No. 07-56424

In The United States Court of Appeals For The Ninth Circuit

Robert M. Nelson, et al.

Plaintiffs - Appellants,

v.

National Aeronautics and Space Administration, an Agency of the United States; Michael Griffin, Director of NASA, in his official capacity only; Department of Commerce; Carlos M. Gutierrez, Secretary of Commerce, in his official capacity only; California Institute of Technology; and Does 1-100,

Defendants - Appellees.

On Appeal From the Order Denying Motion for Preliminary Injunction of the United States District Court
For the Central District of California
Case No. CV-07-05669 ODW (VBKx)

CALIFORNIA INSTITUTE OF TECHNOLOGY'S ("CALTECH") OPPOSITION TO EMERGENCY MOTION FOR STAY AND EXPEDITED APPEAL UNDER CIRCUIT RULE 27-3

Mark Holscher
R. Alexander Pilmer
Mark T. Cramer
KIRKLAND & ELLIS LLP
777 South Figueroa Street
Los Angeles, California 90017
(213) 680-8400
(213) 680-8500 Facsimile
Attorneys for Caltech

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Introduction

Plaintiffs describe their motion as seeking a "temporary injunction preserving the status quo, and a stay of the district court's proceedings." Emer. Mot., 1. But that is not really what plaintiffs seek. There are no district court proceedings to stay -- after all, plaintiffs lost their request for a preliminary injunction -- and the "status quo" is that plaintiffs must complete a standard government form and submit to a limited background investigation in order to obtain a federal ID badge. Rather, plaintiffs are asking this Court, on an emergency motion, to enjoin the use of the government's least intrusive background check for any JPL employee.

Plaintiffs' emergency motion fails for at least four reasons. ***First***, any "emergency" is a result of plaintiffs' own delay. As plaintiffs acknowledge, the challenged background check policy was published by the U.S. Department of Commerce in **March 2006**. *See* Plaintiffs Complaint ¶ 41, attached as Exhibit 1. This policy imposes a "background investigation requirement on all employees or contractors seeking to obtain the new form of identification" and requires the completion of the Standard Form 85 ("SF 85"). *Id.* Plaintiffs learned the details of the background check program in February 2007, when the JPL Director issued an all personnel e-mail detailing the requirements for a background check for

employees at the JPL facility. *See* Declaration of Susan Foster ¶ 13 (Pls' Exs., pp. 200-201). Lead Plaintiff Robert Nelson wrote to his Congressman on March 17, 2007 complaining that this same background check violated his constitutional rights and exceeded NASA's authority, the exact claims plaintiffs waited until August 30, 2007 to bring before the district court. *See* Ex. 2 (Pilmer Decl., Sept. 9, 2007, p. 7). Yet, plaintiffs did not bring their lawsuit until August 30, 2007, less than two months before the government's deadline to complete SF 85. *See* Ex. 1 (Pls' Compl.). The expedited appeal process is designed for true emergencies, not self-created ones.

Second, emergency relief is inappropriate at this time because plaintiffs are not likely to succeed on the merits of any appeal of the district court's denial of their request for preliminary injunction. Absent from plaintiffs' instant motion is any discussion about how the district court supposedly abused its discretion or committed clear legal errors. In fact, the district court thoroughly considered close to a hundred pages of briefing, including two briefs from plaintiffs and amicus curiae briefs filed on their behalf, several hundred more pages in declarations and supporting evidence, and conducted a lengthy hearing with oral argument from the various parties. United States District Court Judge Wright then issued an eighteen page order that considered, and rejected, plaintiffs' theories. As detailed below, the district court's decision to deny the request for a preliminary injunction was

grounded on a number of sound, independent legal bases. Moreover, the denial of the preliminary injunction is reviewed by this Court under an "abuse of discretion" standard.

Third, plaintiffs failed to abide by the requirement in Fed. R. App. P. 27-3(a)(1) that before filing a motion for emergency relief, "the movant shall make every practicable effort to notify the Clerk and opposing counsel, and to serve the motion, at the earliest possible time." Plaintiffs' notice to counsel was provided in a two-sentence email at 7:05 a.m. this morning, advising that plaintiffs intended to file a motion seeking emergency relief. *See* Ex. 3. Unbeknownst to defendants, plaintiffs issued a press release yesterday announcing their intent to "file an emergency motion on Thursday to appeal a federal district court's decision." *See* Ex. 4 (plaintiffs' October 3, 2007 press release). Plaintiffs' decision to tell reporters the day before the filing, while providing counsel with just a few hours notice, flies in the face of Fed. R. App. P. 27-3's requirement that notice be provided "at the earliest possible time."

Fourth, plaintiffs cannot demonstrate that good cause exists to expedite their appeal, as required by Ninth Circuit Fed. R. App. P. 27-12. As the district court already found, plaintiffs will suffer no irreparable injury if the appeal proceeds on a normal track. *See* Order Denying Motion for Preliminary Injunction ("Order") at 16, attached as Ex. 5 ("[T]emporary denial of access to JPL does not amount to

irreparable harm."). Plaintiffs do not establish irreparable harm simply re-hashing the identical failing arguments they made below.

Argument

1. Plaintiffs Cannot Establish "Emergency" Circumstances When They Were Long Aware of the Requirements for the Challenged Background Check and Waited Until August 30, 2007 to Seek Relief in the District Court

When filing an emergency motion, the movant must certify that relief is needed in less than 21 days to avoid irreparable harm and that plaintiffs have not been "dilatory in seeking it." Fed. R. App. P. 27-3(a)(2). Here, plaintiffs had knowledge of the background checks as early as February 2007, but nonetheless took no legal action until August 30, 2007. *See* Foster Decl. ¶ 13 (Pls.' Exs., p. 200-201). Further, records on plaintiffs' own website demonstrate that as early as March 17, 2007, lead plaintiff Robert Nelson wrote a local congressman making the same arguments he raises here.[1] *See* Ex. 2.

Having delayed seeking relief in the district court, plaintiffs now designate this as an "emergency motion." But had plaintiffs sought relief below in a timely manner after plaintiffs became aware of the background checks, this Court could have considered an appeal in the normal course.

[1] A copy of this letter is available at http://hspd12jpl.org/files/ADAMschiffmar2007.doc (last checked October 4, 2007 at 10:00 am).

A party's delay in seeking relief is a "factor to be considered" since by "sleeping on its rights, a plaintiff demonstrates the lack of need for speedy action." *Lydo Enterprises, Inc. v. City of Las Vegas*, 7445 F.2d 1211, 1213 (9th Cir. 1984). Plaintiffs' unjustified delay in filing their original motion for preliminary injunction demonstrates the lack of any real emergency, and they have "been unreasonably dilatory in seeking relief." Ninth Circuit General Order 6.4(b).

2. Plaintiffs Are Not Likely To Succeed on the Merits of Their Appeal of the Denial of the Preliminary Injunction

Denial of a motion for a preliminary injunction lies within the discretion of the district court. "The district court's denial of a motion for preliminary injunction will be reversed only if the district abused its discretion or based its decision upon an erroneous legal standard or clearly erroneous finding of fact." *Aleknagik Natives Ltd. v. Andrus*, 648 F.2d 496, 501 (9th Cir. 1980). Even when reviewing a denial of a preliminary injunction request in the ordinary course, appellate courts give great deference to the district court's decision to deny equitable relief. *See Southwest Voter Registration Ed. Project v. Shelly*, 344 F.3d 914, 918 (9th Cir. 2003). As detailed below, the district court's denial of plaintiffs' request was correct, and plaintiffs do not point to a single legal or factual error in the court's order. Further, this decision is in line with other circuits that have upheld government background checks of employees. *See, e.g., Am. Fed'n of Gov't Employees, AFL-CIO v. Dept. of Housing & Urban Dev.*, 118 F.3d 786

(D.C. Cir. 1997); *Nat'l Treasury Employees Union v. U.S. Dept. of Treasury*, 25 F.3d 237 (5th Cir. 1994).

Judge Wright's order provides several reasons why plaintiffs are not entitled to injunctive relief. First, Judge Wright found that plaintiffs failed to establish that they had standing to bring the bulk of their claims, as required by Article III of the Constitution. *See* Order at 7. The court recognized that many of plaintiffs' arguments focused on allegedly impermissible standards that might be used to determine if they were entitled to an identification badge. The court considered voluminous declarations and other evidence and found that those claims were "strictly speculative" and that "no facts" supported plaintiffs' argument that an impermissible policy would be used to issue identification badges to JPL employees. *Id.* at 8-9. The court's finding that there is no standing for hypothetical injuries is well-grounded in the law. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

With respect to the claims for which plaintiffs did have standing, the court properly found that plaintiffs were not likely to succeed on the merits of their constitutional challenge. The court correctly noted that, contrary to plaintiffs' claims, no Fourth Amendment interest is implicated by requiring federal contractors to fill out a questionnaire and authorization to release records. Order at 9; *see also*, *Greenawalt v. Ind. Dep't of Corrections*, 397 F.3d 587, 590 (7th Cir.

2005) (holding that questioning did not constitute a "search" for Fourth Amendment purposes "even when the questions are skillfully designed to elicit what most people would regard as highly personal private information."). Plaintiffs cite no decisions, either below or in connection with this motion, where a background check questionnaire was found to violate the Fourth Amendment. Nor do they cite any cases that even analyze the issue under the Fourth Amendment.

Next, the district court rejected plaintiffs' Fourteenth Amendment claim because that amendment only applies to the states, not the federal government. Order at 10, *citing Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Indeed, plaintiffs conceded in their reply papers below that the Fourteenth Amendment does not apply to the federal government.[2] *See* Pls.' Joint Reply, 8, n.4.

The district court also rejected plaintiffs' claim that SF 85 violated their right to "informational privacy." Here, the court applied the exact test plaintiffs' proposed in their brief, weighing the factors set forth in *In re Crawford*, 194 F.3d 954 (9th Cir. 1999). Because the court applied plaintiffs' own test, plaintiffs cannot now argue that the court used an erroneous legal standard. Indeed, plaintiffs make no attempt to describe any legal or fact-finding errors made by the district court in their emergency motion. In order to succeed on the merits of their

[2] The district court also analyzed plaintiffs' Administrative Procedures Act ("APA") claim. Because plaintiffs did not bring this claim against Caltech, it will not be addressed in this opposition.

appeal, including a demonstration of irreparable harm, plaintiffs would have to show that the district court abused its discretion or made clearly erroneous findings of fact. *See, e.g., Southwest Voter Registration Project,* 344 F.3d at 918 (holding that review of denial of a preliminary injunction is "limited and deferential"). Here, the court carefully weighed the facts and competing concerns. The court noted that plaintiffs were asked about illegal drug use, but properly considered that the form itself guaranteed that responses would "not be used against the applicant in any subsequent criminal proceeding." Order at 14.

Similarly, the court rejected plaintiffs' claim that the SF 85 "Authorization for Release of Information" violated privacy interests because the court found the government showed it had a legitimate interest in enhancing security at federal facilities and detecting individuals claiming a false identity. *Id.* at 14-15. The court went on to find that there were adequate safeguards on the face of the release "that support the notion that the release is narrowly tailored." *Id.* at 15. Because plaintiffs again emphasized that unnecessary information *might* improperly be uncovered, the court repeated that hypothetical harms are not ripe for review. *Id.*

Plaintiffs' "emergency" motion also requires a showing of irreparable injury. Yet, plaintiffs fail to point out any critical failings in the district court's conclusion that plaintiffs will not suffer irreparable harm by signing SF 85 or, if they fail to do so, by losing access to the JPL facilities. Order at 16-17. The district court made

this determination based on consideration of all facts available in the record, and plaintiffs can point to nothing new that creates an emergency.[3] While plaintiffs argue the "harm" is a constitutional violation, they ignore the lower court's detailed determination that no such constitutional violation has taken place.

The district court's determination that a preliminary injunction should not issue was correct and will not likely be overturned in any appeal. For this reason, emergency relief is not necessary as it will only cause delay, confusion and expense in implementing a constitutional security program designed to protect the nation's federal facilities and safeguard the employees that work there.

3. Plaintiffs Failed to Meet the Requirements of FRAP 27-3 By Failing to Notify Opposing Counsel Of Any Intent to Seek Emergency Relief Before the Ninth Circuit

The Ninth Circuit's Federal Rule of Appellate Procedure 27-3 requires a that party bringing an emergency motion must "make every practicable effort to notify the Clerk and opposing counsel, and serve the motion, at the earliest possible time." Plaintiffs failed to do this. The district court stated at the conclusion of the hearing on October 1, 2007 that, at a minimum, it would deny nearly all of plaintiffs' requested relief. The district court then issued its written

[3] Plaintiffs are wrong to suggest that no harm will befall to defendants if an injunction is issued. Further delays in the court proceedings will mean further delays in the implementation of the background checks. Caltech believes there are employees who are awaiting resolution of the legal challenge before completing their SF 85s. The longer the legitimacy of this program remains in flux, the more difficult it will be to process the late applications submitted by these employees.

ruling on October 3, 2007 denying the injunction completely. It was not until October 4, 2007 at 7:05 a.m., via a two-sentence email, that plaintiffs notified the defendants that they intended to seek any kind of emergency relief. *See* Ex. 3. A press release issued by plaintiffs on October 3, 2007, stating that plaintiffs intended to seek emergency relief from the Ninth Circuit, undercuts any argument by plaintiffs that October 4th was the "earliest possible time" plaintiffs could have notified defendants. *See* Ex. 4.

4. Plaintiffs Cannot Demonstrate "Good Cause" for Motion to Expedite Their Appeal of the District Court's Denial of the Preliminary Injunction

Ninth Circuit Rule of Appellate Procedure 27-12 requires that a motion to expedite briefing establish good cause. Examples of good cause include "irreparable harm" or that the "appeal may become moot." Neither is applicable here. As the district court already found, irreparable harm will not occur if the injunction is denied. Order at 16. Further, there is no danger the appeal will be moot because plaintiffs can still pursue other remedies if it turns out the background checks are ultimately administered in an impermissible manner. *See*

Ex. 6 (Caltech Opp. Brief at 26-27). Accordingly, good cause does not exist to expedite the schedule to appeal a preliminary injunction set forth in Fed. R. App. P. 3-3.

DATED: October 4, 2007

KIRKLAND & ELLIS LLP

By: Mark Holscher

Mark Holscher

Attorneys for Defendant - Appellee
California Institute of Technology

CIRCUIT RULE 27-3 CERTIFICATE

I, R. Alexander Pilmer, hereby certify:

1. That I am an attorney in good standing duly licensed to practice before all of the courts of this state, including the Ninth Circuit Court of Appeals, a member of the law firm of Kirkland & Ellis LLP, and a counsel of record for Defendant Appellee California Institute of Technology. I have personal knowledge of the information set forth below and if called as a witness to testify would testify as to the truth of the following:

2. Defendant California Institute of Technology is represented by the law firm of Kirkland & Ellis LLP, 777 S. Figueroa St., Los Angeles, CA 90071, Telephone (213) 680-8400; Facsimile (213) 680-8500

3. Defendants National Aeronautics and Space Administration; Michael Griffin, Director of NASA, Department of Commerce; and Carlos M. Gutierrez, Secretary of Commerce are represented by Mark Stern, Attorney, Federal Programs Branch, U.S. Department of Justice, Civil Division 20 Massachusetts Ave., N.W., Washington D.C., 20530, Telephone (202) 514-4686, Fax (202)616-8470.

4. Plaintiffs are represented by the law offices of Hadsell & Stormer, Inc., 128 N. Fair Oaks Ave., Pasadena, CA 91103, Telephone (626) 585-9600; Fax (626) 577-7079.

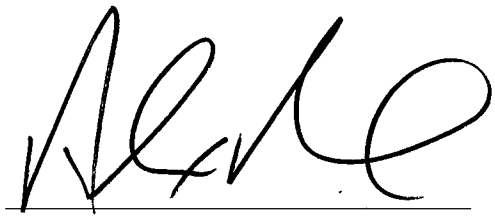
5. On October 3, 2007, plaintiff Robert M. Nelson issued a press release, attached hereto as Exhibit A, stating that the plaintiff employees at the California Institute of Technology's Jet Propulsion Laboratory would file an emergency motion to appeal the federal district court denial of Plaintiff's Motion for Preliminary Injunction on October 4, 2007.

6. On October 4, 2007 at 7:05 a.m., I received an email from Virginia Keeny, counsel for plaintiffs, stating that the plaintiffs would be filing a notice of appeal and motion for emergency stay and expedited appeal with the Ninth Circuit later that day. At approximately 12:00pm, I received a copy of Plaintiffs' Emergency Motion for Stay and Expedited Appeal Under Circuit Rule 27-3.

7. I contacted Virginia Keeny, counsel for plaintiffs, on October 4, 2007 and indicated that we would be filing an response to their emergency motion.

8. I called the Clerk's office in San Francisco at (415) 355-8020 on October 4, 2007 and spoke with Daniel Torres, the assigned attorney. We received permission to file a response to the motion via email to Daniel_Torres@ca9.uscourts.gov before 5:00pm of the same day.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 4th day of October, 2007 in Los Angeles, California.



R. Alexander Pilmer
Attorneys for Defendant
California Institute of Technology