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

IN RE OPINIONS AND ORDERS OF THIS COURT CONTAINING NOVEL OR SIGNIFICANT INTERPRETATIONS OF LAW	No. Misc. 16–01

MOVANT'S REPLY IN SUPPORT OF MOTION FOR THE RELEASE OF COURT RECORDS

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PRELIMINARY STATEMENT

Movant American Civil Liberties Union ("ACLU") seeks access to a particular category of this Court's records that are especially salient to public debate and democratic oversight: judicial opinions, orders, and decisions that include novel or significant interpretations of law.

As Movant's opening brief established, the public's constitutional and common law rights of access attach to nothing more strongly than legal opinions of Article III courts. Nearly every day, Article III courts around the country issue opinions concerning the statutory and constitutional reach of the government's surveillance powers, including under the Foreign Intelligence Surveillance Act ("FISA"), under the amendments to FISA enacted in 2008, and under many other surveillance authorities. All but one of those courts recognize the public's right to see their opinions with only those redactions necessary to safeguard compelling governmental interests.

This Court is the sole exception—the one federal court in which the public is denied access to judicial interpretations of public laws, individual rights, and limitations on government power. The Court's refusal to recognize a right of access to its legal opinions has become increasingly significant in recent years, as the FISC's mandate has expanded from its original role of hearing only *targeted* surveillance applications to opining on the lawfulness of entire *programs* of surveillance. That the public continues to be denied access to this Court's opinions—and only this Court's opinions—is constitutionally intolerable.

The government can defend this state of affairs only by attempting to shift the level of generality at which courts analyze the right of access. The government does not, and could not, dispute that the public right of access attaches to the judicial opinions of Article III courts. Instead, it argues that the public right of access does not attach to *this Court's* opinions,

regardless of the specific characteristics of the records Movant seeks. But the government's logic is inconsistent with the law governing access to judicial records.

The relevant question is not whether history and logic support access to the FISC *in general*, but whether history and logic support access to particular proceedings or records. Insofar as the FISC sits as an Article III court analyzing the scope of executive surveillance authority, there is no question that history and logic support access to the resulting opinions. Those sorts of Article III judicial records have always been available to the public.

Moreover, all three branches of government have endorsed the commonsense wisdom that public access to this Court's significant decisions is integral to public trust, informed debate, and government accountability. Congress has mandated declassification of the Court's significant opinions; the executive branch is now routinely releasing the same with appropriate redactions to protect necessary secrecy; and the Court itself has, on its own initiative, both published certain of its important opinions and indeed written them for the very purpose of enriching public scrutiny, understanding, and debate.

Situated in the long history of access to judicial opinions, proper application of the "history and logic" test under the First Amendment right of access demands that this Court's opinions and orders containing novel or significant interpretations of law be disclosed to the public.

ARGUMENT

I. The ACLU has standing to assert its First Amendment right of access to opinions of this Court.

The ACLU incorporates herein the arguments presented in its briefs in *In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence*

Surveillance Act, No. Misc. 13-08 (FISC 2017) (en banc). For the reasons set forth in those papers, this Court has jurisdiction over the ACLU's motion.

II. The First Amendment right of access attaches to this Court's opinions and orders containing novel or significant interpretations of law.

The government does not dispute the public's right of access to judicial opinions of Article III courts, but argues that this Court's orders do not constitute "a 'place' []or a 'process'" to which a First Amendment right of access attaches. Gov. Br. at 9. The government thus appears to contend that the public categorically lacks a right of access to the FISC as a *forum*, including to all of the proceedings and documents filed in or produced by this Court. In so doing, the government misapplies the right-of-access doctrine, which requires this Court to examine whether the right of access extends to the specific type of records or proceedings at issue, not to the forum more generally. Contrary to the government's assertions, this Court need only resolve a narrow question in this matter: whether the public has a right of access to this Court's opinions containing novel or significant interpretations of law. Whether the right of access also attaches to other of the FISC's proceedings or records is simply not at issue here.

A. The First Amendment right of access is analyzed based on the particular type of records or proceedings at issue, not based on the forum generally.

The government reaches the wrong conclusion because it asks the wrong question. The government incorrectly frames the inquiry as concerning access to the FISC as a whole, including all of its proceedings and outputs. Such a broadside approach is at odds with the case law, in which the Supreme Court and federal courts of appeals analyze the right of access to particular records or proceedings by focusing on the "type or kind" of document or proceeding, not a court or forum as a whole.

Thus, for instance, when a newspaper sought access to preliminary hearings in Puerto Rico courts, the Supreme Court asked whether the newspaper had a right of access to that type of

hearing, not to the criminal process generally. *See El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 150 (1993) (per curiam). The courts of appeals have proceeded in like fashion with civil proceedings. Courts have asked not whether civil proceedings as a whole are subject to the right of access but instead whether the right applies to the particular stage at issue. *See, e.g.*, *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93–94 (2d Cir. 2004) (assessing right of access to docket sheets); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252–53 (4th Cir. 1988) (assessing right of access to summary judgment papers as distinct from other aspects of a civil proceeding); *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1983) (assessing right of access specifically to civil contempt proceedings). As the Second Circuit has summarized the case law, "numerous federal and state courts have also extended the First Amendment protection provided by *Richmond Newspapers* to *particular types of judicial documents. . . .* " *Hartford Courant*, 380 F.3d at 91 (emphasis added).[1]

By contrast, the government's categorical approach ignores the significance of particular documents and proceedings that adjudicate substantive rights, and invites end-runs around the right of access. For example, under the government's approach, if Congress tomorrow enacted a

[1] In an effort to demonstrate that FISC proceedings and documents are categorically exempt from the right of access, the government analogizes this Court's proceedings to those occurring before a grand jury. *See* Gov. Br. at 9–10. Here, however, Movant seeks access to the opinions of this Article III court, not to documents like grand-jury materials that reflect an "arms-length" relationship with the federal judiciary. *In re Motions of Dow Jones & Co.*, 142 F. 3d 496, 498 (D.C. Cir. 1998) (quoting *United States v. Williams*, 504 U.S. 36, 47 (1992)). Moreover, the cases upon which the government relies confirm that the denial of public access to materials ancillary to grand-jury proceedings is proper only to the extent that disclosure would do harm to grand-jury secrecy. *See, e.g.*, *United States v. Smith*, 123 F.3d 140, 150 (3d Cir. 1997) (determining that the First Amendment right of access attaches to proceedings that contain allegations of government misconduct, but not if disclosure would "'affect' or 'relate to' grand jury proceedings"); *In re Motions of Dow Jones & Co.*, 142 F. 3d at 506 (remanding for reconsideration the Chief Judge's order refusing to make available even "redacted papers, orders, and transcripts" from grand-jury ancillary proceeding).

statute redirecting Espionage Act prosecutions to the FISC—to take advantage, for example, of the FISC's familiarity with handling sensitive material—the long-recognized right of access to those criminal proceedings would vanish. The government's theory rests on the fact that FISC proceedings are frequently closed, rather than the specific characteristics of the Court's opinions and orders interpreting law.

For the reasons set forth above, this Court must analyze whether the right of access applies by looking to the history of access to the type or kind of document requested: the legal opinions of Article III courts. Under the First Amendment, it is irrelevant that the FISC, as opposed to another Article III court, issues the opinions. But even if the Court were to apply the "history and logic" test to FISC opinions in particular, Movant has still established that a right of access attaches to this Court's opinions and orders containing novel or significant interpretations of law.

B. FISC opinions containing novel or significant interpretations of law fall within the category of judicial records that lie at the core of the right of access.

Properly framed, the answer to the question that the ACLU's motion raises is clear: opinions of an Article III court that contain significant or novel interpretations of law are subject to the First Amendment right of access. As the ACLU's opening brief explained, judicial opinions are the paradigmatic judicial record to which the constitutional right of access attaches. *See* Mov. Br. at 12–13. Like the opinions of other Article III courts, this Court's orders and opinions that interpret the law and Constitution in novel and significant ways "involve[] issues and remedies affecting third parties or the general public." *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983).

This Court and the FISCR adjudicate issues of importance to the public concerning the extent of the government's authority to conduct surveillance and the scope of constitutional and

statutory authorization and protection. *See, e.g.*, *In re Sealed Case*, 310 F.3d 717, 736 (FISA Ct. Rev. 2002) (considering whether FISA and the Fourth Amendment permit the government to use electronic surveillance when "its primary purpose" is criminal prosecution); *In re Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1012 (FISA Ct. Rev. 2008) ("[A] foreign intelligence exception to the Fourth Amendment's warrant requirement exists when surveillance is conducted to obtain foreign intelligence for national security purposes and is directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States.").

The First Amendment right of access applies with special force to particular documents and proceedings that "adjudicate[] substantive rights." *Rushford*, 846 F.2d at 252 (4th Cir. 1988); *see also Matter of Cont'l Illinois Sec. Litig.*, 732 F.2d 1302, 1309 (7th Cir. 1984) (applying presumption of openness to a proceeding to terminate derivative claims). In the criminal context, this principle has been extended to plea agreements, which are "the most common form of adjudication of criminal litigation." *United States v. Haller*, 837 F.2d 84, 87 (2d Cir. 1988); *see also Oregonian Pub. Co. v. U.S. Dist. Court for Dist. of Oregon*, 920 F.2d 1462, 1465 (9th Cir. 1990) (recognizing right of access to plea agreements); *In re Washington Post Co.*, 807 F.2d 383, 389 (4th Cir. 1986) ("Because the taking of a guilty plea serves as a substitute for a trial, it may reasonably be treated in the same manner as a trial for First Amendment purposes.").

This Court's opinions and orders containing novel and significant interpretations of law are integral to its adjudication of the scope of government authority and individual rights. In analyzing whether the right of access attaches, this Court must "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." *N.Y. Civil Liberties Union v. N.Y. City Transit*

Auth., 684 F.3d 286, 299 (2d Cir. 2012). Indeed, if Congress had vested jurisdiction over the government's FISA applications in the federal district courts as a whole, rather than establishing a specialized Article III tribunal, there would be no question that the public had a right of access to opinions of broad legal consequence interpreting FISA. That would plainly be true even if, as is common throughout the federal courts, certain information in those opinions was classified or otherwise secret. *See, e.g., N.Y. Times Co. v. U.S. Dep't of Justice*, 806 F.3d 682, 690 (2d Cir. 2015) (ruling that paragraphs at issue in district court ruling could be disclosed in redacted form).

That Congress has routed the applications to a specialized Article III court does not change the analysis. Statutory sealing requirements could not possibly establish that the resulting secrecy is constitutional. Were it otherwise, "legislatures could easily avoid constitutional strictures by moving an old governmental function to a new institutional location." *N.Y. Civil Liberties Union v. N.Y. City Transit Auth.*, 684 F.3d at 299.[2]

That Congress in 1978 created a specialized Article III court—drawn from sitting Article III judges in district courts across the country—and process in order to consider the government's FISA applications does not remove this Court's records from the scope of the access right. The Supreme Court has recognized that proceedings that "have no historical counterpart" are nonetheless subject to the First Amendment right of access. *Press-Enter. Co. v. Superior Court* ("*Press-Enter. II*"), 478 U.S. 1, 10 n.3 (1986). "Because the first amendment must be interpreted in the context of current values and conditions... the lack of an historic tradition of open... hearings does not bar our recognizing a right of access to such hearings." *United States v. Chagra*, 701 F.2d 354, 363 (5th Cir. 1983) (citations omitted); *see also Detroit*

[2] Just so, the government's argument that a tradition of access can develop only if Congress adopts a retroactively applicable statute mandating openness, Gov. Br. at 9, is unavailing. If a constitutional right of access attaches to particular judicial records or proceedings, Congress cannot impinge on that right by statute.

Free Press v. Ashcroft, 303 F.3d 681, 700 (6th Cir. 2002) (analyzing "whether this inquiry requires a significantly long showing that the proceedings at issue were historically open"); *United States v. Criden*, 675 F.2d 550, 555 (3d Cir. 1982) ("We do not think that historical analysis is relevant in determining whether there is a first amendment right of access to pretrial criminal proceedings.").

Moreover, the government's argument that this Court's opinions are categorically exempt from the public right of access ignores how the FISC's role has changed over time—both by congressional requirement and by executive and FISC practice. Since FISA was originally enacted in 1978, the Court's docket has expanded significantly to include approval and oversight of several surveillance programs beyond individual *ex parte* applications for searches, surveillance, or wiretaps. *See, e.g.*, Protect America Act of 2007, Pub. L. No. 110–55, 121 Stat. 552 (2007); FISA Amendments Act of 2008 ("FAA"), Pub. L. No. 110–261, 122 Stat. 2436 (2008). In this role, the FISC frequently is called upon not only to interpret FISA, but also to determine whether applications for orders authorizing programmatic or individual surveillance comport with the Constitution. This function is fundamentally identical to that performed by other Article III courts that have analyzed and ruled on the government's authority to conduct surveillance. *See, e.g.*, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013); *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 493 F.3d 644 (6th Cir. 2007); *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193 (4th Cir. 2017); *Klayman v. Obama*, 142 F. Supp. 3d 172 (D.D.C. 2015); *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008); *In re National Security Letters*, No. 1:17-mc-980 (D.D.C. 2017).

Even if Congress had imagined this Court to be immune to the First Amendment right of access at its inception—which it did not do, and could not have done—this body is not a static

one, and recent changes to the Court's function and processes demonstrate that its significant opinions and orders resemble those of a standard Article III court more than ever before. Following the approach of the case law, this Court must consider the particular type of document at issue—judicial opinions—not FISC proceedings in their entirety.

C. The First Amendment right of access attaches even to judicial opinions containing classified information or issued after *ex parte* proceedings.

In an effort to shift the focus away from the judicial opinions at issue in this case, the government mischaracterizes the ACLU's narrow motion as a sweeping one. The government misconstrues the motion as seeking immediate access to all of this Court's *ex parte* proceedings, rather than to one category of its judicial output: its binding orders and opinions on issues of constitutional, as well as legislative, importance. Gov. Br. at 1, 13. The fact that this precedent often contains information that the government deems classified does not categorically defeat any right of access to the Court's opinions and orders.

Indeed, that this Court conducts many *ex parte*, classified proceedings does not transform its opinions containing significant interpretations of law into something other than core judicial records. For example, that federal magistrate judges commonly hold *ex parte* warrant proceedings does not deprive the public of a right of access to their judicial opinions interpreting the Fourth Amendment. To the contrary, numerous courts—including this one and the FISCR—have published opinions regarding the constitutionality of requests for surveillance that were made *ex parte*. *See, e.g.*, *In re Application of U.S. for an Order for Prospective Cell Site Location Info. on a Certain Cellular Tel.*, 460 F. Supp. 2d 448, 452 (S.D.N.Y. 2006) ("To date, at least three district and eleven magistrate judges have issued opinions addressing applications for orders authorizing the disclosure of prospective cell site information pursuant to the Pen Register Statute and the Stored Communications Act."). Indeed, that warrant applications are

made *ex parte* does not even deprive the public of the right of access to the affidavits submitted in support of warrant applications, and to the resulting warrants, after the warrants have been executed. *See, e.g.*, *Jones v. Kirchner*, 835 F. 3d 74, 88 (D.C. Cir. 2016) (appending the search warrant to the opinion); *YoungBey v. March*, 676 F. 3d 1114, 1118 (D.C. Cir. 2012) (quoting the warrant affidavit, which is in the record).

Moreover, that the executive branch has "broad discretion" to redact opinions issued by Article III courts that contain classified information, Gov. Br. at 11, does not mean that it can unilaterally decide whether the First Amendment right attaches to a particular opinion at all. *See, e.g.*, *N.Y. Times Co.*, 806 F.3d at 690 ("We have . . . made all of the redactions requested by the government, except those concerning the three paragraphs at issue on page 9 of the District Court's opinion."); *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002) (redacting classified information). Nor does it mean that the Court has no role to play in reviewing that decision. *See, e.g.*, *Bismullah v. Gates*, 501 F.3d 178, 188 (D.C. Cir. 2007) ("It is the court, not the Government, that has discretion to seal a judicial record."), *vacated on other grounds*, 554 U.S. 913 (2008); *In re Washington Post Co.*, 807 F.2d 383, 393 (4th Cir. 1986) (even if the government sought to withhold classified material from the public under the Classified Information Procedures Act, "the district court would not be excused from making the appropriate constitutional inquiry" under *Press-Enterprise II*.). Such a suggestion belies the rigorous standard applicable to the sealing of court records, even those that contain classified information. *Press-Enter. II*, 478 U.S. at 9, 11. Contrary to the government's assertions, the Constitution *requires* courts to make "specific, on the record findings" regarding the content of classified records in order to determine whether "closure is essential to preserve higher values

and is narrowly tailored to serve that interest." *Press-Enter. II*, 478 U.S. at 13–14 (quoting *Press-Enter. Co. v. Superior Court* ("*Press-Enter. I*"), 464 U.S. 501, 502 (1984)).

The government likewise errs when it suggests that this Court, in particular, has no role to play in reviewing executive branch classification decisions pertinent to its own decisions, opinions, and orders. This Court's own actions refute the government's position. *See, e.g.*, Order, *In re Directives*, No. 105B(g) 07-01, at 3 (July 15, 2013) (requiring the government to undertake a declassification review). Moreover, this Court's scrutiny of executive branch classification decisions plays an important public role by effectively reducing the scope and extent of unjustified classification. For example, in response to the ACLU's 2014 motion for access to FISC opinions, Judge Saylor undertook a searching review of the government's classification decisions, "examined the scope of each redaction in the First Redaction Proposal and called to the government's attention each portion of redacted text as to which the Court questioned the basis for, or scope of, the redaction." *In re Orders of this Court Interpreting Section 215 of Patriot Act*, No. MISC. 13-02, 2014 WL 5442058, at *4 (FISA Ct. Aug. 7, 2014). In response, the government ultimately declassified the material in question. *Id.* In any event, the government's fixation on what it calls "the FISC's unbroken history as a non-public forum" is simply inaccurate. Gov. Br. at 9.[3]

[3] The government's use of the phrase "non-public forum" to describe this Court is puzzling. Forum doctrine describes "the rights of the state to limit expressive activity" in certain locations. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). It may be true, for example, that federal courts are non-public forums for the purposes of expressive activity such as art exhibits, *see Sefick v. Gardner*, 164 F.3d 370, 372 (7th Cir. 1998), but that has no bearing on the Movant's ability to seek access to judicial records through litigation.

That this Court consistently deals with classified information might make it an outlier among federal courts, but it does not make it unique.[4] As the Seventh Circuit has recognized, "[e]ven disputes about claims of national security are litigated in the open." *Union Oil Co. of California v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000). Indeed, the decisions the government cites establish that the presence of classified information does not outweigh the strong tradition of issuing published judicial opinions, regardless of subject matter. *See, e.g., Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 202 (D.C. Cir. 2001) (reviewing designation as a foreign terrorist organization); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003) (reviewing designation as foreign terrorist organization and blocking of assets); *Bismullah v. Gates*, 501 F.3d 178 (reviewing designation as enemy combatant); *Dhiab v. Trump*, 852 F.3d 1087, 1094 (D.C. Cir. 2017) (Op. of Randolph, J.) (reviewing order compelling disclosure of court records to the media).

The government's framing is also erroneous because it suggests that the right of access to judicial opinions and orders attaches only if the public has an unfettered, contemporaneous right of access to the underlying proceedings. This suggestion has two flaws. First, it conflates the question of whether the right *attaches* with whether it is *overcome*. In other words, the right of access is a *qualified* right that may be overcome by a compelling showing, but the fact that access may be overcome in specific circumstances does not defeat access in a global sense. Second, the government's argument ignores that denials of access must be narrowly tailored in duration: information that may be redacted today must nevertheless be released once the interest

[4] Indeed, while sitting in their regular district courts rather than "in" the FISC, the judges of this Court regularly encounter classified information. *See, e.g., ACLU v. CIA*, 109 F. Supp. 3d 200 (D.D.C. 2015) (Collyer, J.); Opinion & Order, *United States v. Khan*, No. 12-cr-659 (D. Or. Nov. 24, 2014), ECF No. 157 (Mosman, J.); *ACLU v. CIA*, 808 F. Supp. 2d 280 (D.D.C. 2011) (Collyer, J.).

justifying secrecy dissipates. *See, e.g.*, *Gannett Co. v. DePasquale*, 443 U.S. 368, 393 (1979) ("Once the danger of prejudice had dissipated, a transcript of the suppression hearing was made available."); *Phx. Newspapers, Inc. v. U.S. Dist. Court for Dist. of Ariz.*, 156 F.3d 940, 947 (9th Cir. 1998) ("[T]ranscripts of public trial proceedings must be released when the factors militating in favor of closure no longer exist."); *United States v. Edwards*, 823 F.2d 111, 119 (5th Cir. 1987) (instructing courts to "avoid unnecessary delay in releasing the record of closed proceedings after trial"). The government's recent decisions to declassify some of the records sought here and produce them under FOIA demonstrate that the public need not have access to this Court's *ex parte* proceedings in order to benefit from the release of its opinions. Indeed, the fact that courts sometimes issue redacted opinions, or accompany public opinions with classified ones, simply demonstrates that courts can appropriately handle classified information while ensuring that closure is narrowly tailored under the First Amendment.

Nor does the possible availability of a remedy under FOIA, as the government suggests, *see* Gov. Br. at 15–16, displace the constitutional right of access to this Court's opinions and orders that demands more rigorous scrutiny. FOIA's requirement that the executive branch produce all "reasonably segregable" non-exempt material is less demanding than the First Amendment's requirement that closure is "narrowly tailored" to serve a "overriding" government interest. *Press-Enter. I*, 464 U.S. at 510. More fundamentally, when FOIA requesters seek access to FISC orders and opinions as "agency records" under FOIA, the Court lacks any opportunity to itself consider whether the opinions should be published, or to direct the Executive Branch to undertake a declassification review. Instead, FOIA cases are adjudicated by district court judges who simply do not have the ability to examine the government's claims with the same familiarity that the FISC itself can apply to its own opinions.

The limited set of this Court's opinions at issue in this matter fit squarely within the long tradition of public access to significant legal opinions. Indeed, that courts take pains to publish opinions on significant legal matters even when the underlying proceedings involve classified information or occur *ex parte* further underscores the strength of that tradition of access. For that reason, this Court should reject the government's insinuation that the ACLU is attempting to slip through the Court's back door to gain access to its *ex parte* proceedings. That issue is simply not before the Court.

D. Access to FISC opinions has a positive effect on FISC proceedings and on public understanding of the government's surveillance authorities.

Public access to judicial opinions of Article III courts—the outcomes of the adjudicative process—is integral both to public participation in the justice system and to the development of judicial decisionmaking and a body of caselaw. Access to this Court's opinions and orders containing novel or significant legal interpretations is equally essential to development of the law as it is to democratic oversight. Mov. Br. at 16–20. "Without access to judicial opinions, public oversight of the courts, including the processes and the outcomes they produce, would be impossible." *Doe v. Pub. Citizen*, 749 F.3d 246, 267 (4th Cir. 2014).

All three branches of government have now recognized the "logic" of transparency when it comes to FISC opinions, and the positive effects that transparency has had on this Court's proceedings and on the public's understanding of FISA. Congress embraced the importance of transparency when it enacted the USA FREEDOM Act, requiring that the government "make publicly available to the greatest extent practicable" each FISC order or opinion issued after June 2, 2015 that contains a significant or novel interpretation of the law. USA FREEDOM Act § 402, 50 U.S.C. § 1872 (2016). This provision reflects Congress's confidence that such opinions ought to be available for public inspection. *Id. see also* 42 U.S.C. § 2000ee (requiring the Privacy and

Civil Liberties Oversight Board to issue public reports and hold public hearings to the extent possible). Pursuant to this statutory requirement, in 2016, the Office of the Director of National Intelligence ("ODNI") released a FISCR opinion that contained a significant interpretation of the law regarding the acquisition of post cut-through digits pursuant to Section 402. *In re Certified Question of Law*, No. 16-01 (FISA Ct. Rev. Apr. 14, 2016); *see also In re [Redacted], a U.S. Person*, PR/TT No. 15-52 (FISA Ct. Jun. 18, 2015) (Boasberg, J.); Mem. Op. (FISA Ct. Nov. 6, 2015) (Hogan, J.); Mem. Op. (FISA Ct. Dec. 31, 2015) (Hogan, J.); Mem. Op. (FISA Ct. Apr. 26, 2017) (Collyer, J.); *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, BR No. 15-99 (FISA Ct. Nov. 24, 2015) (Mosman, J.).

The executive branch has likewise recognized that transparency is integral to "the appearance of fairness." *Press-Enter. II*, 478 U.S. at 9. The government has made available substantial additional material concerning this Court's proceedings and records in response to recent FOIA requests. For example, in recent weeks, the government has made available transcripts of two *ex parte*, classified FISC hearings, as well as an *amicus curiae* brief, and numerous other FISC filings. *See* ODNI, *Additional Release of FISA Section 702 Documents*, IC on the Record (June 14, 2017), http://bit.ly/2tqkMPF. The government has also declassified and released portions of eighteen FISC opinions to the Electronic Frontier Foundation pursuant to a stipulation reached in FOIA litigation. *See* Stipulation and [Proposed] Order, *EFF v. Dep't of Justice*, No. 16-cv-2041 (N.D. Cal. Dec. 1, 2016), ECF No. 39.

More generally, the executive branch has recognized the strong public interest in transparency regarding the government's use of FISA orders. In 2013, Bob Litt testified before Congress that "it's important to help the public understand how the intelligence community uses

the legal authorities that Congress has provided it to gather foreign intelligence, and the vigorous oversight of those activities to ensure that they comply with the law." *See Surveillance Transparency Act of 2013: Hearing on S. 1621 Before the Subcomm. on Privacy, Tech. & the Law of the S. Comm. on the Judiciary*, 113th Cong. 5 (2013) (statement of Robert Litt, General Counsel, ODNI, and J. Bradford Wiegmann, Deputy Assistant Attorney General). To that end, in 2014, ODNI began publishing an annual transparency report. ODNI, *Statistical Transparency Report* (2016), *available at* http://bit.ly/2pkcxjq. In 2015, ODNI adopted the "Principles of Intelligence Transparency Implementation Plan" to "enhance[] public understanding of intelligence activities." ODNI, *Principles of Intelligence Transparency Implementation Plan* 1 (2015), *available at* http://bit.ly/2s5lbD3.

Indeed, this Court and the FISCR have also recognized the value of public participation and representation in their proceedings. As a result, they have taken actions that have substantially increased the public's ability to understand the Court's proceedings by, for example, accepting amicus participation and publishing opinions. *See, e.g.*, *In re Sealed Case*, 310 F.3d 717, 719 (FISA Ct. Rev. 2002) (accepting amicus participation). Since 2013, this Court has taken further steps to increase the transparency of its proceedings and documents by maintaining a public docket of unclassified filings. *See* Public Filings, U.S. Foreign Intelligence Surveillance Court, http://www.fisc.uscourts.gov/public-filings (listing public filings "[b]eginning June 2013"). FISC judges have also ordered the government to conduct declassification reviews of the Court's opinions. *See, e.g.*, Order, *In re Directives*, No. 105B(g) 07-01, at 3 (July 15, 2013) (Walton, J.); *In re Orders of this Court Interpreting Section 215 of Patriot Act*, 2014 WL 5442058, at *1 (Saylor, J.).

Moreover, in numerous decisions, this Court and the FISCR have also recognized that the public interest in the substance of the Court's decisions weighs in favor of publication. For example, in September 2013, Judge Saylor recognized both that "movants and *amici* have presented several substantial reasons why the public interest might be served" by publishing the Court's opinions regarding Section 215. *In re Orders of this Court Interpreting Sec. 215 of the Patriot Act*, No. MISC. 13-02, 2013 WL 5460064, at *7 (FISA Ct. Sept. 13, 2013) (finding that openness "would contribute to an informed debate" regarding Section 215); *see also In re Directives*, 551 F.3d at 1016 (publishing opinion); *In re Application of F.B.I. for an Order Requiring Prod. of Tangible Things from Redacted*, No. BR 13-109, 2013 WL 5741573, at *10 (FISA Ct. Aug. 29, 2013) (Eagan, J.) (requesting, *sua sponte*, publication under Rule 62(a) "[b]ecause of the public interest in this matter").

All of this recent history reflects a conviction by all three branches of government that public oversight and understanding of the FISC's activities are essential.

The government counters that recognizing a right of access to this Court's significant legal opinions would "incentivize government officials to conduct surveillance without FISC approval where the need for such approval is unclear." Gov. Br. at 14. As an initial matter, given the executive branch's commitment to transparency, it is odd that the government claims that public review would "chill" its interactions with the Court. In support of this assertion, the government relies heavily on Judge Bates's 2007 *In re Motion* opinion. *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 492 (FISA Ct. 2007). Since 2007, however, as detailed above, Congress, the executive branch, and this Court have all recognized the increased importance of transparency and accountability for the Court's opinions, decisions, and orders, as well as court filings. In so doing, the government, Congress, and this Court have undermined

Judge Bates's speculation about the negative consequences that would flow from greater transparency. Moreover, the government's suggestion that the public servants bound by this Court's rulings would flout its constitutional commands is both an affront to the Court's authority and takes an unjustifiably dim view of government employees themselves. This Court should therefore reject the government's suggestion that facilitating access to the Court's opinions, as Congress has already required in Section 402 of the USA FREEDOM Act, would "incentivize" it to conduct warrantless surveillance or be less than candid before the Court. Br. at 14. For the same reasons, this Court should likewise reject the government's contention that recognizing a right of access to the opinions would pose an unacceptable risk to security. History has shown that the courts are competent to publish what should be made public and to keep secret what should not.

III. This Court can consider publishing its own opinions pursuant to FISC Rule 62.

The government cites no authority suggesting that this Court cannot consider the ACLU's request that it exercise discretion under Rule 62 to publish its own opinions. This Court can undoubtedly decide, pursuant to Rule 62, to initiate the process of publishing the opinions to which the ACLU has sought access. This Court should not and need not be blind to the public interest in determining whether to pursue publication of its own opinions.

CONCLUSION

For the foregoing reasons, Movant respectfully requests that this Court release its opinions containing novel or significant interpretations of law, with only those limited redactions that satisfy the strict test to overcome the constitutional right of access.

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Respectfully submitted,

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* This brief does not purport to present the institutional views of Yale Law School, if any.

CERTIFICATE OF SERVICE

I, Brett Max Kaufman, certify that on this day, June 29, 2017, a copy of the foregoing brief was served by UPS on the following persons:

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