United States Foreign Intelligence Surveillance Court of Review

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IN RE: CERTIFICATION OF QUESTIONS OF LAW TO THE FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW

Docket No. FISCR 18-01

Upon Certification for Review by the United States Foreign Intelligence Surveillance Court.

Decided: March 16, 2018

PATRICK TOOMEY, BRETT MAX KAUFMAN, American Civil Liberties Union Foundation, New York, N.Y.; ARTHUR B. SPITZER, SCOTT MICHELMAN, American Civil Liberties Union of the District of Columbia, Washington, D.C.; DAVID A. SCHULZ, HANNAH BLOCH-WEHBA, JOHN LANGFORD, Media Freedom & Information Access Clinic, New Haven, Ct.; ALEX ABDO, JAMEEL JAFFER, Knight First Amendment Institute at Columbia University, New York, N.Y.

JOHN C. DEMERS, J. BRADFORD WIEGMANN, STUART J. EVANS, JEFFREY M. SMITH, United States Department of Justice, Washington, D.C.

PROFESSOR LAURA K. DONOHUE, Washington, D.C., as court-appointed amicus curiae.

BRUCE D. BROWN, Reporters Committee for Freedom of the Press, Washington, D.C., as amicus curiae.

Before BRYSON, CABRANES, AND TALLMAN, *Judges.*

PER CURIAM.

This matter began with a motion by three public interest groups seeking access to certain opinions of the Foreign Intelligence Surveillance Court ("FISC"). The motion was initially denied on the ground that the movants lacked Article III standing because they "failed to claim an injury to a legally protected interest" by seeking access to the classified FISC opinions. The FISC judges subsequently reconsidered the matter en banc and held, by a six-to-five vote, that the movants had established the requisite injury in fact. The FISC judges then certified the standing question for review by this court pursuant to 50 U.S.C. § 1803(j).

We agree with the majority of the FISC judges that the movants have standing to seek disclosure of the classified portions of the opinions at issue. As the majority explained, standing is a prerequisite to a party's filing suit. It entails a threshold inquiry, one that is separate from the merits of the underlying claim—and one that requires far less substantiation. Movants need not show that they are ultimately entitled to access the materials in question. Instead, they need only show that their claim is not immaterial nor wholly insubstantial and frivolous. Regardless of whether the movants are entitled to relief on their claim, they have standing to present that question to the court.

Importantly, our decision—like that of both the FISC majority and the dissent—is limited to the issue of Article III standing. We do not address the merits of the question whether the movants are entitled to have access to any of the materials in dispute in this case or, more broadly, whether the FISC is authorized to order that members of the public be granted access to portions of FISC opinions that have not been declassified by the Executive Branch.

Although the movants and the court-appointed amicus suggest that the argument for a First Amendment right of access to FISC opinions is parallel to the First Amendment right of access to court opinions in other settings, the work of the FISC is different from that of other courts in important ways that bear on the First Amendment analysis.

The FISC is a unique court. It is responsible for reviewing applications for surveillance and other investigative activities relating to foreign intelligence collection. The very nature of that work, unlike the work of more conventional courts, requires that it be conducted in secret. Moreover, the orders of the court, including orders that entail legal analysis, often contain highly sensitive information, the release of which could be damaging to national security. *See generally In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 487–90 (FISC 2007) (Bates, J.).

Apart from the highly sensitive nature of the work, the FISC is not well equipped to make the sometimes difficult determinations as to whether portions of its orders may be released without posing a risk to national security or compromising ongoing investigations. For those determinations, the court has relied on the judgments of the Executive Branch, in the form of classification decisions. Accordingly, while we agree with the movants that they have standing to litigate the issue of access to the redacted portions of the court's opinions, our

decision should not be taken as an endorsement of their suggestion that First Amendment analysis applies to the FISC in the same manner that it applies to more conventional courts.

I

In November 2013, the American Civil Liberties Union Foundation, the American Civil Liberties Union of the Nation's Capital, and the Media Freedom and Information Access Clinic ("the movants") filed a motion "For the Release of Court Records." In the motion, they asked the FISC to "unseal its opinions addressing the legal basis for the 'bulk collection' of data by the United States government under the Foreign Intelligence Surveillance Act ('FISA')." They contended that those FISC opinions were "subject to the public's First Amendment right of access, and no proper basis exists to keep the legal discussion in these opinions secret."

In its response, the government stated that it had identified four relevant FISC opinions. Following a declassification review conducted by the Executive Branch, two of the opinions had been released by the FISC. Two others were released by the government after the movants filed their motion. All four opinions were released in redacted form; the material that remained classified was omitted from the public versions of the opinions.

In response to the movants' request for access to the redacted portions of the four opinions, the government argued that the movants lacked standing under the FISC's Rules of Procedure to seek further declassification of the redacted portions of the opinions, or otherwise to contest the redactions. The government also argued that the movants lacked a First Amendment right to obtain access to classified FISC records, and that the FISC is not authorized to review and override classification decisions made by the Executive Branch.

On January 25, 2017, Presiding Judge Rosemary M. Collyer issued an opinion dismissing the movants' motion on the ground that they lacked standing under Article III of the Constitution to demand access to the redacted materials. *In re Opinions & Orders of this Court Addressing Bulk Collection of Data under the Foreign Intelligence Surveillance Act* ("*In re Bulk Collection*"), No. Misc. 13-08, 2017 WL 427591 (FISC Jan. 25, 2017). Judge Collyer concluded that the First Amendment right of access does not apply to materials such as the redacted portions of FISC opinions. For that reason, she ruled that the movants had failed to "assert an injury to a legally protected interest," and that they therefore lacked standing to press their First Amendment access claim. *Id.* at *1.

Because Judge Collyer's analysis of the standing issue conflicted with the analysis of another FISC judge in a similar case, *see In re Orders of This Court Interpreting Section 215 of the Patriot Act*, No. Misc. 13-02, 2013 WL 5460064 (FISC Sept. 13, 2013) (Saylor, J.), the FISC judges sua sponte granted en banc reconsideration of Judge Collyer's order "on the ground that it is necessary to secure or maintain uniformity of the court's decisions." *In re Bulk Collection*, 2017 WL 1500037, at *1 (FISC Mar. 22, 2017) (citing FISC Rule of Procedure 49). Subsequently, in an opinion issued on November 9, 2017, the en banc court held, by a six-to-five vote, that the movants had established the requisite injury in fact to raise their First Amendment claim. *In re Bulk Collection*, 2017 WL 5983865 (FISC Nov. 9, 2017) (en banc).

The six-judge majority ruled that the movants had sufficiently alleged that the denial of access to the redacted portions of the FISC opinions constituted a cognizable injury for purposes of establishing standing. Without deciding whether the movants could or would ultimately succeed in establishing a right to relief on the merits of their claim to access, the majority held that "they should

not be barred at this threshold procedural stage." *Id.* at *8.

The five dissenting judges adhered to Judge Collyer's position that the movants had failed to establish a judicially cognizable injury. No such interest was shown, they concluded, because there is no legally protected right to obtain access to portions of FISC opinions that the Executive Branch has decided not to declassify.

On January 5, 2018, the FISC judges certified the following question to us for review: "Whether Movants have adequately established Article III standing to assert their claim of a qualified First Amendment right of public access to FISC judicial opinions." *In re Bulk Collection*, 2018 WL 396244, at *2 (FISC Jan. 5, 2018). On January 9, 2018, we accepted the certification. We appointed one of our designated amici curiae, as provided in 50 U.S.C. § 1803(i), to serve as amicus curiae in the matter. Order, *In re: Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review*, No. 18-01 (FISCR Jan. 9, 2018).

II

A

Under the First Amendment, as Judge Collyer explained in her initial opinion in this case, the Supreme Court has applied what is referred to as the experience-and-logic test to determine whether there is a constitutional right of access to particular court records or proceedings. *See Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986). That test entails asking whether the record or proceeding in question has "historically been open to the press and general public," and "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.*

Applying the experience-and-logic test, Judge Collyer concluded that the movants clearly lacked a First

Amendment right of access to the redacted materials and therefore did not have standing to press their access claim. The en banc majority rejected Judge Collyer's ruling on injury in fact, but did not reach the merits of the movants' First Amendment claims. *See In re Bulk Collection*, 2017 WL 5983865, at *8. The question we have been asked to answer is whether the movants have constitutional standing to raise their First Amendment claim. We agree that they do.

B

At the outset, we note that the government has urged us to address issues other than the standing issue that was certified to us by the FISC judges. The government first asks us to hold that the FISC lacks subject matter jurisdiction over the movant's motion. If we should rule in favor of the movants on both subject matter jurisdiction and standing, the government asks us to address the merits and hold that the movants have no right of access to the opinions in dispute. For the reasons set forth below, we will decide only the standing issue.

First, this case comes to us on a certified question. It is thus appropriate for us to limit ourselves to the question we have been asked to answer, in the absence of a strong reason to do otherwise. To be sure, the statute that gives us jurisdiction over the FISC's certification order allows us to decide "the entire matter in controversy." 50 U.S.C. § 1803(j). However, to address the government's arguments about the subject matter jurisdiction of the FISC would require us to decide a question the FISC has not considered or decided, and to do so without full briefing from the parties.

While the government contends that we are obliged to address the issue of subject matter jurisdiction, that is not so. It is true that subject matter jurisdiction is an issue that the FISC will have to address before it can address the merits of the underlying dispute. But we are not

required to go beyond the scope of the certification and address all jurisdictional issues that could result in denial of the movant's request. The FISC chose to address standing first and asked us to resolve that fundamental jurisdictional issue before moving on (if necessary) to other jurisdictional questions. When presented with two jurisdictional issues, a court "may choose which one to answer first." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 115 (1998) (Stevens, J., dissenting); *see Sinochem Int'l Co. v. Malaysia Int'l Shipping Co.*, 549 U.S. 422, 431 (2007) ("[T]here is no mandatory 'sequencing of jurisdictional issues.'" (citation omitted)).

It would likewise exceed the scope of the task we have been asked to perform if we were to address the merits of the motion. That is a matter for the FISC to decide in the first instance. If it reaches the merits of the access issue and decides that it needs further guidance from us, it can ask. It would not be appropriate for us to decide that issue without the benefit of the FISC's views on the merits and full briefing from the parties.

III

We have held that the FISC's authority and inherent secrecy is cabined by—and consistent with—Article III of the Constitution. *See In re Sealed Case*, 310 F.3d 717, 731, 732 n.19 (FISCR 2002). For that reason, we assume the FISC's jurisdiction is governed by Article III, section 2, of the Constitution, which limits the power of Article III courts to deciding "cases" and "controversies."

One way that federal courts have policed the "case or controversy" boundary on the exercise of judicial power is through the doctrine of constitutional standing. The Supreme Court has held that in order to have standing to seek relief from a federal court, a plaintiff must satisfy three requirements: First, the plaintiff must have suffered an "injury in fact." Second, there must be a causal connection between the injury and the conduct com-

plained of. Third, it must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

A

In this case, the causation and redressability requirements are clearly met. And although neither the opinion of the dissenting FISC judges nor the government's briefs have contended that either causation or redressability is absent here, the question certified to us was "[w]hether Movants have adequately established Article III *standing*," *In re Bulk Collection*, 2018 WL 396244, at *2 (emphasis added), not injury in fact alone. Accordingly, we address those elements as well.

With respect to causation, the movants' position is straightforward: they have sought access to the redacted portions of the four FISC opinions at issue over the government's objection (in the form of a refusal to declassify those materials). The court has possession and control over those opinions, and its continued withholding of the redacted portions of the opinions in response to the government's objection to their release in full is a cause of the movants' asserted injury.

With respect to redressability, the Supreme Court has held that the relevant inquiry is "whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976). In this case, assuming that the claim of a right of access to the FISC opinions is justiciable, a favorable decision by the FISC on the merits would redress the injury asserted by the movants, as it would provide them, in whole or in part, the access that they seek.

B

The remaining question is whether the movants have demonstrated that the denial of access to the redacted materials constitutes an injury in fact. That is the issue on which the FISC judges focused in their en banc decision and about which the majority and dissenting FISC judges disagreed.

To demonstrate injury in fact requires a plaintiff to show that it suffered an invasion of a legally protected interest that is concrete, particularized, and actual, rather than merely conjectural or hypothetical. *Lujan*, 504 U.S. at 560. In this case, the asserted injury is the denial of access to the entirety of the four FISC opinions sought by the movants. The government has not disputed that the asserted injury is concrete, particularized, and actual. What the government contends is that the movants do not have a legal right to require the FISC to provide them with access to the redacted portions of the four opinions, and that the movants therefore have not demonstrated a legally protected interest sufficient to give them standing to seek relief.

The flaw in the government's position is that it attacks the *merits* of the movants' claim rather than whether the claim is judicially *cognizable*. In other words, the government confuses the question of whether the movants have a First Amendment right of access to FISC opinions with the question of whether they have a right merely to *assert* that claim. Courts have repeatedly pointed out that there is a distinction between whether the plaintiff has shown injury for purposes of standing and whether the plaintiff can succeed on the merits. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("[S]tanding in no way depends on the merits of the plaintiff's contention. . . ."); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970) ("The 'legal interest' test goes to the merits. The question of standing is different.").

As the Third Circuit explained in *Cottrell v. Alcon Laboratories*, 874 F.3d 154 (3d Cir. 2017), "whether a plaintiff has alleged an invasion of a 'legally protected interest' does not hinge on whether the conduct alleged to violate a statute does, as a matter of law, violate the statute. Were we to conclude otherwise, we would effectively collapse our evaluation under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim into an Article III standing evaluation." *Id.* at 164; *see also Cooksey v. Futrell*, 721 F.3d 226, 239 (4th Cir. 2013) ("[W]hether the statute in fact constitutes an abridgement of the plaintiff's freedom of speech is, of course, irrelevant to the standing analysis." (quoting *Meese v. Keene*, 481 U.S. 465, 473 (1987))); *Arreola v. Godinez*, 546 F.3d 788, 794–95 (7th Cir. 2008) ("Although the two concepts unfortunately are blurred at times, standing and entitlement to relief are not the same thing. Standing is a prerequisite to *filing suit*, while the underlying merits of a claim (and the laws governing its resolution) determine whether the plaintiff is *entitled to relief*."); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1092 (10th Cir. 2006) (en banc) ("For purposes of standing, the question cannot be whether the Constitution, properly interpreted, extends protection to the plaintiff's asserted right or interest. If that were the test, every losing claim would be dismissed for want of standing.").

Because determining the presence of injury in fact for standing purposes does not depend on whether the plaintiff will succeed on the merits of its claim, the courts have held that "when considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim." *Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007), *aff'd sub nom. District of Columbia v. Heller*, 554 U.S. 570 (2008); *see also Initiative & Referendum Inst.*, 450 F.3d at 1093 ("For purposes of standing, we must assume the Plaintiffs' claim has legal validity."); *City of Waukesha v. EPA*, 320

F.3d 228, 235 (D.C. Cir. 2003) ("[I]n reviewing the standing question, the court must be careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims."); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1385 (5th Cir. 1986) ("It is inappropriate for the court to focus on the merits of the case when considering the issue of standing.").

In a case involving a press request for access to court materials, the Third Circuit applied that analysis and concluded that the plaintiff did not have to show that it was ultimately entitled to access in order to establish that it had standing to litigate its claim. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777 (3d Cir. 1994) ("[T]o establish standing, it is not necessary for litigants to demonstrate that they will prevail on the merits of their claim. Therefore, in determining whether the Newspapers have standing, we need not determine that the Newspapers will ultimately obtain access to the sought-after Settlement Agreement. We need only find that the Order of Confidentiality being challenged presents an obstacle to the Newspapers' attempt to obtain access." (citation omitted)). Thus, the question for purposes of standing is whether the claim raised by the plaintiff is judicially cognizable, regardless of whether the claim will ultimately be found to be meritorious. *See Flynt v. Rumsfeld*, 355 F.3d 697, 702–03 (D.C. Cir. 2004) (plaintiffs had standing to assert First Amendment right to accompany military units into combat, even though court rejected claim on the merits).[1]

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[1] The term "legally protected interest," which is sometimes used to describe the "injury in fact" prong of the standing test, has occasionally led to confusion, as Judge Williams explained in his concurring opinion in *Judicial Watch, Inc. v. U.S. Senate*, 432 F.3d 359, 363–66

The government has not challenged that general principle. Instead, the government relies on the proposition that an action may be dismissed for lack of standing if a party lacks a "colorable claim" of legal injury. *See Carlson v. United States*, 837 F.3d 753, 758 (7th Cir. 2016); *Bond v. Utreras*, 585 F.3d 1061, 1073 (7th Cir. 2009). The government contends that the movants have failed to establish standing under that standard because the movants' claim of a right of access to the redacted portions of the four FISC opinions in dispute is not even colorable.

The test for what constitutes a colorable claim for standing purposes is quite lenient. In addressing that standard, the courts have generally focused not on the merits of the party's claim, but on whether the claim is of the type that is cognizable by a court. *See Aurora Loan Servs., Inc. v. Craddieth*, 442 F.3d 1018, 1024 (7th Cir. 2006) ("The point is not that to establish standing a plaintiff must establish that a right of his has been infringed; that would conflate the issue of standing with the merits of the suit. It is that he must have a colorable *claim* to such a right.").

As the courts have made clear, the question whether a claim of injury is colorable does not turn on whether the movants have stated a claim upon which relief can be

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(D.C. Cir. 2005) (Williams, J., concurring). "Legally protected interest" is not directed to the merits of a plaintiff's claim, but instead is directed to whether the interest is "legally cognizable" or "judicially cognizable." *Id.*; *see Raines v. Byrd*, 521 U.S. 811, 819 (1997); *Bennett v. Spear*, 520 U.S. 154, 167 (1997). It is not intended to invite courts to fold the standing question into the merits. *See Judicial Watch*, 432 F.3d at 364; *see also Cottrell*, 874 F.3d at 164; 13 Charles Alan Wright et al., *Federal Practice and Procedure* § 3531.4, at 149–53 (3d ed. 2008).

granted, the standard applicable to motions to dismiss a civil action under Federal Rule of Civil Procedure 12(b)(6). That would be a merits determination, not a finding as to standing. Instead, the principle that applies in determining standing is the same as the principle that governs whether a party has sufficiently pleaded a federal cause of action to avoid dismissal on jurisdictional grounds. *See Rogers v. Brockette*, 588 F.2d 1057, 1062 n.9 (5th Cir. 1979). In that setting, the Supreme Court has said that it is "well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction," and that the assertion of a federal claim would be sufficient to give a federal court jurisdiction as long as the claim was not "wholly insubstantial and frivolous" or "patently without merit." *Bell v. Hood*, 327 U.S. 678, 682–83 (1946).

That is a very low bar. In *Hagans v. Lavine*, 415 U.S. 528 (1974), the Supreme Court summarized a number of cases holding that federal courts lack power to entertain claims otherwise within their jurisdiction only if the claims are "'so attenuated and unsubstantial as to be absolutely devoid of merit,' . . . 'obviously frivolous,' . . . [or] 'essentially fictitious.'" *Id.* at 536–37 (citations omitted). "[P]revious decisions that merely render claims of doubtful or questionable merit do not render them insubstantial" for jurisdictional purposes. *Id.* at 538. If there is "room for the inference that the question sought to be raised can be the subject of controversy," the court has jurisdiction. *Ex parte Poresky*, 290 U.S. 30, 32 (1933).

More recently, in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), the Supreme Court reaffirmed that principle, holding that a court lacks subject matter jurisdiction only when the federal claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Id.* at 89 (quoting *Oneida Indian Nation of N.Y. v. County of Onei-*

da, 414 U.S. 661, 666 (1974)); *see also id.* at 97 n.2 ("[T]he Article III requirement of remediable injury in fact . . . (except with regard to entirely frivolous claims) has nothing to do with the text of the statute relied upon.").

In this case, as the FISC majority held, the movants have cleared that low bar. The movants have demonstrated that their claimed right of access is judicially cognizable, and we agree with the FISC majority that their claim cannot be characterized as "completely devoid of merit," or "wholly insubstantial and frivolous," even though it may ultimately be determined to be legally unsound.

To be clear, the FISC majority has not adopted a regime that will necessarily require access to classified portions of FISC opinions. Rather, the majority confined itself to standing and did not reach the merits. As the majority explained at the conclusion of its opinion, "Whether or not [the movants] will ultimately succeed in establishing that the . . . experience-and-logic test entitles them to relief, we believe that they should not be barred at this threshold procedural stage. We further offer no opinion on whether other jurisdictional impediments exist to this challenge, but hold only that Movants have established a sufficient injury-in-fact." *In re Bulk Collection*, 2017 WL 5983865, at *8.

Because we agree with the standing analysis of the FISC majority, we answer the certified question in the affirmative.