

CASE No. 15-16133

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CAROLYN JEWEL, ERIK KNUTZEN, AND JOICE WALTON,

PLAINTIFFS-APPELLANTS,

v.

NATIONAL SECURITY AGENCY, *ET AL.*,

DEFENDANTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, No. 08-cv-04373-JSW
THE HONORABLE JEFFREY S. WHITE, UNITED STATES DISTRICT JUDGE, PRESIDING

MOTION TO EXPEDITE BRIEFING AND HEARING ON APPEAL

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INTRODUCTION

Pursuant to 28 U.S.C. § 1657 and Ninth Circuit Rules 27-12 and 34-3, plaintiffs and appellants Carolyn Jewel, Erik Knutzen and Joice Walton (“appellants”) hereby respectfully request that this Court expedite the briefing and hearing date on this appeal because it raises an issue of unusual magnitude and urgency, namely whether the government’s admitted, ongoing program of mass surveillance involving tapping into the “backbone” network of the Internet in the United States and then indiscriminately intercepting and searching the electronic communications of millions of innocent Americans violates the Fourth Amendment. The district court granted summary judgment against appellants without ever permitting any discovery, holding that appellants’ extensive public evidence was insufficient to prove their standing and alternatively that the state secrets privilege compelled dismissal of appellants’ claim, notwithstanding Congress’ direction in 50 U.S.C. § 1806(f) that claims challenging the legality of electronic surveillance should be decided on the merits using secret evidence if necessary.

Appellants seek the following expedited briefing schedule:

Opening Brief: August 4, 2015 (currently due September 14, 2015)

Answering Brief: September 3, 2015 (currently due October 13, 2015)

Optional Reply Brief: September 17, 2015 (currently due October 27, 2015)

Appellants additionally request that the appeal be calendared for the November 2015 calendar.

The government declined to disclose to appellants' counsel its position on appellants' motion to expedite or the proposed schedule, and would not say whether it intended to oppose the motion. It said only that it would file a response to the motion to expedite after appellants file the motion.

Good cause exists for expediting the briefing and hearing of this appeal. The constitutional harms appellants and millions of other Americans are suffering from the government's collection of their Internet communications are ongoing and significant. As a result, appellants will continue to suffer irreparable harm if this appeal is not expedited.

I. FACTUAL AND PROCEDURAL BACKGROUND.

Appellants filed their complaint in 2008 on behalf of themselves and a class of millions of other AT&T customers, challenging the post-9/11 domestic dragnet surveillance programs conducted by the NSA and other government agencies in which the government collects and searches the electronic communications and communications records of appellants and the class members. ECF No. 1. Appellants allege a number of constitutional and statutory claims, including a

Fourth Amendment claim for which they sought injunctive relief. After the district court *sua sponte* dismissed the lawsuit in 2010 on Article III standing grounds, this Court reversed and held that appellants had sufficiently alleged standing. *Jewel v. NSA*, 673 F.3d 902, 905 (9th Cir. 2011).

In the proceedings at issue in this appeal, appellants brought a motion for partial summary judgment on their claim that the government violates their Fourth Amendment rights by intercepting, copying and searching their Internet communications without a warrant. The government defendants brought a cross-motion for summary judgment on appellants' same Fourth Amendment Internet interception claim. The district court granted the government defendants' summary judgment motion and denied appellants' summary judgment motion. ECF No. 321. On appellants' motion, the district court entered final judgment on appellants' Fourth Amendment Internet interception claim pursuant to Federal Rule of Civil Procedure 54(b) on May 21, 2015. ECF No. 328.

Appellants timely filed this appeal on June 4, 2015. ECF No. 329.

II. GOOD CAUSE EXISTS TO EXPEDITE THIS APPEAL BECAUSE IT INVOLVES THE RESOLUTION OF A CRITICALLY IMPORTANT CONSTITUTIONAL QUESTION AND APPELLANTS ARE SUFFERING IRREPARABLE HARM.

Circuit Rule 27-12 provides that “[m]otions to expedite briefing and hearing may be filed and will be granted upon a showing of good cause.” Similarly, Circuit Rule 34-3 defines priority cases to include “[a]ppeals entitled to priority on the

basis of good cause under 28 U.S.C. § 1657.” That section, in turn, provides that “[g]ood cause” is shown “if a right under the Constitution of the United States or a Federal Statute . . . would be maintained in a factual context that indicates that a request for expedited consideration has merit.” 28 U.S.C. § 1657. “It is abundantly clear that Congress intended to give preference on crowded court dockets to federal questions.” *Zukowski v. Howard, Needles, Tammen, & Bergendoff*, 115 F.R.D. 53, 55 (D. Colo. 1987).

This appeal presents a constitutional question of great public significance: whether the government’s ongoing mass collection and subsequent searching of Internet communications violates the Fourth Amendment. Good cause exists to expedite the appeal because appellants seek to stop an ongoing, daily violation of their Fourth Amendment rights by the government defendants’ collection and searching of their Internet communications without a warrant, probable cause, or individualized suspicion. This Fourth Amendment violation causes appellants irreparable injury. It has long been established that the loss of constitutional freedoms, “for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 374 (1976). And indeed, the Court has previously recognized the appropriateness of expediting appeals challenging the constitutionality of the government’s domestic dragnet surveillance

programs. Order Granting Motion To Expedite *Smith v. Obama*, No. 14-35555, ECF No. 20 (9th Cir. July 14, 2014).

The district court's order was the first adjudication in a public, adversarial Article III proceeding of whether hundreds of millions of innocent people whose communications are being swept up and analyzed by tapping into the Internet backbone can obtain a judicial determination of whether this practice violates their Fourth Amendment rights. It has already been almost seven years since appellants filed their complaint, which as this Court has recognized, "challenges conduct that strikes at the heart of a major public controversy involving national security and surveillance." *Jewel*, 673 F.3d at 912. Given that appellants suffer—and will continue to suffer—irreparable harm on a daily and continuing basis if this appeal is not expedited, and given the importance of promptly answering this constitutional question, expedited briefing and hearing is warranted.¹

III. STATUS OF TRANSCRIPT PREPARATION.

This is an appeal of a grant of summary judgment on a single claim. There has been no trial in the matter. The transcripts relevant to this appeal have already been prepared and filed by the court reporter. ECF Nos. 133, 318.

¹ The recently enacted USA FREEDOM Act of 2015, Pub. L. 114-23 (June 2, 2015) has no bearing on this appeal as it does not alter or amend the statute under which the government conducts its interception and searching of Internet communications, section 702 of the FISA Amendments Act, 50 U.S.C. § 1881a.

IV. POSITION OF DEFENDANTS-APPELLEES.

The government has declined to disclose to appellants' counsel its position on the motion to expedite or the proposed schedule, and would not say whether it intended to oppose the motion. It said only that it would file a response to the motion to expedite after appellants file the motion.

CONCLUSION

Appellants respectfully request that the Court grant this motion for expedited briefing and hearing and set the following schedule for this appeal:

Opening Brief: August 4, 2015

Answering Brief: September 3, 2015

Optional Reply Brief: September 17, 2015

Hearing Date: November 2015 Calendar

Dated: June 17, 2015

Respectfully submitted,

By: s/ Andrew Crocker

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 17, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 17, 2015

s/ Andrew Crocker
ANDREW CROCKER