

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

**PLAINTIFFS-APPELLANTS' OPPOSITION TO DEFENDANTS-APPELLEES'
MOTION TO SUSPEND BRIEFING AND CROSS-MOTION TO EXPAND THE
OCTOBER 29, 2015 HEARING TO INCLUDE THE MERITS**

RACHAEL E. MENY
BENJAMIN W. BERKOWITZ
MICHAEL S. KWUN
AUDREY WALTON-HADLOCK
PHILIP J. TASSIN
KEKER & VAN NEST LLP
633 Battery Street
San Francisco, CA 94111
Telephone: (415) 391-5400

THOMAS E. MOORE III
ROYSE LAW FIRM, PC
1717 Embarcadero Road
Palo Alto, CA 94303
Telephone: (650) 813-9700

ARAM ANTARAMIAN
LAW OFFICE OF ARAM ANTARAMIAN
1714 Blake Street
Berkeley, CA 94703
Telephone: (510) 841-2369

RICHARD R. WIEBE
LAW OFFICE OF RICHARD R. WIEBE
One California Street, Suite 900
San Francisco, CA 94111
Telephone: (415) 433-3200

CINDY A. COHN
DAVID GREENE
LEE TIEN
KURT OPSAHL
MARK RUMOLD
ANDREW CROCKER
JAMES S. TYRE
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Telephone: (415) 436-9333

Counsel for Plaintiffs-Appellants

Plaintiffs-appellants hereby oppose the government defendants-appellees' motion to suspend the briefing schedule ordered by the Court. Plaintiffs' respectfully cross-move for an order expanding the issues to be heard at the October 29, 2015 hearing to include all of the merits issues on appeal.

ARGUMENT

1. Plaintiffs-appellants appeal a judgment in favor of the government defendants-appellees on plaintiffs' claim that the mass interception and searching of plaintiffs' Internet communications violates their Fourth Amendment rights. *See Jewel v. NSA*, 673 F.3d 902, 910 (9th Cir. 2011). Plaintiffs allege 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 plaintiffs and millions of other innocent Americans violates the Fourth Amendment.

The district court granted summary judgment against appellants without ever permitting any discovery, holding that plaintiffs' extensive public evidence was insufficient to prove their standing. ER 5-14. The district court held in the alternative that the state secrets privilege also compelled dismissal of plaintiffs' 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 and the district court's own earlier holding that section 1806(f) displaces the state secrets privilege in this lawsuit. ER 5-14; ER 15-29.

2. The District Court entered judgment in favor of the government on plaintiffs' claim pursuant to Fed. R. Civ. Pro. 54(b). ER 1-2.

3. This Court has recognized the significance of plaintiffs' claims in holding that plaintiffs "challenge[] conduct that strikes at the heart of a major public controversy involving national security and surveillance." *Jewel*, 673 F.3d at 912. It has also held with respect to the same allegations at issue in this case, made by the same plaintiffs, that "[t]he federal courts remain a forum to consider the constitutionality of the wiretapping scheme." *In re National Security Agency Telecommunications Records Litigation*, 671 F.3d 881, 899 & n.3 (9th Cir. 2011).

4. In further recognition of the significance of this appeal, the Court has ordered that the briefing and hearing of the appeal be expedited. 9th Cir. ECF No. 10. Plaintiffs filed their opening brief on August 4, 2015 as ordered by the Court. 9th Cir. ECF No. 18-1. The Court's order expediting the appeal set the due date for the government defendants' answering brief for September 3, 2015. 9th Cir. ECF No. 10. The Court later extended the due date for the government defendants' answering brief to September 21, 2015. 9th Cir. ECF No. 25.

5. Shortly before plaintiffs filed their opening brief, the government defendants moved to dismiss the appeal on the ground that the district court improperly entered judgment under Rule 54(b). 9th Cir. ECF No. 15-1. Plaintiffs have opposed the motion, explaining why the district court properly entered judgment on plaintiffs' separate and distinct Fourth Amendment Internet interception claim. 9th Cir. ECF No. 16. The government defendants' motion to dismiss was ordered referred to the merits panel. 9th Cir. ECF No. 25.

6. The merits panel has now ordered oral argument limited to the government defendants' motion to dismiss for October 29, 2015. 9th Cir. ECF No. 33.

7. The Court should reject the government defendants' attempt to further delay the resolution of plaintiffs' claim by moving to suspend the briefing pending the hearing and decision of their motion to dismiss. Instead, the Court should retain the present briefing schedule, and should expand the scope of the October 29 hearing to encompass all of the issues on appeal.

8. It has been seven years since plaintiffs filed their complaint; it has been almost ten years since plaintiffs first sought to litigate these same claims, including their Fourth Amendment Internet interception claim, in 2006 in *In re National Security Agency Telecommunications Records Litigation*. The present lawsuit has suffered from numerous delays, including the district court's meritless *sua sponte* dismissal for lack of standing which this Court reversed in the previous appeal. *Jewel*, 673 F.3d at 913. The summary judgment proceedings on plaintiffs' Fourth Amendment Internet interception claim that are the subject of this appeal were plaintiffs' first opportunity to address the merits of any of their claims.

9. The Court properly expedited this appeal in light of the widespread public significance of the issues it raises and the long pendency of this lawsuit. The government defendants' proposal to suspend briefing until after hearing and decision of their motion to dismiss should be rejected because it will unduly prolong the appeal and prejudice the plaintiffs and is inconsistent with an expedited appeal.

10. The proposal should also be rejected because the government defendants are unlikely to prevail on their motion to dismiss the appeal. As explained in plaintiffs' opposition, the district court's order and judgment completely resolved plaintiffs' Fourth Amendment claim against the government

defendants for searching and seizing the contents of their Internet communications. 9th Cir. ECF No. 16. This claim is separate and distinct from plaintiffs' other claims. Plaintiffs have no other such claim against these defendants; their other claims go to communications records (*e.g.*, telephone records) and/or to violations of legal prohibitions other than the Fourth Amendment.

11. Moreover, entry of judgment was proper because it will serve “efficient judicial administration” (*Wood v. GCC Bend, LLC*, 422 F.3d 873, 880 (2005)) and “will aid ‘expeditious decision’ of the case” (*Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 797 (9th Cir. 1991)). Among the issues on appeal is Congress’ displacement of the state secrets privilege in electronic surveillance cases with the statutory procedure of 50 U.S.C. § 1806(f). Resolution of this issue by this Court will advance the litigation of the remaining claims in the district court. Likewise, resolution of the other issues on appeal will likely simplify and advance the litigation of the remaining claims.

12. The district court has already rejected the arguments that the government defendants make in their motion to dismiss, further demonstrating their lack of merit. Defendants fully and vigorously litigated in the district court their objections to entry of judgment. Dist. Ct. ECF No. 324. The district court carefully examined defendants’ objections to the entry of judgment pursuant to Rule 54(b) and found their objections to be without merit. ER 1-4.

13. At bottom, the government defendants seek to enjoy the fruits of their summary judgment victory in district court while insulating it as long as possible from any review by this Court. Suspending briefing until the Court hears and decides a fruitless motion to dismiss will only further delay final resolution of the

appeal and of the lawsuit as a whole, which has been pending for seven years now while the challenged searches and seizures continue. The public interest weighs instead in favor of an early resolution by this Court of plaintiffs' appeal of their claim, and retaining the present briefing schedule will advance that goal.

14. The government defendants' argument in their motion that it would be burdensome for them to brief the constitutional violations they have inflicted on plaintiffs and millions of other Americans for well over a decade is entitled to no weight. These fundamental constitutional issues deserve consideration by this Court.

15. Moreover, briefing the issues on appeal will make clear that the claim decided by the district court is distinct from the other claims remaining in the district court.

16. Rather than suspending the current briefing schedule, the Court should expand the October 29, 2015 to encompass a full hearing on the merits of the appeal, in addition to a hearing on the government defendants' motion to dismiss. Hearing all the issues in the appeal—whether plaintiffs have demonstrated their standing, whether the government is violating plaintiffs' Fourth Amendment rights, and whether section 1806(f) displaces the state secrets privilege, as well as the issue raised in the government's motion to dismiss—is the most expeditious means of resolving the appeal. Any other course will unnecessarily delay the resolution of these important issues.

CONCLUSION

The government defendants' motion to suspend the briefing schedule should be denied. The October 29, 2015 hearing should be expanded to include all of the merits issues briefed in plaintiffs' opening brief in addition to the government defendants' motion to dismiss.

Dated: September 4, 2015

Respectfully submitted,

/s/ Richard R. Wiebe

RICHARD R. WIEBE
LAW OFFICE OF RICHARD R.
WIEBE

ANDREW CROCKER
CINDY COHN
LEE TIEN
KURT OPSAHL
JAMES S. TYRE
MARK RUMOLD
DAVID GREENE
ELECTRONIC FRONTIER
FOUNDATION

THOMAS E. MOORE III
ROYSE LAW FIRM

RACHAEL E. MENY
MICHAEL S. KWUN
BENJAMIN W. BERKOWITZ
AUDREY WALTON-HADLOCK
JUSTINA K. SESSIONS
PHILIP J. TASSIN
KEKER & VAN NEST LLP

ARAM ANTARAMIAN
LAW OFFICE OF ARAM
ANTARAMIAN

*Counsel for Plaintiffs-Appellants
Carolyn Jewel, Erik Knutzen and
Joice Walton*

