No. 14-35555

In the United States Court of Appeals
For the Ninth Circuit

ANNA J. SMITH,

Plaintiff-Appellant,

v.

BARACK OBAMA, *et al.*,

Defendant-Appellees,

On Appeal from the United States District Court
for the District of Idaho
Case No. 2:13-cv-00257-BLW

MOTION OF *AMICUS CURIAE* CENTER FOR NATIONAL SECURITY STUDIES FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT

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Pursuant to Federal Rule of Appellate Procedure 29(g), the Center for National Security Studies ("the Center") respectfully moves the Court for leave to participate in oral argument in the above-captioned matter to address why this Court should reverse the District Court below on statutory grounds not addressed by the parties on appeal. The Center requests that it be allotted 10 minutes of argument time taken from neither party. Counsel for Plaintiff-Appellant has indicated that Plaintiff-Appellant does not oppose this motion, provided that her time for oral argument is not reduced. Counsel for the government has indicated that it opposes this motion. The Center notes that the D.C. Circuit has granted the Center's motion to participate in oral argument in the parallel matter of *Klayman v. Obama* in order to argue that the program has not been authorized by Congress. *See* Order, No. 14-5004, (D.C. Cir. Oct. 7, 2014). Oral argument for that case is set for November 4, 2014.

In support of this motion, the Center states as follows:

1. The Center's participation in oral argument is warranted and would be beneficial to the Court. Whereas the parties urge the Court to address the far-reaching constitutional issues raised in this case, the Center has presented narrower and indispensible statutory grounds on which this Court can resolve this matter. The Center's brief methodically describes why the telephony metadata program ("the program") satisfies none of the key elements of Section 501 of the Foreign

Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1861, *see* Br. of Amicus Curiae Ctr. for Nat'l Sec. Studies 7-21, and why Congress may not be deemed to have ratified the government's and the FISA Court's secret interpretation of Section 501, *see id.* at 21-29. The government's response brief makes no effort to address the merits of the Center's argument that the program violates Section 501, but rather contends that the Court is barred from considering the statutory issue altogether. *See* Br. for the Appellees 41 n.12. In short, the Center's participation in oral argument is warranted because the Center intends to put the merits of the statutory issue before the Court.

2. If this Court determines that the program has not been statutorily authorized, ruling on the constitutional issues presented by the parties would be unnecessary and contrary to the Court's responsibility to avoid rendering advisory opinions on constitutional issues where alternative means of resolution are available. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring); *see also Thomas v. Crosby*, 371 F.3d 782, 802 (11th Cir. 2004) (reviewing a statutory issue *sua sponte* to avoid rendering an advisory opinion on a constitutional claim). By permitting the Center to participate in oral argument, the Court can ensure that it receives full presentation of the statutory issue, which the Court is compelled to decide under the doctrine of constitutional avoidance.

3. In the District Court, the Plaintiff-Appellant alleged that the program "exceeds the authority" granted by Section 501. Am. Compl.¶ 25, No. 13-cv-00257, ECF No. 3. Plaintiff-Appellant made a similar allegation about the Administrative Procedure Act. *Id.* In response, the government fully briefed the statutory issue before the District Court, *see* Defs.' Mot. Dismiss 30-43, No. 13-cv-00257, ECF No. 14-1; Mem. Opp. Pl.'s Mot. Prelim. Inj. 30-43, No. 13-cv-00257, ECF No. 15, and thus would not be prejudiced by the Court's decision to resolve this matter on statutory grounds. *See Teague v. Lane*, 489 U.S. 288, 300 (1989) (adopting a position raised by *amicus curiae* on appeal where the parties had provided briefing on the same issue for a different claim). Moreover, the Center is not seeking to expand or alter the relief sought by Plaintiff-Appellant. Rather, the Center is simply advocating that this Court reverse on alternative statutory grounds the District Court's holding that Plaintiff-Appellant does not have a substantial likelihood of success on the merits of her claim that the program is unlawful.

4. The question of whether Congress authorized the program is properly before this Court even though the parties have not raised that question in their briefing. As argued in the Center's amicus brief, *see* Br. of Amicus Curiae Ctr. Nat'l Sec. Studies 3-4, this Court has ultimate authority to determine what issues it will consider in order to properly resolve the case before it. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("The matter of what questions may be taken up and resolved

for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases"). Courts of appeals may consider *sua sponte* issues not raised on appeal or not presented at any stage of the proceedings, particularly where doing so is necessary to avoid unnecessarily addressing a constitutional issue. *See, e.g., See United States v. Underwood*, 597 F.3d 661, 665 (5th Cir. 2010) (considering an issue not raised on appeal *sua sponte* was appropriate in order to avoid ruling on a more difficult constitutional issue, per *Ashwander*); *Thomas*, 371 F.3d at 802. Moreover, the Supreme Court has explicitly resolved important legal questions based on an issue raised only by *amicus curiae*. *See Teague*, 489 U.S. at 300; *Mapp v. Ohio*, 367 U.S. 643, 646 n.3 (1961).

5. At numerous points in its response brief, the government asserts that Congress has authorized the program and relies on that assertion to support its claim that the program is constitutional. *See, e.g.*, Br. for the Appellants 25-26 ("That reasoning [of *Smith v. Maryland*, 442 U.S. 735 (1979)] applies with particular force where, as here, plaintiff is claiming a privacy interest in telephony metadata acquired pursuant to statutory authorization and court orders from the business records of telecommunications companies."); *id.* at 40 ("Indeed, the privacy interests here are even weaker than in *Smith*. This case concerns repeated orders issued by numerous Article III judges pursuant to statutory

authorization…."); *id.* at 63 ("Plaintiff's insistence that the government cannot obtain telephony metadata under Section 215 without a warrant and individualized probable cause is particularly anomalous given the broad discretion the Fourth Amendment ordinarily provides the government to compel the production of documents under statutory authorization."). Yet, the government contends that this Court is powerless to scrutinize that assertion and to determine for itself whether the program has in fact been congressionally authorized. *See id.* at 41 n.12. As the government would have it, this Court must simply take the government at its word that Congress has authorized the program, and then consider that purported authorization as a factor in favor of the program's constitutionality.

6. Although the government appears to concede that the Court may consider an issue *sua sponte* that has not been raised on appeal by the parties, it argues that the Court may not consider the statutory issue here because Plaintiff-Appellant conceded her statutory claim before the District Court and declined to pursue that claim on appeal. *See id.* at 20. But the government cites no authority in support of its contention that the court of appeals is prohibited from considering an issue withdrawn before the district court.[1] To the contrary, courts of appeals have

[1] The case cited by the government, *Golden Gate Restaurant Ass'n v. San Francisco*, 546 F.3d 639, 653 (9th Cir. 2008), supports only the proposition that the court of appeals is not *required* to consider an argument raised only by *amicus curiae* or for the first time by a party on appeal. Here Plaintiff-Appellant *did* raise this issue before the District Court prior to withdrawing it, and the government

authority to consider issues never raised before the district court at all, as well as issues that were abandoned or waived before the district court. *See Booking v. Gen. Star Mgmt. Co.*, 254 F.3d 414, 418-419 n.4 (2d Cir. 2001) (stating that the court of appeals has discretion to consider issues not reached by the district court "even if an argument that is pressed on appeal was abandoned or waived in the District Court."). It is especially important that the Court exercise that authority here to consider the antecedent question of whether the program is authorized by Section 501, in order to avoid ruling unnecessarily on the constitutional issues briefed by the parties.[2] *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 343 (1999) (quoting *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality … unless such adjudication is unavoidable.")).

7. In deciding whether to resolve the statutory issue, this Court should consider that the issue is being weighed presently by the Second Circuit in *ACLU v.*

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fully briefed its response. More importantly, the canon of constitutional avoidance compels this Court to seek to resolve the case on antecedent statutory grounds. Br. of Amicus Curiae Ctr. Nat'l Sec. Studies 5-7.

[2] Additionally, the Court's authority to address and rely on the statutory argument is analogous to an exercise of supplemental jurisdiction. That doctrine provides that once a district court has jurisdiction over one claim, it may address all other claims that are so "related" that "they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a); *see also United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966).

Clapper, No. 14-42, and will be considered by the District of Columbia Circuit in *Klayman v. Obama*, No. 14-5004. The issue of whether the program is authorized by statute was briefed by the parties in *ACLU v. Clapper* and was addressed extensively at oral argument.[3] If this Court declines to decide the statutory issue, the result could be a constitutional holding before this Court and a holding in the Second Circuit and D.C. Circuit on the antecedent statutory issue, simply because the Plaintiff-Appellant elected not to pursue the statutory issue before this Court.

8. As noted above, the government relies on Congress's supposed authorization of the program as evidence of the program's legality while insisting that the Court is prohibited from hearing the statutory issue. Permitting the Center to participate in oral argument would allow the Court to hear a rebuttal to the government's position and a presentation of the merits of the Center's contention that the program violates Section 501.

Based on the foregoing, the Center respectfully requests that this Court grant this motion for leave to participate in oral argument.

[3] *See* Oral Argument, *ACLU v. Clapper*, No. 14-42 (2d Cir. Sept. 2, 2014), http://www.c-span.org/video/?321163-1/aclu-v-clapper-oral-argument-phone-record-surveillance.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2014, I caused the foregoing Motion of *Amicus Curiae* Center for National Security Studies for Leave to Participate in Oral Argument to be electronically filed via the Court's CM/ECF System, causing a true and correct copy to be served upon all counsel of record who are registered CM/ECF users.

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