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

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

MOVANTS' MOTION TO ALTER OR AMEND THE JUDGMENT & FOR JOINT BRIEFING WITH CASE NO. MISC. 16-01

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PRELIMINARY STATEMENT

On January 21, 2017, this Court issued an Opinion dismissing this action for lack of jurisdiction, holding that "the First Amendment does not afford a qualified right of access" to certain legal opinions sought by Movants and, therefore, "Movants lack standing under Article III." Op. at 2. The Court's broad conclusion that it lacks jurisdiction over all of Movants' claims contradicts previous rulings of this Court, and, significantly, was reached sua sponte, without providing any opportunity for Movants, during the 33-month pendency of this litigation, to address this novel ground for dismissal that no party had raised.

For these reasons—and because the issues raised by the Court's Opinion overlap with those presently pending in another motion before the Court—Movants respectfully request that the Court reconsider its judgment in this matter, join this case with the other pending matter, and permit Movants to address the standing questions raised by the Court as part of the currently scheduled briefing in the other case. *See* Fed. R. Civ. P. 59(e); *In re Opinions and Orders of this Court Containing Novel or Significant Interpretations of Law*, No. Misc. 16-01 (F.I.S.C. filed Oct. 21, 2016). Consideration of the two matters together will significantly promote judicial efficiency because it will allow both cases to be fully briefed and addressed in this Court before any petition for review in the Court of Review must be filed. If, however, the Court is unwilling to reconsider its conclusion in this case, Movants request that the Court withdraw its judgment until the motion in No. Misc. 16-01 is also resolved, so that any petition for review in these the two matters may be heard at the same time.[1]

[1] Movants have twice contacted the government to ask whether the government consents to this Motion, but have not received a response.

ARGUMENT

In the interests both of fairness and judicial efficiency, the Court should reopen its judgment in this matter pursuant to Fed. R. Civ. P. 59(e) and order joint briefing in this case and in No. Misc. 16-01.[2]

First, during the entirety of this litigation, Movants never had reason to address the Court's ultimate grounds for dismissal—that the Court lacked *jurisdiction* to consider Movants' access motion because no First Amendment right of access applies. Until this Court issued its Opinion, it appeared to be settled that this Court had jurisdiction to consider such motions; indeed, neither the government nor any member of this Court had ever suggested the contrary. In fact, at least three other members of this Court, when faced with similar right-of-access motions, plainly believed that they had jurisdiction to consider Movants' claims for public access. *See In re Orders of this Court Interpreting Section 215 of the PATRIOT Act*, No. Misc. 13-02, 2013 WL 5460064 (F.I.S.C. Sept. 13, 2013) ("*215 Public Access*") (Saylor, J.); *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484 (F.I.S.C. 2007) (Bates, J.); *In re Proceedings Required by 702(i) of FISA Amendments Act of 2008*, No. Misc. 08-01, 2008 WL 9487946, at *2–3 (F.I.S.C. Aug. 27, 2008) (McLaughlin, J.). The most recent of those decisions, *215 Public Access*, explicitly analyzed standing—and held that Movants had established jurisdiction to litigate their claims under the First Amendment and FISC Rule of Procedure 62.[3] Nothing in any of those earlier cases, or in this one, gave Movants cause to address the novel legal theory adopted by the

[2] Because this Court's Rules do not address motions to alter or amend judgment, the Federal Rules of Civil Procedure may apply. *See* FISC Rule 1. In accordance with Rule 59(e), this motion is filed within 28 days of the order in question.

[3] The Court explained its conclusion that this case is distinguishable from *215 Public Access* because, here, Movants sought only redacted information contained in "judicial documents that already have been made public." Op. at 10. It is unclear from the Court's opinion, however, how that distinction affected the jurisdictional analysis.

Court. Of course, as the Court pointed out in its Opinion, Movants did address certain other standing matters in their motion here—but they did so in order to satisfy the same standing threshold the FISC found Movants had satisfied when it granted relief in *215 Public Access*. *See* Op. at 8; Mot. at 10. Similarly, while the government addressed standing in its response brief, its argument focused entirely on the question of whether Movants were "parties" under Rule 62 and the availability of comparable relief under the Freedom of Information Act ("FOIA"). *See* Response at 2–4. In short, Movants had no reason to rebut a previously unexpressed theory of standing, and at no time in the 33 months during the pendency of this motion did the Court invite Movants to address it.

There is good reason to afford Movants the opportunity to address the legal questions raised for the first time in the Court's Opinion. The decision dismissing this matter for lack of jurisdiction is incorrect because it improperly conflates the merits of Movants' claims with their standing to bring them in the first place, and it runs contrary to previous decisions of this Court as well as a large body of federal judicial precedent.[4] As the prior cases of this Court made clear, *standing* to seek public access to court records is not the same as having a *right to obtain* those records. *See 215 Public Access*, 2013 WL 5460064, at *1, 17; *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 487, 491 (F.I.S.C. 2007). More broadly, the Court's standing ruling conflicts with a wealth of precedent concerning the public's standing to seek judicial records under the First Amendment. Movants' injury here—a denial of access to court records—is concrete and particularized. *See Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596 (1982); *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 576 (1980); *N.Y. Civil Liberties Union v.*

[4] Should the Court grant the Motion, Movants will elaborate on these points in more detail, responding to both the Court's Opinion and any arguments concerning standing taken up by the government in No. Misc. 16-01, in a future joint filing.

N.Y.C. Transit Auth., 684 F.3d 286, 294–95 (2d Cir. 2011); *In re Wash. Post*, 807 F.2d 383, 388 n.4 (4th Cir. 1986). And plainly, Movants are injured by the denial of public access to the opinions and orders sought, *see Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 472 (1982), and that injury would be redressed by the disclosure requested, *see Town of Barnstable v. FAA*, 659 F.3d 28, 31 (D.C. Cir. 2011).[5] For precisely these reasons, courts considering motions for public access have clearly separated standing to seek judicial records from the merits. *See, e.g.*, *Carlson v. United States*, 837 F.3d 753, 759 (7th Cir. 2016) ("That his petition is not guaranteed to be granted, because a court may find a valid justification for denying him access, in no way destroys his standing to seek the documents. . . . To hold otherwise would amount to denying standing to everyone who cannot prevail on the merits, an outcome that fundamentally misunderstands what standing is."); *Doe v. Public Citizen*, 749 F.3d 246, 253, 264 (4th Cir. 2014).

Second, Movants should be afforded the opportunity to address one other striking aspect of the Court's decision: its conclusion that in the absence of a viable First Amendment claim, Movants also lack standing to seek relief under Rule 62 and the Court's inherent supervisory powers over its own records. As the Opinion acknowledged, two other decisions of this Court recognized that Movants had standing to assert such claims regardless of any First Amendment claim. *See* Op. at 10 (discussing *215 Public Access*, 2013 WL 5460064, at *8); *id.* at 9 n.5 (discussing *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 486–87 (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978))). Yet with little analysis, the Court found

[5] Likewise, in the FOIA context, the Supreme Court has held that plaintiffs have standing to litigate FOIA claims so long as they are able to show (a) "that they sought and were denied specific agency records," and (b) that prevailing would provide access to records, *regardless* of whether plaintiffs are ultimately entitled to the records sought. *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 450–51 (1989).

that because Movants had not established a First Amendment right of access, it lacked jurisdiction to consider other grounds for relief. *See* Op. at 40 n.17. Briefly, the Court's apparent belief that Movants must first establish an entitlement to relief under the First Amendment in order to seek the discretionary relief contemplated by Rule 62 proves far too much. Such a rule would render the relief afforded by Rule 62 all but illusory, because either the First Amendment would require public access—in which case discretionary relief would be unnecessary—or the First Amendment would not require access and thus, according to the Court, parties would lack standing to seek discretionary relief. Such an approach is also in tension with the canon of constitutional avoidance, because it would require the FISC to resolve constitutional questions (as it did here) before considering the non-constitutional ground for relief presented by Movants. *See, e.g., United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 478 (1995) (describing the Supreme Court's "policy of avoiding unnecessary adjudication of constitutional issues"); *Ashwander v. Tenn. Valley Auth.*, 297 U.S.288, 347 (1936) (Brandeis, J., concurring) ("The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it." (quotation marks omitted)).

Finally, reopening the judgment and permitting joint briefing in this case and in Misc. No. 16-01 would promote judicial economy. On January 27, 2017—two days after this Court published its Opinion in this case—the Court granted Movants' motion for a briefing schedule in *In re Opinions and Orders of this Court Containing Novel or Significant Interpretations of Law*, No. Misc. 16-01 (F.I.S.C. filed Oct. 21, 2016), an action also brought by Movant American Civil Liberties Union. Given the Court's ruling in this case and the similarity of the claims of access underlying both motions, the Court's ruling here will necessarily influence the briefing and decision in the other case. Because the two cases involve similar issues, Movants respectfully

request that the Court permit Movants, in a single brief to this Court, to argue for reconsideration of this Court's January 21, 2017 Opinion in No. Misc. 13-08 and to reply to the government's forthcoming response in No. Misc. 16-01. Should the Court grant this relief, both cases would be aligned for an ultimate decision simultaneously—allowing Movants, the government, and the Court to address all of the relevant arguments together, and alleviating any burden on the Court of Review, which would consider any appeal in a single proceeding, rather than through piecemeal litigation.

In the alternative, even if the Court is unwilling to reconsider its conclusion here, Movants request that the Court withdraw its judgment until the motion in No. Misc. 16-01 is resolved, so that any petition for review in these the two matters may be heard together.

CONCLUSION

For the foregoing reasons, Movants respectfully request that this Court permit Movants, in a single brief to this Court, to argue for reconsideration of this Court's January 21, 2017 Opinion in No. Misc. 13-08 and to reply to the government's forthcoming response in No. Misc. 16-01. In the alternative, Movants request that the Court withdraw its judgment until the motion in No. Misc. 16-01 is resolved, so that any petition for review in these the two matters may be heard together.

Dated: February 17, 2016

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I, Patrick Toomey, certify that on this day, February 17, 2017, a copy of the foregoing motion was served on the following persons by the methods indicated:

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