took too narrow a view of the "experience" prong of the Supreme Court's test. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d at 493 (emphasis omitted). Again, "the 'experience' test of *Globe Newspaper* does not look to the particular practice of any one jurisdiction, but instead to the experience in that *type* or *kind* of hearing throughout the United States." *El Vocero*, 508 U.S. at 150 (quotation marks omitted). Second, the Court erred in concluding that public access would "result in a diminished flow of information, to the detriment of the process in question." *See In re Motion for Release of Court Records*, 526 F. Supp. 2d at 496. Instead, disclosure of the requested opinions would serve weighty democratic interests by informing the governed about the meaning of public laws enacted on their behalf.

B. The First Amendment requires disclosure of the Court's opinions relating to bulk collection.

Although the First Amendment right of access is a qualified one, judicial records that are subject to the right may be kept from the public only upon a rigorous showing. Different

formulations have been used by various courts to define the showing that must be made, but the governing standard applied by the Supreme Court encompasses four distinct factors:

1. **There must be a "substantial probability" of prejudice to a compelling interest.** Anyone seeking to restrict the right of access must demonstrate a substantial probability that openness will cause harm to a compelling governmental interest. *See, e.g.*, *Press-Enterprise II*, 478 U.S. at 13–14; *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1983); *Richmond Newspapers*, 448 U.S. at 580–81. In *Press-Enterprise II*, the Court specifically held that a "reasonable likelihood" standard is not sufficiently protective of the right and that a "substantial probability" standard must be applied. 478 U.S. at 14–15. This standard applies equally in the context of national security. *See In re Wash. Post*, 807 F.2d at 392.

2. **There must be no alternative to adequately protect the threatened interest.** Anyone seeking to defeat access must further demonstrate that nothing short of a limitation on the constitutional right of access can adequately protect the threatened interest. *See Press-Enterprise II*, 478 U.S. at 13–14; *see also Presley v. Georgia*, 558 U.S. 209, 214–15 (2010) (per curiam) ("[T]rial courts are required to consider alternatives to closure even when they are not offered by the parties" and "are obligated to take every reasonable measure to accommodate public attendance at criminal trials."); *In re Herald Co.*, 734 F.2d 93, 100 (2d Cir. 1984) (A "trial judge must consider alternatives and reach a reasoned conclusion that closure is a preferable course to follow to safeguard the interests at issue."); *Robinson*, 935 F.2d at 290.

3. **Any restriction on access must be narrowly tailored.** Even "legitimate and substantial" governmental interests "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Any limitation imposed on public access thus must be no broader than necessary to protect the threatened interest. *See, e.g.*, *Press-Enterprise II*, 478 U.S. at 13–14; *Lugosch*, 435 F.3d at 124; *Robinson*, 935 F.2d at 287.

4. **Any restriction on access must be effective.** Any order limiting access must be effective in protecting the threatened interest for which the limitation is imposed. As articulated in *Press-Enterprise II*, the party seeking secrecy must demonstrate "that closure would prevent" the harm sought to be avoided. 478 U.S. at 14; *see Robinson*, 935 F.2d at 291–92 (disclosure could not pose any additional threat in light of already publicized information); *In re Herald Co.*, 734 F.2d at 101 (closure order cannot stand if "the information sought to be kept confidential has already been given sufficient public exposure"); *United States v. Hubbard*, 650 F.2d 293, 322 (D.C. Cir. 1981) ("One possible reason for unsealing is that the documents were already made public through other means.").

The party seeking to restrict access bears the burden of presenting specific facts that satisfy this four-part test. *See Press-Enterprise II,* 478 U.S. at 15 ("The First Amendment right of access cannot be overcome by [a] conclusory assertion.").

The government cannot satisfy these strict standards in this case. The proposition that the government has an interest—let alone a "compelling" one—in preventing disclosure of this Court's opinions on the legality of bulk collection is insupportable. In fact, a public accounting of the legal review by this Court of bulk collections would *serve* governmental interests by clarifying the government's actions and the legal rationale supporting them. *See* Nakashima & Leonnig, *supra* (quoting current and former government officials advocating for release of original FISC bulk-collection opinion). Even the Director of National Intelligence has complained of the absence from the public debate of "key information regarding how a classified intelligence collection program is used to prevent terrorist attacks and the numerous safeguards that protect privacy and civil liberties," and underscored the importance of the public "understand[ing] the limits of this targeted counterterrorism program and the principles that govern its use." Press Release, DNI Statement on Recent Unauthorized Disclosures of Classified Information, Office of the Director of National Intelligence (June 6, 2013), http://1.usa.gov/13jwuFc.

Of course, portions of the Court's opinions may be sealed to serve compelling governmental interests—for example, to protect intelligence sources and methods that have not been previously disclosed—but the First Amendment requires the Court itself to ensure that any redactions are narrowly tailored to serve that interest. *Cf. Pepsico, Inc. v. Redmond*, 46 F.3d 29, 31 (7th Cir. 1995) (Easterbrook, J.) ("The judge must make his own decision about what should be confidential . . . and what may be spoken of openly. I regret that this means extra work for the

judge, but preserving the principle that judicial opinions are available to the public is worth at least that much sacrifice."); Nakashima & Leonnig, *supra* (quoting former senior DOJ attorney Kenneth Wainstein as arguing that "[e]specially when it comes to legal decisions about big programs, . . . we can talk about them in a sanitized way without disclosing sources and methods"). Critical to that analysis will be the numerous disclosures made to date regarding the government's bulk-collection surveillance activities. *See, e.g.*, *Doe v. Gonzales*, 386 F. Supp. 2d 66, 78 (D. Conn. 2005) (in First Amendment challenge to gag of recipient of national-security letter, relying in part on "the nature and extent of information about the [national-security letter] that has already been disclosed by the defendants" in determining that "the government has not demonstrated a compelling interest in preventing disclosure of the recipient's identity").

III. THE COURT SHOULD ORDER DECLASSIFICATION REVIEW UNDER RULE 62 AND THEN APPLY THE FIRST AMENDMENT STANDARD TO ANY PROPOSED SEALING BY THE GOVERNMENT.

In implementing the constitutional right of access to opinions concerning the bulk collection of Americans' information, the Court should first order the government to conduct a declassification review of the opinions pursuant to FISC Rule 62(a). *See, e.g.*, *In re Section 215 Orders*, 2013 WL 5460064, at *7; Order, *In re Application of the FBI for an Order Requiring the Production of Tangible Things from [Redacted]*, No. BR 13-109 (Aug. 23, 2013), http://1.usa.gov/16miTkR (discussing *sua sponte* request by FISC judge to publish memorandum opinion under FISC R.P. 62(a)); *In re Directives [Redacted] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1016 (FISA Ct. Rev. 2008).

If, after the completion of that review, the government proposes to redact any information in the Court's opinions, the Court should set a briefing schedule, requiring the government to justify how its sealing request meets the constitutional standard set out above, and allowing Movants to contest any sealing they believe to be unjustified. Although the Court should give

due consideration to the government's predictive judgments of harm to national security, it should not simply defer to those judgments or to the results of the government's declassification review. *See, e.g.*, *In re Wash. Post*, 807 F.2d at 392. The First Amendment right of access is a *constitutional* right that belongs to the public, and that right can be overcome only upon specific findings by a court, including a finding that disclosure would risk a substantial probability of harm to a compelling interest. *See supra* Part II.B.[29]

Independent judicial review of any proposed redactions from this Court's opinions is necessary because the standards that justify classification do not always satisfy the strict constitutional standard and because executive-branch decisions cannot substitute for the judicial determination required by the First Amendment. Specifically, information may be classified on a simple determination by the executive branch that "the unauthorized disclosure of [the information] *reasonably could be expected* to cause damage to the national security." Exec. Order No. 13,526, 75 Fed. Reg. 707, § 1.2(a) (Dec. 29, 2009) (emphasis added). The First Amendment, however, can be overcome only upon a showing of a "substantial probability" of harm, a standard that the Supreme Court has specifically held to be more stringent than a "reasonable likelihood" test. *Press-Enterprise II*, 478 U.S. at 14. Moreover, under the classification regime, the executive branch alone decides whether to consider the public's interest in disclosure, and it does so only in "exceptional cases." Exec. Order No. 13,526 § 3.1(d). Applying that standard to judicial records would flatly contradict the First Amendment right of access, which presumes that the public's interest is in disclosure, and permits sealing

[29] *Cf. Doe*, 386 F. Supp. 2d at 78 ("However, the plaintiffs' desire here is to exercise their First Amendment rights, which distinguishes this case from those in which an individual seeks disclosure of information in the course of discovery or pursuant to FOIA. Here, plaintiffs seek to vindicate a constitutionally guaranteed right; they do not seek to vindicate a right created, and limited, by statute.").

only if there are no less-restrictive alternatives and if the limitation on access is narrowly tailored.

Furthermore, whether the public's constitutional right of access has been overcome is a question for the courts, not one that rests with the executive. *See Press-Enterprise II*, 478 U.S. 13–14. As the Fourth Circuit has forcefully explained,

> [T]roubled as we are by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants, we are equally troubled by the notion that the judiciary should abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present. History teaches us how easily the spectre of a threat to "national security" may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse.

In re Wash. Post, 807 F.2d at 391–92; *see United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985) ("[E]ven when the interest sought to be protected is national security, the Government must demonstrate a compelling need to exclude the public . . . ." (emphasis omitted)); *United States v. Grunden*, 2 M.J. 116, 122 (C.M.A. 1977) (although classification and the policy determinations it involves "are not normal judicial functions, immunization from judicial review cannot be countenanced in situations where strong countervailing constitutional interests exist").

Case law under the Classified Information Procedures Act, 18 U.S.C., App. 3 (2000) ("CIPA"), confirms that the fact of classification does not automatically trump the constitutional right of access. To seal classified information where CIPA is involved, the government must make "a sufficient showing that disclosure of the information sought would impair identified national interests in substantial ways," and the court must conduct an "independent review" to determine that closure is "narrowly tailored to protect national security." *Aref*, 533 F.3d at 82–83; *see In re Wash. Post*, 807 F.2d at 393 (district court not excused under CIPA "from making

the appropriate constitutional inquiry"); *Rosen*, 487 F. Supp. 2d at 710, 716–17 (a statute cannot defeat a constitutional right and "government's *ipse dixit* that information is damaging to national security is not sufficient to close the courtroom doors"); *see also United States v. Moussaoui*, 65 F. App'x 881, 887 (4th Cir. 2003) (under CIPA procedures, courts "must independently determine whether, and to what extent, the proceedings and documents must be kept under seal"); *United States v. Poindexter*, 732 F. Supp. 165, 167 n.9 (D.D.C. 1990) ("CIPA obviously cannot override a constitutional right of access"); *United States v. Pelton*, 696 F. Supp. 156, 159 (D. Md. 1986) (same).

In other contexts, too, courts routinely scrutinize executive-branch classifications. *See, e.g., Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1999); *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 76 (D.C. Cir. 1987). This principle is not controversial, and in other forums, the government has expressly accepted it. *See, e.g.*, Final Reply Br. for Appellants at 8 n.1, *Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Rep.*, No. 12-5136 (D.C. Cir. Nov. 27, 2012), 2012 WL 5940305 (clarifying that the government has not "suggested that the Executive's determination that a document is classified should be conclusive or unreviewable").

For these reasons, merely ordering discretionary release under Rule 62(a) after executive declassification review would not satisfy the constitutional right of access. The Court should thus order declassification review as a first step and then test any sealing proposed by the government against the standard required by the First Amendment. Of course, even if the Court holds that the First Amendment right of access does not attach to the legal opinions requested by Movants, it should nonetheless exercise its discretion—as it has in the past and in the public interest—to order the government to conduct a declassification review of its opinions pursuant to Rule 62. *See, e.g., In re Section 215 Orders*, 2013 WL 5460064, at *7.

CONCLUSION

For the foregoing reasons, the movants respectfully request that this Court unseal its opinions addressing the constitutional and statutory bases for the "bulk collection" of records under various authorities within FISA, including but not limited to 50 U.S.C. § 1842, with only those limited redactions that satisfy the strict test to overcome the constitutional right of access. Given the relevance of the opinions to an ongoing debate of immense public interest, Movants request expedited consideration of this motion, as well as oral argument.

Dated: November 6, 2013

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CERTIFICATE OF SERVICE

I, Alex Abdo, certify that on this day, November 6, 2013, a copy of the foregoing brief was served by UPS on the following persons:

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