

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOHAMED SHEIKH KARIYE, et al.,

Plaintiffs-Appellants,

v.

JEFFERSON B. SESSIONS III, ATTORNEY
GENERAL, et al.,

Defendants-Appellees.

No. 17-35634

**MOTION FOR LEAVE TO FILE MATERIALS
EX PARTE AND *IN CAMERA*,
MOTION TO LEAVE TO FILE SEALED ANSWERING BRIEF,
AND MOTION TO FILE OVERSIZED BRIEF**

Pursuant to Federal Rule of Appellate Procedure 27, Interim Circuit Rule 27-13, and Circuit Rule 32-2, Defendants/ Appellees Jefferson B. Sessions III, Attorney General, et al., hereby respectfully move for the following relief in the above-captioned matter: (a) leave to file classified and other sensitive materials in the district court record *ex parte* and *in camera* with the Court; (b) leave to file a sealed answering brief; and (c) leave to file an oversized brief of 16,763 words. The reasons for this motion

are set forth below.

Defendants' counsel has conferred with plaintiffs' counsel, Hina Shamsi, who states on behalf of all plaintiffs that plaintiffs consent to the motion for leave to file a sealed answer brief and consent to the motion for leave to file an oversized brief. Plaintiffs object to the Government's motion for leave to file materials *ex parte* and *in camera*, and will file a motion in response.

I. THIS COURT SHOULD GRANT LEAVE TO FILE CLASSIFIED MATERIALS IN THE DISTRICT COURT RECORD *EX PARTE* AND *IN CAMERA*

This appeal concerns the procedures for seeking a person's removal from the No Fly List. The principal question on appeal is whether those procedures comply with due process. In the course of its adjudication, the district court held that it "cannot and will not Order Defendants to disclose classified information to Plaintiffs," *Latif v. Holder*, 28 F. Supp.3d 1134, 1154 (D. Or. 2014) (1 ER 147), and the Government may, consistent with due process, withhold disclosures in part or in full if "any such disclosure would create an undue risk to national security," so long as the Government "make[s] such a determination on a case-by-case basis," *id.* at

1162 (1 ER 167). *See also Latif v. Lynch*, 2016 WL 1239925 at * 14-15 (D. Or. 2016) (1 ER 86-88).

Thus, on March 28, 2016, the district court ordered the Government to provide individualized filings identifying the information withheld from plaintiffs, the reasons for withholding, and an explanation of why additional disclosures could not be made. The district court further held that such filings could be made *ex parte* and *in camera*, if necessary to protect sensitive national security information. *Id.* at * 20 (1 ER 103-104).

In accordance with the district court's holding, the Government filed classified and other sensitive materials with the district court *ex parte* and *in camera*. The district court "thorough[ly] review[ed]" those materials before granting summary judgment to the Government on the procedural due process issue. 1 ER 42-43.

Because those classified materials were central to the district court's analysis and conclusion in this case, this Court should have those materials before it for purposes of appellate review. The classified materials are properly part of the record on appeal pursuant to Federal Rule of Appellate Procedure 10(a)(1). Those materials, however, are not included in

plaintiff's Excerpts of Record because those materials were filed in the district court *ex parte* and *in camera*. Accordingly, the Government respectfully moves this Court for leave to submit those materials in a Supplemental Excerpts of Record filed *ex parte* and *in camera*.

This Court has inherent authority to receive *ex parte, in camera* filings. *See Gilmore v. Gonzales*, 435 F.3d 1125, 1131 (9th Cir. 2006) (ordering "Government to file under seal the relevant material * * * so that we could conduct an *in camera, ex parte* review"); *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2012) ("[T]he court has inherent authority to review classified material *ex parte, in camera* as part of its judicial review function."). Simultaneous with the filing of this motion, the Government is lodging the Classified Supplemental Excerpts of Record with the Court Information Security Officer for delivery to the Court.

Those materials are properly filed *ex parte* and *in camera* because of the sensitive national security information they contain, including classified information, the handling of which is governed by federal law. *See* Executive Order No 13,526; 75 Fed. Reg. 707 (Dec. 29, 2009). Federal law prohibits disclosure of classified information except to individuals who

have been cleared for access to the information by the head of a federal agency or his designee, who have signed a nondisclosure agreement, and who have a need to know the information. *See id.* § 4.1(a); 75 Fed. Reg. at 720; *see also* 28 C.F.R. § 17.46. The materials the Government seeks leave to file contain the withheld materials and the justifications for withholding. The Government has explained on the public record, and in detail, the national security harms that would follow from unauthorized disclosure. 2 ER 376-384. Because one of the questions presented on appeal is whether or not the Government may permissibly withhold this information from plaintiffs' counsel, disclosure at this juncture - without permitting the materials to be filed *ex parte* and *in camera* - would prematurely decide the very merits question posed on appeal.

For these reasons, the Government respectfully requests leave to file *ex parte* and *in camera* the same classified materials filed *ex parte* and *in camera* in response to the district court's March 28, 2016 order, and which the district court thoroughly reviewed prior to granting summary judgment to the Government on plaintiffs' procedural due process claims.

II. THIS COURT SHOULD GRANTE LEAVE TO FILE THE ANSWERING BRIEF UNDER SEAL

On January 5, 2018, plaintiffs filed a motion for leave to file Volume 4 of the Excerpts of Record under seal. *See* Dkt. No. 14. As a basis for its motion, plaintiffs observed that the materials were previously subject to a protected order in the district court, and that the materials contained personally identifiable information and other materials that plaintiffs believed to be sensitive and stigmatizing. The Government took no position on that motion. On January 5, 2018, this Court granted the motion to seal Volume 4 of the Excerpts of Record. Dkt. No. 15.

The Government's answering brief refers to, and quotes from, the sealed materials in Volume 4 of the Excerpts of Records on numerous occasions. Because that material is under seal pursuant to this Court's January 5, 2018 order, the Government respectfully moves for leave to file its Answering Brief under seal as well. The Government is filing this motion simultaneously with its Answering Brief pursuant to Interim Circuit Rule 27-13(e).

In order to ensure that the Answering Brief is sealed to the least extent possible, the Government proposes that it subsequently file a

redacted, public version of the Answering Brief, redacting only those portions required by this Court's sealing order. To do so, the Government proposes that it confer with plaintiffs' counsel to ensure that the proper portions of the Government's public brief are redacted, and file a redacted Answering Brief be filed no later than 14 days after plaintiffs' reply brief is filed.

III. THIS COURT SHOULD GRANT LEAVE TO FILE AN OVERSIZED ANSWERING BRIEF

The Government respectfully moves, pursuant to Circuit Rule 32-2, for leave to file an oversized Answering Brief containing 16,763 words. On December 15, 2017, plaintiffs filed a motion for leave to file an oversized Opening Brief of 20,817 words. Dkt. No. 10. As the basis for its motion, plaintiffs cited the number and complexity of the issues involved, including issues of first impression, the complicated procedural history of this case, and the importance of the issues at stake. *Id.* at 2. Plaintiffs also cited Circuit Rule 32-2(b), under which separately represented parties filing a joint brief are entitled to 15,400 words (the ordinary 14,000 word limit plus an additional 1,400 words). *See id.* at 1. The Government took no position on plaintiffs' motion, *id.* at 4, which this Court granted on January

15, 2018. Dkt. No. 17.

For similar reasons, the Government respectfully moves for leave to file an oversized Answering Brief containing 16,763 words. The Government agrees that the complexity and importance of the issues presented in this case, as well as the lengthy procedural history, warrant the filing of an oversized brief. In addition, the Government must respond to the arguments raised in an Opening Brief of nearly 21,000 words. The Government has worked diligently but is unable to comply with the otherwise applicable 15,400 word limit. (As a party responding to the joint brief of separately represented parties, the Government would be entitled to the same 15,400 word limit specified in Circuit Rule 32-2(b).) The Government's Answering Brief, however, would contain 4,054 fewer words than plaintiffs' Opening Brief and the Government respectfully submits that an Answering Brief of 16,763 words is appropriate under the circumstances.

CONCLUSION

For the reasons stated above, this Court should grant leave for the Government to file (a) materials *ex parte* and *in camera*; (b) its Answering Brief under seal, with a redacted public Answering Brief due no later than 14 days after the filing of plaintiffs' Reply Brief; and (c) an oversized Answering Brief of no more than 16,763 words.

Respectfully submitted,

/s/ Joshua Waldman
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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2018, I caused to be filed with the Court through the CM/ECF system the foregoing MOTION FOR LEAVE TO FILE MATERIALS *EX PARTE* AND *IN CAMERA*, LEAVE TO FILE SEALED ANSWERING BRIEF, AND LEAVE TO FILE OVERSIZED BRIEF. I also hereby certify that counsel for plaintiffs are a registered CM/ECF users and will be served by the CM/ECF system.

/s/ Joshua Waldman
Joshua Waldman
Counsel for Defendants/Appellees