

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Carolyn Jewel et al.

Plaintiffs-Appellants,

v.

National Security Agency et al.

Defendants-Appellees.

No. 15-16133

**MOTION TO SUSPEND THE BRIEFING SCHEDULE PENDING  
RESOLUTION OF MOTION TO DISMISS APPEAL FOR LACK OF  
JURISDICTION**

The government respectfully moves to suspend briefing on the merits until after this Court decides the government's pending motion to dismiss the appeal for lack of jurisdiction, which this Court has set for oral argument on October 29, 2015.

1. This appeal has been expedited. The government filed a motion to dismiss this case for lack of jurisdiction on July 27, 2015, and filed its reply in support of that motion on July 31, 2015. On August 4, 2015, plaintiffs filed their opening brief on the merits.

2. In an order issued August 12, 2015, the government's motion to dismiss was "referred to the panel assigned to decide the merits of this appeal." That order also addressed pending procedural motions and reset the briefing schedule, under which the government's responsive brief is currently due September 21, 2015. On August 28, 2015, the merits panel scheduled oral argument on the government's motion to dismiss for October 29, 2015, in San Francisco, California.

3. The government respectfully moves to suspend the due date for its responsive brief until after this Court decides whether the case should be dismissed for lack of jurisdiction. The fact that the Court has scheduled oral argument on the motion to dismiss for October 29 appears to indicate that the Court intends to consider the issue of jurisdiction separate from the merits (given that no oral argument date for the merits has been set). Plaintiffs' opening brief raises numerous complex merits issues. Preparing a responsive government brief on the merits already has consumed, and will continue to consume, considerable resources of the Department of Justice and the numerous client agencies with interests in plaintiffs' broad-

ranging challenge to aspects of the government's intelligence-gathering activities. Preparing a responsive merits brief will likely necessitate the filing of classified information in camera with the Court as well as the filing of a classified brief regarding the government's assertion of the state secrets privilege in this case, which the district court upheld after considering the government's in camera classified filings. As the government's motion to dismiss showed, controlling precedent requires dismissal of plaintiffs' appeal for lack of jurisdiction. The considerable time and energy required to complete the government's merits brief will be wasted if the panel agrees with the motion and dismisses the appeal without reaching the merits.

4. The government has consulted with plaintiffs, who oppose this motion.

### **CONCLUSION**

The Court should suspend the due date for the government's responsive brief until after it resolves the threshold question of whether it has jurisdiction over this appeal.

Respectfully submitted,

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AUGUST 2015

## CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2015, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system.

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

/s/ Henry C. Whitaker

Henry C. Whitaker