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-_______

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR THE RELEASE OF COURT RECORDS

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PRELIMINARY STATEMENT

Under the authority of the First Amendment and pursuant to Rule 62 of this Court's Rules of Procedure, the American Civil Liberties Union (the "ACLU" or "Movant") respectfully moves the Foreign Intelligence Surveillance Court ("FISC") to unseal its opinions and orders containing novel or significant interpretations of law issued between September 11, 2001, and the passage of the USA FREEDOM Act on June 2, 2015.[1] Based on public disclosures, it is clear that over the past fifteen years the FISC has developed an extensive body of law—one that defines the reach of the government's surveillance powers and broadly affects the privacy interests of Americans. Yet, even today, many of the FISC's significant opinions and orders have not been disclosed to the public. These rulings appear to address a range of novel surveillance activities, including the government's bulk searches of email received by Yahoo! customers; the government's use of so-called "Network Investigative Techniques" ("NITs"), more commonly known as "malware"; and the government's use of "cybersignatures" as a basis for surveillance conducted pursuant to the Foreign Intelligence Surveillance Act ("FISA").[2] The Court's undisclosed rulings also appear to address the lawfulness of surveillance conducted under Section 702 of FISA—a controversial authority scheduled to expire in December 2017. The significant legal interpretations of this Court are subject to the public's First Amendment right of access, and no proper basis exists to keep that legal analysis secret.

Congress created this Court in 1978 to "hear applications for and grant orders approving electronic surveillance" within the United States of foreign powers and their agents. FISA, Pub. L. No. 95-511, § 103, 92 Stat. 1783 (1978) (codified at 50 U.S.C. § 1803). Since the disclosures

[1] Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act ("USA FREEDOM Act"), Pub. L. No. 114-23, 129 Stat. 267 (2015).

[2] In the attached Appendix, Movant has provided a non-exhaustive list of FISC rulings that it believes fall within the scope of this motion and have not yet been publicly released.

that began in June 2013, however, it has become increasingly apparent that the Court does more than review individualized surveillance applications on a case-by-case basis. Rather, the Court's role expanded over the past fifteen years to include programmatic approval and review of government surveillance activities that affect countless Americans.

The Court's new role was accompanied by a growing body of secret law. In at least some instances, the Court's interpretations departed significantly from the public understanding of the laws at issue. *See, e.g.*, *ACLU v. Clapper*, 785 F.3d 787, 812 (2015) (describing the "expansive concept of 'relevance'" adopted by this Court in interpreting Section 215). During the past three years, the Court has responded by making more of its precedent available to the public, including in response to a previous motion filed by the ACLU. *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 (FISC Sept. 13, 2013); Opinion and Order Directing Declassification of Redacted Opinion ("Declassification Order"), *In re Section 215 Orders*, No. Misc. 13-02 (FISC Aug. 7, 2014), http://1.usa.gov/1yekcfM. Congress, too, has responded by directing the government to publicly release significant opinions of this Court to the greatest extent practicable, as part of the USA FREEDOM Act. *See* 50 U.S.C. § 1872. However, the government has taken the position that its statutory disclosure obligation does *not* apply to opinions that predate the Act's passage on June 2, 2015.[3] As a result, a number of significant opinions and orders of this Court issued prior to June 2015 remain secret.

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[3] *See* Gov't Mem., *Elec. Frontier Found. v. DOJ*, No. 14-cv-00760 (D.D.C. Feb. 5, 2016) (ECF No. 28). *But see* Pl. Mot. for Partial Summ. J. & Opp., *Elec. Frontier Found. v. DOJ*, No. 14-cv-00760 (N.D. Cal. Oct. 13, 2016) (ECF No. 32); Sen. Ron Wyden, Press Statement (Oct. 7, 2016) ("The USA Freedom Act requires the executive branch to declassify Foreign Intelligence Surveillance Court opinions that involve novel interpretations of laws or the Constitution.").

Through this Motion, the ACLU seeks access to these opinions and orders for two reasons. First, some of the opinions and orders pertain to surveillance programs that are already the subject of considerable public debate—including the government's PRISM and Upstream collection programs conducted pursuant to Section 702 of FISA. The public is entitled under the First Amendment to access the legal interpretations that define the limits of those programs. Second, and more broadly, some of the opinions and orders relate to novel legal questions the Court addressed as the government's surveillance activities expanded after September 11, 2001, such as the use of court-authorized malware and the extension of FISA to cybersecurity activities. These rulings are necessary to inform the public about the scope of the government's surveillance powers today.

The ACLU's request for access to opinions and orders of this Court seeks to vindicate the public's overriding interest in understanding how federal statutes are being construed and implemented, and how constitutional protections for personal privacy and expressive and associational activities 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 regularly been available for inspection by the public, and because their release is 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 ACLU respectfully asks this Court to order the government to promptly process and prepare for publication opinions and orders of this Court containing novel or significant interpretations of law, including but not limited to those identified in the Appendix.[4] Because the opinions are of critical importance to the ongoing public debate about the legitimacy and wisdom of the government's surveillance activities, the ACLU respectfully requests that the Court order the publication of the opinions as quickly as possible, with only those redactions justified under the stringent First Amendment standard.

FACTUAL BACKGROUND

In June 2013, various press outlets disclosed the existence of previously unknown government surveillance programs, including the National Security Agency's bulk collection of telephone metadata pursuant to 50 U.S.C. § 1861, and the PRISM and Upstream programs operated under Section 702 of FISA, which the government uses to seize and search vast quantities of Internet communications.[5] These news stories and subsequent reporting and disclosures alerted the public to the existence of a growing body of important FISC rulings on matters of significant public interest. While the FISC was created to hear individualized

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[4] Movant notes that, since 2004, the government has been required to identify, summarize, and provide to the Intelligence and Judiciary Committees of both houses of Congress "significant" legal interpretations of FISA. 50 U.S.C. § 1871(a)(4)–(5); *see also id.* § 1871(c). Similarly, for FISC opinions related to § 702 of FISA, the executive branch is required to categorize the Court's opinions as containing a significant legal interpretation or not. 50 U.S.C. § 1881f(b)(1)(D) (requiring the government to provide copies to Congress of any FISC opinion "that contains a significant legal interpretation of the provisions of [Section 702 of FISA]"). Where there is a question as to whether an opinion or order constitutes a significant interpretation of law, Movant requests that the Court make a determination as to the ruling's significance.

[5] *See, e.g.*, Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, Guardian, June 6, 2013, http://gu.com/p/3gc62; Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, Wash. Post, June 7, 2013, http://wpo.st/eW7Y1.

surveillance demands, the orders and opinions that were published with the leaked documents revealed that the FISC was also authorizing and overseeing several broad programs of surveillance, relying on a body of its own opinions interpreting statutory and constitutional law. Because FISC opinions were rarely published, the disclosures made the public aware that it was being (and had for some time been) denied access to a growing body of secret law.

To address the public's concerns that developed in the wake of these disclosures about the legal foundations of the government's various surveillance programs, the government began to declassify and release significant information related to its surveillance activities. For example, in the months immediately following the initial news stories about the government's bulk call-records program, the government released a white paper providing more details about the program, its purported value, and its legal underpinnings.[6] And the Office of the Director of National Intelligence ("ODNI") began a marked increase in its communications with the public about the government's national-security surveillance programs.[7]

This Court also grasped the immense public interest surrounding the government's surveillance activities and the need for public access to its opinions and orders. After the initial disclosures in June 2013, this Court began to makes more of its opinions and orders available to the public as a matter of course.[8] 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

[6] *Administration White Paper: Bulk Collection of Telephony Metadata Under Section 215 of the USA PATRIOT Act* (Aug. 9, 2013), http://big.assets.huffingtonpost.com/Section215.pdf.

[7] As one example of its increased outreach efforts, the ODNI began utilizing social media to address these important matters of public concern and to release declassified documents, including opinions of this Court, to the public. *See* ODNI, IC on the Record, https://icontherecord.tumblr.com/.

[8] *See generally* Public Filings – FISC, http://www.fisc.uscourts.gov/public-filings.

"[p]ublication of FISC opinions . . . would contribute to that debate."[9] The Court also underscored the assertions by legislators of the "value of *public* 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."[10] Likely for the same reason, the Court's then-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.[11]

The intense public interest triggered by the June 2013 surveillance disclosures has only grown in the ensuing years. For almost three years, the American people have taken part in a wide-ranging public debate about the scope, interpretations, and appropriate bounds of our nation's surveillance laws. New details have continued to emerge about the government's programs.[12] Executive-branch bodies have engaged in significant public oversight of surveillance programs, conducting hearings with government and outside experts, and issuing reports on several programs that assess their legality and make recommendations on areas of concern.[13] And Congress has actively engaged on the issue, including by passing legislation to

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

[10] *Id.*; *see* Mem. Op., *In re Application of the FBI for an Order Requiring the Production of Tangible Things from [Redacted]*, No. BR 13-158 (FISC Oct. 11, 2013), http://bit.ly/2e2yB1y; *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 (FISC Aug. 29, 2013).

[11] *See, e.g.*, Letter from Hon. Reggie B. Walton, Presiding Judge, FISC, to Hon. Patrick J. Leahy, Chairman, Comm. on the Judiciary (Oct. 11, 2013), http://bit.ly/2e2H8BH.

[12] *See, e.g.*, Charlie Savage et al., *Hunting for Hackers, N.S.A. Secretly Expands Internet Spying at U.S. Border*, N.Y. Times, June 4, 2015, http://nyti.ms/1GmFXE0 (reporting that in 2009 the NSA began conducting warrantless searches using patterns associated with computer intrusions—*i.e.*, "cybersignatures"—and Internet protocol addresses as selectors).

[13] *See, e.g.*, Privacy & Civil Liberties Oversight Bd. ("PCLOB"), *Report on the Telephone Records Program Conducted under Section 215* (2014), http://bit.ly/1SRiPke; President's

end the government's bulk-collection activities and to require the publication of the very sorts of significant legal opinions sought through the ACLU's Motion.[14]

Yet many of this Court's significant opinions and orders—some of which have been explicitly referenced or described by the Court—have never been released to the public. For example, news reports published earlier this month revealed the existence of a previously undisclosed order from this Court requiring Yahoo! to scan, in real time, all incoming email traffic for a particular computer "signature."[15] To comply, Yahoo! reportedly developed a custom scanning system and searched hundreds of millions of emails, storing and making available to the FBI copies of any emails containing the signature(s) specified by the government.[16] The revelation of Yahoo!'s bulk email searching has drawn public alarm. Other major email providers, including Google and Microsoft, quickly moved to reassure their users that they had not engaged in similar surveillance.[17] Senator Ron Wyden expressed dismay and called on the executive branch to notify the public of any substantial changes to its surveillance authorities, while Representative Ted Lieu challenged the program's constitutionality.[18] Yet the public still does not know the legal basis for the Yahoo! order.

Review Grp. on Intelligence & Commc'ns Techs., *Liberty and Security in a Changing World: Report and Recommendations* (2013), http://1.usa.gov/1cBct0k.

[14] USA FREEDOM Act §§ 103, 201, 501; *id.* § 402.

[15] Joseph Menn, *Exclusive – Yahoo Secretly Scanned Customer Emails for U.S. Intelligence Sources*, Reuters (Oct. 4, 2016), http://yhoo.it/2cQh5vB; Charlie Savage & Nicole Perlroth, *Yahoo Said to Have Aided U.S. Email Surveillance by Adapting Spam Filter*, N.Y. Times (Oct. 5, 2016), http://nyti.ms/2dFsC0q.

[16] Menn, *supra* note 15; Savage & Perlroth, *supra* note 15.

[17] Menn, *supra* note 15.

[18] Cyrus Farivar, *Yahoo's CISO Resigned in 2015 over Secret E-mail Search Tool Ordered by Feds*, Ars Technica, Oct. 4, 2016, http://bit.ly/2dHtyhQ.

As the revelation of the Yahoo! order underscores, an unknown number of legal opinions and orders assessing the constitutionality of and statutory basis for the government's surveillance activities remain hidden from the public. Based on official disclosures and media reports, that body of law appears to encompass, among other things: the government's use of malware, or NITs, in foreign-intelligence investigations, *see* Appendix, No. 2; the government's use of FISA to compel technology companies to weaken or circumvent encryption protocols, *see id.* No. 3; the government's use of FISA to compel disclosure of source code from technology companies, *see id.* No. 4; the government's use of "cybersignatures" as a basis for FISA surveillance, *see id.* No. 5; the government's use of "stingrays" and other cell-site simulator technology in foreign-intelligence investigations, *see id.* No. 7; and the CIA's and FBI's bulk collection of Americans' financial records, *see id.* No. 11. While Movant has identified many undisclosed opinions based on existing public information, there are surely additional rulings of this Court that should likewise be disclosed pursuant to the public's First Amendment right of access.[19]

Movant, through this motion, seeks the public release of those controlling legal interpretations.

JURISDICTION

As a 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."). As this Court has previously determined,

[19] By one estimate, there are at least 25 to 30 significant FISC opinions and orders issued between mid-2003 and mid-2013 that remain sealed, and several more that were issued in the two years prior to the passage of the USA FREEDOM Act. *See* Elizabeth Goitein, Brennan Ctr. for Justice, *The New Era of Secret Law* 60–61 (2016), http://bit.ly/2eNep2g.

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 (FISC 2007).

ARGUMENT

I. Movant has 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)). As the Court found when addressing the ACLU's 2013 motion, each element is met here. *See In re Section 215 Orders*, 2013 WL 5460064, at *2–4.

The ACLU's injury here—a denial of access to court opinions—is concrete and particularized. *See Globe Newspaper Co. v. Superior Court for Cty. of Norfolk*, 457 U.S. 596 (1982); *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 576 (1980); *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.* ("*NYCTA*"), 684 F.3d 286, 294–95 (2d Cir. 2011); *In re Wash. Post,* 807 F.2d 383, 388 n.4 (4th Cir. 1986). The ACLU actively participates in the legislative and public debates about the proper scope of the government's surveillance authorities, including the lawfulness of Section 702 surveillance, the government's deployment of malware, and the meaning of FISA's provisions.[20] And plainly, the ACLU's injury is both caused by the denial of public access to the opinions and orders sought here, *see Valley Forge Christian Coll. v. Ams.*

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[20] *See, e.g.*, Submission of ACLU Deputy Legal Director Jameel Jaffer, PCLOB Public Hearing on Section 702 of FISA (Mar. 19, 2014), http://bit.ly/2djfoqM; Joe Uchill, *ACLU Questions How Tor Email Users Got FBI-Deployed Malware*, Hill, Sept. 6, 2016, http://bit.ly/2cIZ82T.

United for Separation of Church & State, 454 U.S. 464, 472 (1982), and would be redressed by the requested relief, *see Town of Barnstable v. FAA*, 659 F.3d 28, 31 (D.C. Cir. 2011).

II. The First Amendment requires the release of this Court's opinions and orders containing novel or significant interpretations of law.

A. The First Amendment right of access attaches to judicial opinions, including the opinions of this Court concerning novel or significant interpretations of law.

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 prevailing "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-Enter. Co. v. Superior Court* ("*Press-Enter. 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. *NYCTA*, 684 F.3d at 296. In other words, the right of access is qualified but may not be denied without "specific, on the record findings" that "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, 510 (1984)).

Here, there is a nearly unbroken tradition of public access to judicial rulings and opinions interpreting the Constitution and our laws. Moreover, public access to such rulings allows the public to function as an essential check on the 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 and orders of this Court concerning novel or significant interpretations of law.

1. "Experience"

Not only is there a nearly unbroken tradition of public access to judicial rulings and opinions interpreting the Constitution and the laws governing the American people, but Congress has recently reaffirmed that tradition with respect to this very Court. *See* USA FREEDOM Act § 402 (codified at 50 U.S.C. § 1872) (requiring decisions, orders, and opinions of the FISC containing "significant construction[s] or interpretation[s] of any provision of law" be made "publicly available to the greatest extent practicable").

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. Publ'g 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-cv-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))).

Dissemination of judicial opinions is necessary both for the public to understand what the law is and to preserve the legitimacy of the judicial process. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) ("[J]udicial precedents are . . . valuable to the legal community as a whole. They are not merely the property of private litigants."); *accord Lowenschuss*, 542 F.2d at 185; *see also Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) (Easterbrook, J.) ("What happens in the halls of government is presumptively public business. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification."). Accordingly, appellate courts have recognized that public access to opinions is protected by the First Amendment. *Company Doe v. Public Citizen*, 749 F.3d 246, 267–68 (4th Cir. 2014) (finding that "it would be anomalous" for the First Amendment to apply to some judicial records but not to "the court's opinion itself"); *United States v. Mentzos*, 462 F.3d 830, 843 n.4 (8th Cir. 2006) (denying motion to file opinion under seal "because the decisions of the court are a matter of

public record”); *Union Oil*, 220 F.3d at 568 (“[I]t should go without saying that the judge’s opinions and orders belong in the public domain.”).

Given this history, courts have customarily disclosed opinions dealing with the government’s authority to conduct investigations and gather information about individuals, particularly 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 the ACLU seeks 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. NSA*, 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”).

Critically, Congress has made the judgment that significant legal opinions and orders of this Court do not fall outside our long tradition of judicial transparency. *See* USA FREEDOM

Act § 402. Recognizing the importance of the FISC's jurisprudence, Congress has explicitly required this Court's opinions and orders involving "significant construction[s] or interpretation[s] of any provision of law" be made "publicly available to the greatest extent practicable." 50 U.S.C. § 1872(a); *see also id.* § 1872(b) (stating that redacted versions of opinions and orders may meet the statutory requirement). Congress set a high bar for withholding such opinions and orders, and even where they can properly be withheld, the Attorney General must publicly release an unclassified statement summarizing their contents. *Id.* § 1872(c) (indicating non-disclosure is appropriate only where "necessary to protect the national security of the United States" and outlining Attorney General's obligations when opinions and orders are withheld).

That until recently FISC opinions were ordinarily sealed is of no moment to the First Amendment's "experience" test. 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 in which such access is being sought. *See, e.g.*, *NYCTA*, 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").

In assessing how the past experience of access applies to a *new* forum, 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.*, *NYCTA*, 684 F.3d at 299 ("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 open or available to the public. *See, e.g.*, *NYCTA*, 684 F.3d at 299.

2. "Logic"

Just as fundamentally, public access to the opinions of this Court is important to the functioning of both the law in general and the FISA system in particular.

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)); *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 opinions and orders. *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); *see also N.Y. Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring) (stating that "fully aware of . . . the need

to defend a new nation," the Framers wrote the First Amendment "to give this new society strength and security"); *Det. Free Press v. Ashcroft*, 303 F.3d 681, 709–10 (6th Cir. 2002) (finding invocation of non-specific "national security" concerns insufficient to overcome public's qualified right of access to quasi-judicial proceedings).

Public access to the opinions of this Court is important to the functioning of the law and 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-Enter. 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, and relatedly, access to this Court's opinions will improve democratic oversight. Because the information released to date does not fully describe the constitutional and statutory bases for the government's surveillance activities under FISA, the release of the requested opinions would permit the public—and Congress itself—to more properly assess these programs and to take action accordingly. *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*, No. 13-02 (FISC June 28, 2013), http://1.usa.gov/1ORRcc4. Members of Congress have acknowledged the importance of proper oversight, but that oversight has been impeded by the secrecy surrounding the Court's interpretations of the government's surveillance powers. *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://bit.ly/2eeW0cf. 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.* Ellen Nakashima & Carol D. Leonnig, *Effort Underway to Declassify Document that Is Legal Foundation for NSA Phone Program*, Wash. Post, Oct. 12, 2013, http://wpo.st/qsYb1 ("[Judge] Kollar-Kotelly told associates this summer that she 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 (quotation marks omitted) (quoting Jeremy Bentham, *Rationale of Judicial Evidence* 524 (1827)). In enacting the USA FREEDOM Act, Congress acknowledged these interests and

sought to give the public access to the Court's significant legal pronouncements. *See* 50 U.S.C. § 1872; 161 Cong. Rec. S2772–01, S2778–79 (statement of Sen. Blumenthal).

Third, allowing the public to review and assess the reasoning of the opinions of this Court will support more refined judicial decisionmaking in future cases. For example, since public attention focused on FISA surveillance and this Court's rulings beginning in June 2013, there has been a proliferation of highly sophisticated legal and technical debate over the foundations of the government's various national-security surveillance programs.[21] *In camera* decisionmaking cannot provide the Court with the same breadth of analysis and expertise, especially over the long-term, because it does not allow for the same interplay and development of various viewpoints. The detailed public discussion that has begun today was impossible prior to the release of this Court's opinions, and it can only benefit the FISA system.

Fourth, 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) ("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 surveillance, new technologies, privacy, and First Amendment protections so that they may rely on, respond to, or distinguish this Court's

[21] *See, e.g.*, Laura K. Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 Harv. J.L. & Pub. Pol'y 117 (2015), http://www.harvard-jlpp.com/wp-content/uploads/2015/02/Donohue_Final.pdf; David S. Kris, *On the Bulk Collection of Tangible Things*, Lawfare Res. Paper Series (Sep. 29, 2013), http://bit.ly/2eKWyZT; Steven M. Bellovin et al., *It's Too Complicated: How the Internet Upends* Katz*,* Smith*, and Electronic Surveillance Law*, Harv. J. of L. & Tech. (forthcoming 2016), http://bit.ly/2ectB8K.

reasoning.[22] Both the FISC and ordinary federal courts have important perspectives to offer on emerging legal issues related to surveillance that inescapably cut across jurisdictions and even statutes. That courts might, when permitted to engage in an open and good-faith debate about such matters, disagree—or agree—about the proper outcomes, is a strength of the common-law system—not a reason to keep one jurisdiction's law siloed and unavailable for logical development. *See, e.g.*, *Clapper*, 785 F.3d 787; *Cent. States, Se. & Sw. Areas Pension Fund v. Int'l Comfort Prods., LLC*, 585 F.3d 281, 287 (6th Cir. 2009) (agreeing with the FISCR that it is important to avoid a "snowballing of precedent unconnected to the 'actual statutory language at issue'") (citing *In re Sealed Case*, 310 F.3d 717, 725–27 (FISCR 2002)).

For these reasons, disclosure of this Court's opinions addressing novel interpretations of the government's surveillance authorities 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 (stating that "movants and *amici* have presented several substantial reasons why the public interest might be served by the[] publication" of FISC opinions interpreting Section 215).

* * *

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 the requested opinions and orders would illuminate crucial gaps in the

[22] *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. . . . 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))).

public knowledge about the legal justifications for its government's surveillance activities, the public's First Amendment right of access attaches to the Court's legal opinions containing novel or significant interpretations of law.

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 containing novel or significant interpretations of law.

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.** A party 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-Enter. II*, 478 U.S. at 13–14; *Press-Enter. I*, 464 U.S. at 510; *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.** A party 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-Enter. 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-Enter. 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. 1980) ("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-Enter. 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 order to justify withholding the FISC's significant and novel opinions and orders in full. The proposition that the government has an interest—let alone a "compelling" one—in preventing disclosure of this Court's opinions on novel or significant interpretations of FISA is insupportable. In fact, a public accounting of this Court's legal analysis would *serve* governmental interests by clarifying the scope of the

government's surveillance powers and the legal reasoning supporting them. *See, e.g.*, Nakashima & Leonnig, *supra* (quoting current and former government officials advocating for release of original FISC bulk-collection opinion). Even the General Counsel of the ODNI has recognized the importance of publicly discussing the legal framework under which the government conducts its surveillance programs and of "demystify[ing] and correct[ing] misimpressions" the public may have about the government's surveillance activities. ODNI, *General Counsel Robert Litt's as Prepared Remarks on Signals Intelligence Reform*, IC on the Record (Feb. 4, 2015), http://bit.ly/2e2J1OM.

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"). This Court itself has rejected the government's overbroad classification claims in releasing opinions in the past. *See* Declassification Order at 6–7, *In re Section 215 Orders*. Important to the analysis here will be the numerous disclosures made to date, which provide critical context for assessing any claim that disclosure of the rulings sought here would harm the government's interests. *See, e.g.*, *Merrill v. Lynch*, 151 F. Supp. 3d 342, 350 (S.D.N.Y. 2015)

(ordering release of details of challenged national-security letter and relying heavily on previous disclosures to find that the government had "not demonstrated a good reason" to expect harm would arise as a result of the ordered release); *Doe v. Gonzales*, 386 F. Supp. 2d 66, 78 (D. Conn. 2005) (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 apply the First Amendment standard to any proposed sealing by the government.

In implementing the constitutional right of access to opinions concerning novel or significant interpretations of law, 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; Declassification Order at 5–7, *In re Section 215 Orders* (discussing FISC judge's review of proposed redactions); Order, *In re Application of the FBI for an Order Requiring the Production of Tangible Things from [Redacted]*, No. BR 13-109 (FISC Aug. 23, 2013), http://www.fisc.uscourts.gov/sites/default/files/BR%2013-109%20Order-2.pdf (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 (FISCR 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 the ACLU to contest any sealing it believes 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.[23]

Independent judicial review of any proposed redactions from this Court's opinions is necessary because—as was made clear in *In re Section 215 Orders* when the ACLU moved this Court for public access to other FISC opinions—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. Declassification Order at 10–11, *In re Section 215 Orders* (applying First Amendment standard to this Court's review of the government's second redaction proposal). 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-Enter. 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,

[23] In evaluating the government's declassification review of FISC opinions in response to the ACLU's prior motion in this Court, the Court noted that the government's proposed redactions "passe[d] muster" under the First Amendment standard, even while declining to reach the ultimate question whether the First Amendment right of access applied. *See* Declassification Order at 9, n.10, *In re Section 215 Orders*.

which presumes that the public's interest is in disclosure, and permits sealing only if there are no less-restrictive alternatives and if the limitation on access is narrowly tailored.

Indeed, judicial intervention in and oversight of government declassification of sealed judicial opinions has led to the release of additional information to which the public was entitled. In *In re Section 215 Orders*, after this Court ordered a declassification review of a FISC opinion, the government determined that the opinion should be "withheld in full," but the FISC judge demanded "a detailed explanation" of why the opinion could not be released in redacted form. Order, *In re Section 215 Orders*, No. Misc. 13-02 (FISC Nov. 20, 2013), http://1.usa.gov/258tRH8. In response, the government agreed to release the opinion in redacted form, but it took multiple proposals before this Court was satisfied that all redactions were sufficiently narrowly tailored. Declassification Order at 5–7, *In re Section 215 Orders* (describing this Court's back-and-forth with the government on proposed redactions to the opinion). Similarly, careful judicial review of redactions in other cases has led to greater disclosure than the government initially proposed. *See, e.g.*, Order, *In re Directives Pursuant to § 105B of FISA*, No. 105B(g) 07-01 (FISC Feb. 5, 2016), http://1.usa.gov/1OIbC1C (ordering the government to respond to FISC judge's concerns "about the scope of certain proposed redactions" in response to an earlier order to conduct a declassification review of documents filed in the case).

Furthermore, whether the public's constitutional right of access is outweighed by a compelling interest in continued sealing is a question for the courts, not one that rests with the executive. *See Press-Enter. II*, 478 U.S. at 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").

In other contexts, too, courts routinely scrutinize executive-branch classifications. *See, e.g.*, *Campbell v. DOJ*, 164 F.3d 20, 30 (D.C. Cir. 1999); *Goldberg v. DOS*, 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 Movant, 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, Movant respectfully requests that this Court unseal its opinions and orders containing novel or significant interpretations of law, including but not limited to those described in the Appendix, with only those limited redactions that satisfy the strict test to overcome the constitutional right of access.

Dated: October 18, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Patrick Toomey, certify that on this day, October 18, 2016, a copy of the foregoing motion was served on the following persons by the methods indicated:

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APPENDIX

Undisclosed Opinions and Orders of the Foreign Intelligence Surveillance Court Issued Between September 11, 2001, and June 2, 2015

	Date	**Subject of Opinions or Orders**	**Source Identifying Opinions or Orders**	**Description**
1	2015	Authorizing bulk searches of incoming Yahoo! email for a computer "signature" pursuant to FISA	Charlie Savage & Nicole Perlroth, *Yahoo Said to Have Aided U.S. Email Surveillance by Adapting Spam Filter*, N.Y. Times (Oct. 5, 2016).[1]	"A system intended to scan emails for child pornography and spam helped Yahoo satisfy a secret court order requiring it to search for messages containing a computer 'signature' tied to the communications of a state-sponsored terrorist organization. . . ." "Two government officials who spoke on the condition of anonymity said the Justice Department obtained an individualized order from a judge of the Foreign Intelligence Surveillance Court last year."
2		Addressing the government's use of malware—for example, NITs and Computer and Internet Protocol Address Verifiers ("CIPAVs" or "IPAVs")	FBI records released via FOIA, including FBI email dated Dec. 8, 2004.[2]	The FBI emails describe, for example, the use of the "IPAV tool" in "both criminal and FISA cases."

[1] *Available at*: http://nyti.ms/2dFsC0q.

[2] *Available at*: https://www.eff.org/files/filenode/cipav/fbi_cipav-01.pdf (PDF page 5). *See also* https://www.eff.org/files/filenode/cipav/fbi_cipav-08.pdf; https://www.eff.org/files/filenode/cipav/fbi_cipav-15.pdf.

	Date	Subject of Opinions or Orders	Source Identifying Opinions or Orders	Description
3		Addressing the use of FISA or Section 702 to compel private companies to provide technical assistance, including measures that weaken or circumvent encryption	Glenn Greenwald, *Microsoft Handed the NSA Access to Encrypted Messages*, Guardian, July 12, 2013.[3]	The report describes assistance provided by technology companies to facilitate NSA and FBI access to encrypted communications of their users and quotes a joint statement by NSA and ODNI officials: "The article[] describe[s] court-ordered surveillance—and a US company's efforts to comply with these legally mandated requirements."
4		Addressing the use of FISA to compel the disclosure of source code by technology companies	Zack Whittaker, *US Government Pushed Tech Firms to Hand Over Source Code*, ZDNet, Mar. 17, 2016.[4]	"The US government has made numerous attempts to obtain source code from tech companies in an effort to find security flaws that could be used for surveillance or investigations." "The government has demanded source code in civil cases filed under seal but also by seeking clandestine rulings authorized under the secretive Foreign Intelligence Surveillance Act (FISA), a person with direct knowledge of these demands told ZDNet."
5	2009	Addressing the use of "cybersignatures" and Internet Protocol addresses to conduct FISA and Section 702 surveillance	Charlie Savage et al., *Hunting for Hackers, N.S.A. Secretly Expands Internet Spying at U.S. Border*, N.Y. Times, June 4, 2015.[5]	"About that time [in May 2009], the documents show, the N.S.A.—whose mission includes protecting military and intelligence networks against intruders—proposed using the warrantless surveillance program for cybersecurity purposes. The agency received 'guidance on targeting using the signatures' from the Foreign Intelligence Surveillance Court, according to an internal newsletter."

[3] *Available at*: https://www.theguardian.com/world/2013/jul/11/microsoft-nsa-collaboration-user-data.

[4] *Available at*: http://www.zdnet.com/article/us-government-pushed-tech-firms-to-hand-over-source-code/.

[5] *Available at*: http://www.nytimes.com/2015/06/05/us/hunting-for-hackers-nsa-secretly-expands-internet-spying-at-us-border.html.

	Date	Subject of Opinions or Orders	Source Identifying Opinions or Orders	Description
6	2011 and earlier	Addressing FISA surveillance directed at computer intrusions	NSA, Memorandum re: SSO's Support to the FBI for Implementation of their Cyber FISA Orders 1–2 (Mar. 27, 2012).[6]	"The FISC has issued a number of orders at the request of the FBI authorizing electronic surveillance directed at communications related to computer intrusions being conducted by foreign powers. The orders include some that are limited to pen register/trap and trace (PR/TT) as well as other that authorize collection of content."
7		Addressing the use of "stingrays" or cell-site simulator technology pursuant to FISA.	DOJ, *Policy Guidance: Use of Cell-Site Simulator Technology* 1 n.1 (Sept. 3, 2015).[7]	"When acting pursuant to the Foreign Intelligence Surveillance Act, Department of Justice components will make a probable-cause based showing and appropriate disclosures to the [FISC] in a manner that is consistent with the guidance set forth in this policy."
8	February and March 2006	Addressing First Amendment restrictions on Section 215 surveillance	DOJ Office of the Inspector General, *A Review of the FBI's Use of Section 215 for Business Records in 2006* at 68 (Mar. 2008).[8]	"The Section 215 request was presented to the FISA Court as a read copy application in February and March 2006. On both occasions the Court declined to approve the application and order. . . . OIPR and NSLB e-mails state that the FISA Court decided that 'the facts were too thin and that this request implicated the target's First Amendment rights.'"

[6] *Available at*: http://www.nytimes.com/interactive/2015/06/04/us/document-cyber-surveillance-documents.html (PDF pages 5–6).

[7] *Available at*: https://www.justice.gov/opa/file/767321/download.

[8] *Available at*: https://assets.documentcloud.org/documents/1385905/savage-nyt-foia-doj-ig-reports-patriot-act.pdf#page=187 (PDF page 187).

	Date	Subject of Opinions or Orders	Source Identifying Opinions or Orders	Description
9		Addressing the collection of location information under FISA or Section 215	Charlie Savage, *In Test Project, N.S.A. Tracked Cellphone Locations*, N.Y. Times, Oct. 2, 2013.[9]	Director of National Intelligence James Clapper said that "the N.S.A. had promised to notify Congress and seek the approval of a secret surveillance court in the future before any locational data was collected using Section 215." Senator Ron Wyden, a member of the Intelligence Committee, said that "[a]fter years of stonewalling on whether the government has ever tracked or planned to track the location of law-abiding Americans through their cellphones, once again, the intelligence leadership has decided to leave most of the real story secret—even when the truth would not compromise national security."
10		Addressing FISA's criminal penalties provision, 50 U.S.C. § 1809(a)	October 3, 2011 FISC Opinion at 17 n.15.[10]	FISC opinion "concluding that Section 1809(a)(2) precluded the Court from approving the government's proposed use of, among other things, certain data acquired by the NSA without statutory authority through its 'upstream collection.'"
11		Addressing bulk collection of financial records by the CIA and FBI under Section 215	Siobhan Gorman et al., *CIA's Financial Spying Bags Data on Americans*, Wall St. J., Jan. 25, 2014.[11]	"The program, which collects information from U.S. money-transfer companies including Western Union, is carried out under the same provision of the Patriot Act that enables the National Security Agency to collect nearly all American phone records, the officials said. Like the NSA program, the mass collection of financial transactions is authorized by a secret national-security court, the Foreign Intelligence Surveillance Court."

[9] *Available at*: http://www.nytimes.com/2013/10/03/us/nsa-experiment-traced-us-cellphone-locations.html.

[10] *Available at*: https://www.aclu.org/sites/default/files/field_document/October 2011 John Bates FISC Opinion.pdf.

[11] *Available at*: http://on.wsj.com/1dO2n2T.

	Date	Subject of Opinions or Orders	Source Identifying Opinions or Orders	Description
12	August 20, 2008[12]	Addressing NSA queries of records collected in bulk	Declaration of Jennifer L. Hudson ¶ 40–46, *ACLU v. FBI*, No. 11-cv-07562 (S.D.N.Y. Apr. 4, 2014) (ECF No. 87).	"The August 2008 FISC Opinion addresses the NSA's use of a specific intelligence method in the conduct of queries of telephony metadata or call detail records. . . ."
13	October 2006; February 2006; December 2005[13]	Addressing collection of records under Section 215, including collection of records in bulk	*See, e.g.*, *Elec. Frontier Found. v. DOJ*, No. 11-cv-05221, 2014 WL 3945646, at *2 (N.D. Cal. Aug. 8, 2014).	Opinions or orders previously identified by the government pursuant to FOIA as containing "significant" legal interpretations of Section 215.
14	2013	Addressing unauthorized NSA surveillance	NSA, Memorandum for the Chairman, Intelligence Oversight Board at 10–11 (May 16, 2013).[14]	"[Redacted] NSA notified Congressional intelligence committees about the FISC's opinion relating to [redacted]. NSA purged the unauthorized collection and recalled all reporting based on those communications. [Redacted] the FISC authorized such collection to be undertaken prospectively."

[12] This Court previously denied without prejudice the ACLU's motion for disclosure of this opinion because the same record was at issue in then-pending FOIA litigation. *See In re Section 215 Orders*, No. Misc. 13-02, 2013 WL 5460064, at *6–7 (FISC Sept. 13, 2013). The district court ultimately declined to order disclosure of the August 20, 2008 opinion under FOIA. *See ACLU v. FBI*, No. 11-cv-07562, 2015 WL 1566775 (S.D.N.Y. Mar. 31, 2016). Accordingly, the ACLU renews its request for disclosure of the opinion based upon the First Amendment right of access and the grounds set forth in this motion.

[13] The district court in *ACLU v. FBI*, 2015 WL 1566775, declined to order disclosure of the October 2006 records to the ACLU under FOIA.

[14] *Available at*: https://www.aclu.org/sites/default/files/field_document/May%2016%2C%202013%20--%20Report%20to%20the%20Presidents%20Intelligence%20Oversight%20Board%20-%202Q%20FY%202013_0.pdf.

	Date	Subject of Opinions or Orders	Source Identifying Opinions or Orders	Description
15	2013	Addressing changes to 2013 NSA minimization procedures for Section 702 surveillance	NSA Office of the Inspector General, Implementation of § 215 of the USA PATRIOT Act and § 702 of the FISA Amendments Act of 2008 (dated Feb. 20, 2015).[15]	"An amendment to the Minimization procedures was made in late 2013. A section was added precluding NSA from using information acquired pursuant to FAA §702 unless NSA determines, based on the totality of the circumstances, that the target is reasonably believed to be outside the United States at the time the information was acquired."
16	August 30, 2013	Addressing sharing of Section 702 information with private entities to mitigate computer intrusions	August 26, 2014 FISC Opinion at 18–19 n.19.[16]	"The FISC approved the current version of this provision under Section 702 on August 30, 2013. *See* August 30, 2013 Opinion at 17–19."
17	September 20, 2012	Addressing sharing of Section 702 information with private entities to mitigate computer intrusions	August 26, 2014 FISC Opinion at 18 n.19.[17]	"The FISC first approved a version of this provision under Section 702 on September 20, 2012, in connection with a prior Section 702 certification. *See* [Redacted] Memorandum opinion entered on Sept. 20, 2012, at 22 ("September 20, 2012 Opinion"). At that time, the FISC noted that the provision at issue [redacted]."

[15] *Available at*: https://assets.documentcloud.org/documents/2712306/Savage-NYT-FOIA-IG-Reports-702-2.pdf (PDF page 312).

[16] *Available at*: https://www.aclu.org/sites/default/files/field_document/fisc_opinion_and_order_re_702_dated_26_august_2014_ocrd.pdf.

[17] *Available at*: https://www.aclu.org/sites/default/files/field_document/fisc_opinion_and_order_re_702_dated_26_august_2014_ocrd.pdf.

	Date	Subject of Opinions or Orders	Source Identifying Opinions or Orders	Description
18	2008 to 2010	Addressing NSA's targeting and minimization procedures for Section 702 surveillance	NSA Office of the Inspector General, Final Report of the Audit on the FISA Amendments Act § 702 Detasking Requirements (dated Nov. 24, 2010).[18]	"Although this section of the draft report notes that the FISC has expressed 'concern' about the modifications the Government proposed [redacted] to NSA's FAA 702 targeting and minimization procedures, the report fails to note that the Court's concern was with the [redacted] issue. [The Office of General Counsel]'s understanding is that the Court concluded that even the modest changes proposed [redacted] to address one aspect of the [redacted] were incompatible with the current statutory framework."
19		Addressing FISA pen-register surveillance and/or collection of post-cut through dialed digits	*See, e.g.*, Second Decl. of David M. Hardy ¶¶ 10–13, *Elec. Privacy Info. Ctr. v. DOJ*, No. 13-cv-1961 (D.D.C. Nov. 7, 2014), ECF No. 24-1.[19]	"The FISC orders discuss classified investigative information regarding the underlying FISA applications, the type and character of information to be collected through the PR/TT order as well as details regarding that particular FISC court proceeding."
20	December 10, 2010	Addressing retention of information obtained through unauthorized electronic surveillance	November 6, 2015 FISC Opinion at 56–57.[20]	"Opinion and Order Regarding Fruits of Unauthorized Surveillance issued on December 10, 2010."

[18] *Available at*: https://assets.documentcloud.org/documents/2712306/Savage-NYT-FOIA-IG-Reports-702-2.pdf (PDF page 53).

[19] *Available at*: https://epic.org/foia/doj/pen-reg-trap-trace/24-Second-Hardy-Decl.pdf.

[20] *Available at*: https://www.dni.gov/files/documents/20151106-702Mem_Opinion_Order_for_Public_Release.pdf.

	Date	Subject of Opinions or Orders	Source Identifying Opinions or Orders	Description
21	May 13, 2011	Requiring destruction of information obtained through unauthorized electronic surveillance	November 6, 2015 FISC Opinion at 57–58.[21]	"Opinion and Order Requiring Destruction of Information Obtained by Unauthorized Electronic Surveillance issued on May 13, 2011."
22	2007 or earlier	Authorizing surveillance of targets outside the United States prior to the Protect America Act	January 15, 2008 FISC Opinion at 3 n.1.[22]	"Prior to the PAA, the government had argued that, in some contexts, surveillances of targets outside the United States *did* constitute electronic surveillance as defined by FISA, such that the FISC had jurisdiction. The FISC judges concluded that they did have jurisdiction over certain types of such surveillances."
23		Addressing the scope of searches and seizures of electronic data, including computer hard-drives and other large data repositories, and applicable minimization requirements	*See, e.g.*, FBI, Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search Conducted under FISA (Nov. 1, 2008).[23]	The FISC reviews and approves rules governing electronic surveillance and physical searches for foreign-intelligence purposes, including searches and seizures of electronic data that may encompass large volumes of personal information.

[21] *Available at*: https://www.dni.gov/files/documents/20151106-702Mem_Opinion_Order_for_Public_Release.pdf.

[22] *Available at*: https://cdt.org/files/2014/09/49-yahoo702-memorandum-opinion-and-order-dni-ag-certification.pdf.

[23] *Available at*: https://www.aclu.org/files/pdfs/natsec/faafoia20101129/FAAFBI0707.pdf.