NSA’s “state secrets” defense kills lawsuit challenging Internet surveillance



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The US Supreme Court yesterday denied a petition to review a case involving the National Security Agency’s surveillance of Internet traffic, leaving in place a lower-court ruling that invoked “state secrets privilege” to dismiss the lawsuit.

The NSA surveillance was challenged by the Wikimedia Foundation, the American Civil Liberties Union, and the Knight First Amendment Institute at Columbia University. The Supreme Court’s denial of Wikimedia’s petition for review (formally

known as “certoriari”) was confirmed in a long list of decisions released yesterday.

“As a final development in our case, *Wikimedia Foundation v. NSA*, the United States Supreme Court denied our petition asking for a review of the National Security Agency’s (NSA) mass surveillance of Internet communications and activities. This denial represents a big hit to both privacy and freedom of expression,” the Wikimedia Foundation said yesterday.

The lawsuit challenged the NSA’s “Upstream” surveillance program in which “the NSA systematically searches the contents of Internet traffic entering and leaving the United States, including Americans’ private emails, messages, and web communications,” the Wikimedia Foundation said. “The Supreme Court’s refusal to grant our petition strikes a blow against an individual’s right to privacy and freedom of expression—two cornerstones of our society and the building blocks of Wikipedia,” Wikimedia Foundation Legal Director James Buatti said.

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Litigation would “risk disclosure of state secrets”

A September 2021 ruling by the US Court of Appeals for the 4th Circuit affirmed a US district court’s decision to throw out the lawsuit. As the appeals court ruling noted, the district court found that Wikimedia didn’t have standing to pursue the case “and that further litigation would unjustifiably risk the disclosure of state secrets.”

“Although the district court erred in granting summary judgment to the government as to Wikimedia’s standing, we agree that the state secrets privilege requires the termination of this suit,” the 4th Circuit panel of appeals

court judges said in a 2-1 ruling. The 4th Circuit subsequently denied Wikimedia's motion for an *en banc* rehearing in front of all the court's judges, and Wikimedia sought Supreme Court review in August 2022.

The Wikimedia petition for Supreme Court review argued that the appeals court "was wrong to dismiss the lawsuit on the basis of the state secrets privilege and that the court should have, instead, excluded any secret evidence, but allowed the case to proceed," the groups challenging NSA surveillance said at the time.

Wikimedia and fellow plaintiffs argued they could prove their case based on the government's public disclosures about the surveillance program.

"It is past time for the Supreme Court to rein in the government's sweeping use of secrecy to evade accountability in the courts. Upstream surveillance is no secret, and the government's own public disclosures are the proof," Patrick Toomey, deputy director of the ACLU's National Security Project, said when the petition for Supreme Court review was filed. "Every day, the NSA is siphoning Americans' communications off the Internet backbone and into its surveillance systems, violating privacy and chilling free expression. The courts can and should decide whether this warrantless digital dragnet complies with the Constitution."

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