HADSELL
STORMER
KEENY
RICHARDSON
& RENICK LLP

128 North Fair Oaks Avenue, Pasadena, California 91103
Tel: 626.585.9600 • Fax: 626.577.7079 • www.hskrr.com

Cornelia Dai
Fernando Gaytan
Barbara Enloe Hadsell
Lisa Holder
Nagwa Ibrahim
Virginia Keeny
Natalie Nardecchia
Josh Piovia-Scott
Randy Renick
Anne Richardson
Dan Stormer
Lauren Teukolsky
of counsel
Traber & Voorhees

July 3, 2008

The Honorable David R. Thompson
The Honorable Kim McLane Wardlaw
The Honorable Edward C. Reed
United States Court of Appeal
for the Ninth Circuit
U.S. Court of Appeals Building
95 Seventh Street
San Francisco, CA 94103-1526

Re: *Robert M. Nelson v. NASA, et al.*, Case No. 08-55308

To the Honorable Thompson, Wardlaw & Reed:

Pursuant to the panel's Order of June 16, 2008, requesting a letter brief on various issue relating to the jurisdiction of the district court and the appealability of that court's order dismissing defendant California Institute of Technology, plaintiffs/appellants submit the following brief.

I. Introduction

The instant appeal arises from a motion for a preliminary injunction filed by plaintiffs, a group of engineers and scientists employed by defendant California Institute of Technology at the Jet Propulsion Laboratory. On January 11, 2008, the court of appeals issued an opinion stating that preliminary injunctive relief should apply as to all defendants, including Caltech. A short five days later, the district court filed an order dismissing Caltech as a defendant, which had the effect of denying injunctive relief to the plaintiffs and thus standing in direct contradiction to the decision issued by the court of appeals. Plaintiffs ask that the court either accept this interlocutory appeal because it has the practical effect of dissolving the injunction as to Caltech, or treat this notice of appeal as a writ of mandamus and order the district court to vacate its decision dismissing Caltech as a defendant in this action.

II. Background and Summary of Procedural History

This action was filed on August 30, 2007, challenging the policy of the federal government, specifically the National Aeronautics and Space Administration ("NASA"), to require low-risk employees of Caltech working at the Jet Propulsion Laboratory in Pasadena to submit to a far-ranging and intrusive background investigation to maintain their access to the lab and their employment with Caltech. (District Court ("USDC") Docket No. 1.) The complaint named NASA, the Commerce Department, the heads of such agencies and Caltech. (*Id.*) On the same date, plaintiffs filed a motion for preliminary injunction against the federal defendants and Caltech, seeking to have the background investigation process halted completely. (USDC Docket No. 4.) The motion for preliminary injunction was denied by the district court in its entirety on October 3, 2007. (USDC Docket No. 40.)

On October 4, plaintiffs filed a notice of appeal to this court as to all defendants. (USCA Appeal No. 07-56424, Docket No. 1.) On the same date, plaintiffs filed an emergency motion for a stay and expedited appeal pursuant to Circuit Rule 27-3. (Appeal No. 07-56424 Docket No. 4.) On October 5, 2007, a panel of the Ninth Circuit granted the emergency motion for temporary restraining order pending determination of whether an injunction pending appeal should be ordered. (Appeal No. 07-56424 Docket No. 5.) On October 11, 2007, a panel of this court granted plaintiffs' motion for an injunction pending appeal and set the matter for expedited hearing and briefing. *Nelson v. Nasa*, 506 F. 3d 713, 715 (9th Cir. 2007).

On December 5, 2007, the denial of preliminary injunction was heard by a regular panel of the Ninth Circuit. That panel ruled in plaintiffs' favor on January 11, 2008. *Nelson v. NASA,* 512 F. 3d 1134 (9th Cir. 2008). In that opinion, the Ninth Circuit held that plaintiffs had shown that they were likely to prevail on the merits of their informational privacy claims and that the balance of hardships tipped sharply toward the plaintiffs. The Ninth Circuit expressly held that "preliminary injunctive relief should apply both to Caltech and to Federal Appellees," finding that "Caltech's threat to terminate non-compliant employees is central to the harm Appellants face and creates the coercive environment in which they must choose between their jobs or their constitutional rights." *Id.*at 1147.

Prior to the issuance of this opinion by the Ninth Circuit, Caltech moved separately to dismiss the complaint as to it. On January 11, 2008, on the same date that the court of appeal issued its opinion, the district court held a hearing on the motion to dismiss. On January 16, 2008, the district court issued a minute order, granting Caltech's motion to dismiss and dismissing it entirely, despite the Ninth Circuit opinion issued less than a week before directing the district court to grant a preliminary injunction against Caltech.

Because the Ninth Circuit decision of January 11, 2008 reversed a prior order of the district court and held that a preliminary injunction should issue against Caltech, on February 15,

2008, plaintiffs filed an immediate interlocutory appeal challenging the district court's dismissal of Caltech. In response, the Ninth Circuit issued an order asking the parties to file simultaneous briefs addressing three issues: first, whether the district court had jurisdiction to enter its January 16, 2008 order dismissing Caltech from the action given that the mandate in Appeal No. 07-56424 had not issued, and if not, what is the legal effect of the dismissal of Caltech; second, whether the Ninth Circuit has appellate jurisdiction to entertain this appeal, and, if so, what is the statutory or other authority so providing; and third, whether the notice of appeal filed by plaintiffs should be recharacterized as a petition for mandamus. Subsequently, on June 20, 2008, the panel issued an amended opinion, again reversing the district court's order and reaffirming the preliminary injunction against Caltech and NASA. *Nelson v. NASA*, 2008 WL 2468884 (9th Cir. 2008).

III. Argument

A. The District Court Did Not Have Jurisdiction to Dismiss Caltech from this Action

Generally, the filing of a notice of appeal divests the district court of jurisdiction over the matters on appeal: this is the principle of exclusive appellate jurisdiction. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam); *Natural Resources Defense Council, Inc. v. Southwest Marine Inc.*, 242 F.3d 1163 (9th Cir. 2001). The district court does retain "jurisdiction during the pendency of an appeal to act to preserve the status quo." *Southwest Marine*, 242 F.3d at 1166; Fed. R. Civ. P. 62(c). However, this exception "grants the district court no broader power than it has always inherently possessed to preserve the status quo during the pendency of an appeal; it does not restore jurisdiction to the district court to adjudicate anew the merits of the case. Thus, any action taken pursuant to Rule 62(c) may not materially alter the status of the case on appeal." 242 F.3d at 1166 (citing *McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734 (9th Cir. 1982)).

First, it cannot be disputed that an order dismissing the claims against Caltech (and thus dissolving the injunction against it) "materially alters the merits of the case" decided by the Ninth Circuit, namely whether the plaintiffs have a substantial likelihood of success on the merits of their claim for a permanent injunction against Caltech.

Second, the mandate of the Ninth Circuit's decision has not issued and thus jurisdiction has not been returned to the district court. In a civil case, such as this one, in which the United States or its agency or officer is a party, any party has 45 days from the date of the entry of judgment to petition for rehearing. Fed. R. App. P. 40(a)(1). Until the mandate issues, the Circuit retains jurisdiction over the matters appealed. For example, this Court may *sua sponte* call for rehearing before the mandate issues; it may modify its disposition; and it may enter orders as to ancillary matters pending rehearing. *Fernandez-Ruiz v. Gonzalez*, 466 F.3d 1121,

1135 (9th Cir. 2006) (en banc) (*sua sponte* call for vote on hearing case en banc before mandate issues); *Clarke v. American Commerce Nat'l Bank*, 977 F.2d 1533 (9th Cir. 1992) (Circuit's power to enter ancillary orders in case pending rehearing); *Nevada Highway Patrol Ass'n v. State of Nevada*, 966 F.2d 534 (9th Cir. 1992) (same).

When the district court granted Caltech's motion to dismiss on January 16, 2008, only five days had passed since this Circuit's decision, ordering that a preliminary injunction remain in place against both the federal defendants and Caltech. Therefore, the Ninth Circuit retains jurisdiction over the matters on appeal, and the district court did not have jurisdiction to enter an order materially altering the merits of the case on appeal.

B. The Ninth Circuit Should Order the District Court to Vacate its Decision to Dismiss Caltech as a Defendant in this Action

1. The Notice of Appeal Can be Treated as a Petition for Mandamus

Although plaintiffs originally filed an appeal, the court "can treat the notice of appeal as a writ of mandamus and consider the issues under the factors set forth in *Bauman*." *Miller v. Gammie*, 335 F.3d 889, 895 (9th Cir. 2003) (en banc). *See also Cordoza v. Pac. States Steel Corp.*, 320 F.3d 989, 998 (9th Cir. 2003) (treating a notice of appeal as a petition for a writ of mandamus where district court order was not appealable). "All courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (2000).

The writ of mandamus "has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Bauman v. United States District Court*, 557 F. 2d 650, 654 (9th Circ. 1977) (internal quotations omitted). In the instant case, the district court did not have jurisdiction to dismiss Caltech from the action because the filing of a notice of appeal divests the district court of jurisdiction over the matters on appeal. Moreover, because mandate has not issued, the district court has not yet regained jurisdiction over the action. Consequently, the appeal notice should be treated by this court as a writ of mandamus so as to compel the district court to practice lawful exercise of its jurisdiction, thereby vacating its decision to dismiss Caltech as a defendant.

2. The Court of Appeal Should Grant Plaintiffs' Petition for Mandamus

In determining whether to grant a mandamus petition, the Court must look to the five objective principles put forth by *Bauman*: (1) the party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires; (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the district court's order is clearly

erroneous as a matter of law; (4) the district court's order is an oft-repeated error or manifests a persistent disregard of the federal rules; and (5) the district court's order raises new and important problems, or issues of law of first impression. *Bauman*, 557 F. 2d *at* 654-55 (citations omitted). Most of these factors weigh heavily in favor of treating this appeal as a petition for mandamus and ordering the district court to vacate its extra-jurisdictional order forthwith.

First, the remedy of the direct appeal is only available to plaintiffs if the court does not consider the motion to dismiss in isolation, but rather considers the effects of the motion to dismiss Caltech - which is to deny plaintiffs the preliminary injunction. If the court considers the motion as such, then the order for motion to dismiss is appealable. However, if the motion to dismiss is considered in isolation from its effects, then it is not an appealable order and plaintiffs are left with no remedy other than the writ.

Second, if Caltech is dismissed from the action, and the dismissal cannot be appealed until final judgment as to *all* defendants, plaintiffs would be irreparably damaged, as Caltech would not be subject to any injunction and would be allowed to continue with the investigations and background checks of all plaintiffs. Even if a court should later decide that the background checks are unconstitutional, the harm has been done because the plaintiffs will have already been forced to "choose between their jobs or their constitutional rights." *Nelson*, 2008 WL 2468884 *at* 12.

Third, as *Bauman* states, the district court's order is clearly erroneous as a matter of law. As described above, the district court did not have jurisdiction to hear Caltech's motion to dismiss because an appeal had already been filed in the Ninth Circuit. Moreover, a mere five days after the court of appeal issued its opinion stating that "preliminary injunctive relief should apply both to Caltech and to Federal Appellees," and that "Caltech's threat to terminate non-compliant employees is central to the harm Appellants face and creates the coercive environment in which they must choose between their jobs or their constitutional rights," the district issued an order granting Caltech's motion to dismiss, having the effect of undermining the Ninth Circuit's decision to grant the preliminary injunction. *Id.*[1] As a consequence, the actions of the district court are erroneous as a matter of law and the motion to dismiss should be vacated.

As to the last two considerations, while this case does not pose an oft-repeated error, it does pose a "significant problem for the judicial administration of this particular case" because the district court has issued an order that directly contradicts the court of appeals decision. *Special Investments Inc. v. Aero Air Inc.*, 360 F. 3d 989, 995 (9th Cir. 2004). Moreover, it is not necessary for all the *Bauman* guidelines to be met in order for the court to grant the writ.

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[1]This opinion was later withdrawn and an amended opinion was issued on June 20, 2008. *Nelson v. NASA*, 2008 WL 2468884 (9th Cir. 2008). The amended opinion's decision as to Caltech's status as an appropriate defendant remains unchanged.

Bauman, 557 F. 2d *at* 655. In fact, courts have looked primarily to the first three *Bauman* factors in determining whether to treat an appeal as a petition for writ of mandamus and to grant the petition. *Special Investments*, 360 F. 3d *at* 995. *See also Admiral Ins. Co. v. U.S. Dist. Court*, 881 F. 2d 1486 (9th Cir. 1989) (petitioner need not establish all five factors for a writ of mandamus to be granted).

For the foregoing reasons, the court of appeals should treat the notice of appeal as a petition for mandamus. Because the district court did not have jurisdiction to dismiss Caltech, the district court should be ordered to vacate its order dismissing Caltech. "[Since] the first three *Bauman* factors are fulfilled, we treat this appeal as a petition for writ of mandamus and grant the petition, directing the district court to vacate its order dismissing [defendant] Twin Commander." *Bauman*, 557 F.2d at 655.

C. The Court of Appeals Has Jurisdiction to Decide Whether it will Hear an Appeal of the Motion to Dismiss or Treat the Notice of Appeal as a Writ of Mandamus

The Ninth Circuit recognizes that an order can have the practical effect of granting or denying injunctive relief even though it does not necessarily refer to an injunction. Specifically, a motion to dismiss may constitute an appealable order where it has the effect of denying injunctive relief. *Victaulic Co. v. Tieman*, 499 F.3d 227 (3rd Cir. 2007) (dismissal of action while motion for preliminary injunction pending is properly appealed pursuant to Section 1291(a)(1).) That is, although in the instant case plaintiffs appeal from a motion to dismiss, because the motion has the practical effect of denying injunctive relief, it is arguably an appealable order. Thus, the Ninth Circuit does have appellate jurisdiction to entertain this appeal.

This rule has been modified somewhat by the Supreme Court's decision in *Carson v. American Brands, Inc.*, 450 U.S. 79, 101 S. Ct. 993, 67 L. Ed. 2d 59 (1981), in which the Supreme Court cautioned:

> For an interlocutory order to be immediately appealable under §1291(a)(1),... a litigant must show more than that the order has the practical effect of refusing an injunction. Because §1291(a)(1) was intended to carve out only a limited exception to the final-judgment rule, we have construed the statute narrowly to ensure that appeal as a right under §1291(a)(1) will be available only in circumstances where an appeal will further the statutory purpose of [permitting] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence. *Id.* at 84.

In the instant case, two panels of this circuit have now twice held that an immediate preliminary injunction be issued against Caltech, enjoining it from taking any action in furtherance of the background investigation being challenged on appeal by plaintiffs. *Nelson*, 506 F. 3d *at* 715. *See also Nelson v. NASA*, 2008 WL 2468884, * 12-13 (9th Cir. 2008). In

ordering preliminary injunctive relief on behalf of plaintiffs against Caltech (and other federal defendants), this court in both of these opinions found that plaintiffs would suffer irreparable injury if the injunction was not ordered. In the October 11, 2007 Order, the court held that the "balance of hardships tips sharply in favor of appellants because if appellants do not complete the questionnaires for non-sensitive positions and the waivers for release of information, they are scheduled to lose their jobs before the appeal will be heard." *Nelson*, 506 F. 3d *at* 716. The regular panel of the Ninth Circuit held that "preliminary injunctive relief should apply both to Caltech and to Federal Appellees," finding that "Caltech's threat to terminate non-compliant employees is central to the harm Appellees face and creates the coercive environment in which they must choose between their jobs or their constitutional rights." *Nelson*, 2008 WL 2468884, *12. The court further found that plaintiffs had established that they would suffer irreparable harm as they were faced with a "stark choice - either violation of their constitutional rights or loss of their jobs." *Id.* at *11.

The district court's decision to ignore the opinions of this court and to nonetheless release Caltech from the injunction by dismissing it from the suit before mandate has even issued from the January 11, 2008 opinion raises again the threat of irreparable harm to plaintiffs and the class they seek to represent, thereby warranting review from this court. Because the decision has the effect of denying injunctive relief, it may be treated as an appealable order by this court.

IV. Conclusion

Consequently, the court of appeals has jurisdiction to decide whether it will hear the appeal of the motion to dismiss or treat the notice of appeal as a writ of mandamus. Plaintiffs argue that the court should do what is most efficient in affording a speedy result to this problem so that plaintiffs are assured their right to injunctive relief against Caltech and all other named defendants.

Very truly yours,

Virginia Keeny
Attorney for Plaintiffs

cc: Mark Holscher, counsel for Caltech
Mark Stern, counsel for NASA and federal defendants

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Letter Brief dated July 3, 2008 in response to Ninth Circuit Court Order

on the person(s) indicated below, by delivering to as follows:

Mark Stern, Esq.**(1 Copy)**
Federal Programs Branch
U.S. Department of Justice, Civil Division
20 Massachusetts Avenue, N.W.
Washington, DC 20530
Telephone: (202) 514-4686/Facsimile: (202) 616-8470
Attorneys for Defendants 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

Mark Holscher, Esq. **(1 Copy)**
KIRKLAND & ELLIS, LLP
777 S. Figueroa Street, #3700
Los Angeles, California 90071
Telephone: (213) 680-8400/Facsimile: (213) 680-8500
Attorneys for Defendant CALIFORNIA INSTITUTE OF TECHNOLOGY

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