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16 **IN THE UNITED STATES DISTRICT COURT**
17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

18 **IN RE NATIONAL SECURITY**) MDL Docket No. 06-1791 VRW
19 **AGENCY TELECOMMUNICATIONS**)
20 **RECORDS LITIGATION**) **PLAINTIFFS' OPPOSITION TO**
This Document Relates Solely To:) **DEFENDANTS' MOTION FOR STAY**
21 *Al-Haramain Islamic Foundation, Inc., et al.*) **PENDING APPEAL AND FOR**
v. Obama, et al. (C07-CV-0109-VRW)) **CERTIFICATION OF AN**
22 **AL-HARAMAIN ISLAMIC**) **INTERLOCUTORY APPEAL**
FOUNDATION, INC., et al.,) **PURSUANT TO 28 U.S.C. § 1292(b)**
23)
24 Plaintiffs,) Date: April 9, 2009
vs.) Time: 2:30 p.m.
25 **BARACK H. OBAMA, President of the**) Courtroom: Courtroom 6, 17th Floor
United States, et al.,) Honorable Vaughn R. Walker
26)
27 Defendants.)

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11 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE
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INTRODUCTION

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2 Currently pending before this Court is a motion by defendants requesting (1) certification of
3 an interlocutory appeal, pursuant to 28 U.S.C. section 1292(b), of this Court's order of January 5,
4 2009, and (2) a stay pending appeal of that order. This Court should deny the motion in both its
5 aspects.

6 With regard to the request to certify an interlocutory appeal: The issue on which defendants
7 seek interlocutory appellate review – whether FISA preempts the state secrets privilege – was decided
8 in this Court's order of July 2, 2008, not in the order of January 5, 2009. That issue cannot be
9 reviewed on an interlocutory appeal of the January 5, 2009 order, for lack of appellate jurisdiction over
10 the issue. The FISA preemption ruling might have been reviewable on an interlocutory appeal of the
11 July 2, 2008 order, but with seven months now having passed without defendants requesting
12 certification of that order for appeal, the time for them to do so is long past. Defendants have not
13 asked for certification on any of the issues decided in the January 5, 2009 order – which is
14 understandable, because nothing in that order merits certification of an interlocutory appeal.

15 With regard to the request for a stay pending appeal: That request is based solely on
16 defendants' purported direct appeal filed on January 16, 2009. This Court has determined, however,
17 that the January 16, 2009 notice of appeal is a nullity, which means there is no valid appeal on which
18 a stay pending appeal could be based. Even if the Court were to certify an interlocutory appeal from
19 the January 5, 2009 order, no stay should issue with regard to such appeal, because the transfer of
20 jurisdiction from this Court to the Court of Appeals that would occur upon the perfection of an
21 interlocutory appeal would prevent any possibility of the injury that defendants claim might occur
22 absent a stay.

ARGUMENT

I. THE COURT SHOULD DENY DEFENDANTS' REQUEST TO CERTIFY AN INTERLOCUTORY APPEAL FROM THE ORDER OF JANUARY 5, 2009 BECAUSE THE ISSUE ON WHICH DEFENDANTS SEEK CERTIFICATION – FISA PREEMPTION – WAS DECIDED IN THE ORDER OF JULY 2, 2008.

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27 We begin by addressing the portion of defendants' motion requesting certification of an
28 interlocutory appeal from the Court's order of January 5, 2009. This Court should deny the request

1 for the simple reason that defendants do not seek interlocutory review of an issue decided in the
2 January 5, 2009 order. Rather, they seek review of an issue this Court decided in its order of July 2,
3 2008 – whether FISA preempts the state secrets privilege.

4 Defendants’ motion plainly states that their sole reason for requesting certification of the
5 January 5, 2009 order for an interlocutory appeal is to obtain immediate appellate review of the
6 question “[w]hether the case should now proceed under the FISA on the ground that it *preempts the*
7 *state secrets privilege.*” Defs.’ Motion at 15, Doc. #60 at 22 (emphasis added); *see also* Doc. #67 at
8 22 (defense counsel’s argument at case management conference of January 23, 2009 for certification
9 under section 1292(b) on “the issue of FISA preemption”). But this Court decided the FISA
10 preemption issue more than seven months ago in a different order – the order of July 2, 2008. The
11 FISA preemption ruling in the July 2, 2008 order could not be plainer: “[T]he [C]ourt has determined
12 that . . . FISA preempts the state secrets privilege in connection with electronic surveillance for
13 intelligence purposes and would appear to displace the state secrets privilege for purposes of plaintiffs’
14 claims.” *In re National Security Agency Telecommunications Records Litigation*, 564 F.Supp.2d 1109,
15 1111 (N.D. Cal. 2008). That is *not* the order on which defendants now request certification under
16 section 1292(b), and it is not subject to appellate review on an interlocutory appeal of the order of
17 January 5, 2009.

18 An interlocutory appeal under section 1292(b) “is from the *certified order*, not from any other
19 orders that may be have been entered in the case.” *United States v. Stanley*, 483 U.S. 669, 677 (1987)
20 (emphasis in original). Appellate jurisdiction under section 1292(b) is “confined to the particular
21 order appealed from.” *Id.* “Commentators and courts have consistently observed that ‘the scope of
22 the issues open to the court of appeals is closely limited to the order appealed from [and] [t]he court
23 of appeals will not consider matters that were ruled upon in other orders.’” *Id.* (quoting 16 C. WRIGHT,
24 A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 3929, p. 143 (1977)).
25 “The court of appeals may not reach beyond the certified order to address other orders made in the
26 case.” *Yamaha Motor Corporation v. Calhoun*, 516 U.S. 199, 205 (1996).

27 Thus, for example, in *Durkin v. Shea & Gould*, 92 F.3d 1510 (9th Cir. 1996), the Ninth Circuit
28 dismissed an interlocutory appeal from an order issued on July 12, 1994, which denied a motion for

1 summary judgment based on collateral estoppel, because the arguments asserted on the appeal –
2 pertaining to claims of breach of fiduciary duty and fraudulent transfers – had been addressed by the
3 district court in *different orders* – e.g., an order issued on February 24, 1993 declining to dismiss the
4 fraudulent transfer claims. *Id.* at 1514 & n. 9. As the Ninth Circuit put it: “The fiduciary duty and
5 fraudulent transfer claims are the subject of district court orders *that are not before us.*” *Id.* (emphasis
6 added). Consequently, said the court, “we lack jurisdiction to consider the . . . arguments concerning
7 the fiduciary duty and fraudulent transfer claims.” *Id.* The appeal had to be dismissed “for lack of
8 appellate jurisdiction.” *Id.* at 1515.

9 Were this Court to certify its order of January 5, 2009 for an interlocutory appeal under section
10 1292(b), the result would be the same as in *Durkin*: The Court of Appeals would have to reject the
11 attempted appeal for lack of appellate jurisdiction, because the sole issue on which defendants seek
12 interlocutory appellate review – FISA preemption – was decided by this Court in a *different order* –
13 the order of July 2, 2008. This Court should not certify an interlocutory appeal where appellate
14 jurisdiction would be absent.

15 During the case management conference of January 23, 2009, defense counsel argued that the
16 order of January 5, 2009 “is reasonably and clearly read to incorporate the Court’s holding of the July
17 2nd Order that FISA preempts the privilege. In fact, you specifically refer to it . . .” Doc. #67 at 18.
18 A similar argument appeared – and was quashed – in *Durkin*, which said “we reject [appellant’s]
19 contention at oral argument that the district court’s earlier order (declining to dismiss *Durkin*’s
20 fraudulent transfer claims) was somehow certified for appeal because the July 12, 1994 Order contains
21 a passing reference to the earlier order.” *Durkin*, 92 F.3d at 1515, n. 12. Here, similar to *Durkin*, the
22 order on which defendants seek interlocutory appellate review – the order of January 5, 2009 – did not
23 revisit, but merely recounted, the FISA preemption ruling in the order of July 2, 2008. *See* Order of
24 Jan. 5, 2009, Doc. #57 at 1 (“This court entertained briefing and held a hearing on that issue and, on
25 July 2, 2008, issued a ruling that . . . FISA preempts the state secrets privilege in connection with
26 electronic surveillance for intelligence purposes and would appear to displace the state secrets privilege
27 for purposes of plaintiffs’ claims”), 11 (“Defendants’ stance does not acknowledge the court’s ruling
28 in the July 2, 2008 order that FISA ‘preempts’ or displaces the SSP for matters within its purview”).

1 This Court's January 5, 2009 order does not, as defendants claim, "incorporate" the prior FISA
2 preemption ruling, but merely mentions that ruling in reciting this case's multi-faceted procedural
3 history. The Court's FISA preemption ruling occurred on July 2, 2008, not January 5, 2009. That
4 ruling would not be subject to appellate review on certification of the January 5, 2009 order for an
5 interlocutory appeal. Given that defendants have requested certification *only* on the issue of FISA
6 preemption, such certification would be a futile gesture, due to the absence of appellate jurisdiction
7 to review that issue.

8 **II. NOTHING IN THE JANUARY 5, 2009 ORDER MERITS CERTIFICATION OF AN**
9 **INTERLOCUTORY APPEAL.**

10 Defendants have *not* asked this Court to certify the January 5, 2009 order for an interlocutory
11 appeal on any of the issues decided in that order – e.g., the standard for determining "aggrieved
12 person" status under 50 U.S.C. section 1806(f), the question whether plaintiffs have met that standard,
13 the matter of security clearances for plaintiffs' counsel, and the requirement that defendants determine
14 whether to declassify any of the sealed or classified submissions in this case. Plainly, defendants do
15 not believe that any of those issues merit certification of an interlocutory appeal.

16 On that score, defendants are right. Section 1292(b) is "to be used only in exceptional
17 situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation."
18 *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1982). An immediate appeal must
19 "materially advance the ultimate termination of the litigation." *Id.* Here, an immediate appeal would
20 have precisely the opposite effect, by stalling the case for yet another year or so while the parties pay
21 a second interlocutory visit to the Ninth Circuit. The salient tactic of the Bush Administration
22 throughout this case has been, with rare exception, *delay*. The pending motion – filed 64 minutes
23 before the end of the last day of the Bush presidency – is consistent with that tactic. The motion was
24 intended to *create* rather than avoid "protracted and expensive litigation" and to *delay* rather than
25 advance "the ultimate termination of the litigation." *Id.* This Court should recognize this latest (and,
26 it is to be hoped, last) delaying tactic as such and reject it accordingly.

27 The pending motion poses the danger this Court noted during the case management conference
28 of January 23, 2009 – of "postponing the steps and postponing one after the other, and pretty soon, a

1 tremendous amount of time has passed.” Doc. #67 at 33. Indeed, a tremendous amount of time (now
2 coming on three years) has *already* passed since the inception of this case, without even an answer by
3 defendants yet on file – a testament to the ability of a powerful litigant like the federal government to
4 impede the timely administration of justice. This case should now move forward expeditiously, with
5 no further stalling tactics.

6 **III. IT IS TOO LATE FOR A REQUEST TO CERTIFY AN INTERLOCUTORY APPEAL**
7 **FROM THE ORDER OF JULY 2, 2008.**

8 In their third dismissal motion, defendants indicated that they might subsequently request
9 certification of an interlocutory appeal under section 1292(b), but they did not request such
10 certification with regard to the order of July 2, 2008. Even now, more than seven months after the
11 FISA preemption ruling, defendants still have not asked this Court to certify an interlocutory appeal
12 from that order. The pending certification request is plainly directed only to the order of January 5,
13 2009.

14 We anticipate, however, that in reply to this opposition memorandum defendants might ask this
15 Court to treat their motion as a request to certify the order they are actually seeking to appeal – the
16 order of July 2, 2008. Any such request, however, should be denied for the reason we previously noted
17 in our opposition to defendants’ third dismissal motion – the request would be untimely. Although
18 section 1292(b) does not prescribe a time limit for requesting a district judge to certify an appeal under
19 section 1292(b), the judge “should not grant an inexcusably dilatory request.” *Richardson Electronics,*
20 *Ltd. v. Panache Broadcasting of Pennsylvania, Inc.*, 202 F.3d 957, 958 (7th Cir. 2000). Any delay in
21 making the request ““must be reasonable.”” *Century Pacific, Inc. v. Hilton Hotels Corp.*, 2008 WL
22 2276701, *2 (S.D.N.Y. 2008) (quoting *Morris v. Flaig*, 511 F.Supp.2d 282, 314 (E.D.N.Y. 2007)).
23 Courts have found unexplained delays of two to five months to be unreasonable. *See, e.g., Richardson*
24 *Electronics, supra*, 202 F.3d at 958 (two months); *Weir v. Probst*, 915 F.2d 283, 287 (7th Cir. 1990)
25 (five months); *Century Pacific, supra*, 2008 WL at 2276701, *2 (“almost four months”); *Green v. City*
26 *of New York*, 2006 WL 3335051, *2 (E.D.N.Y. 2006) (“more than two month[s]”); *Ferraro v.*
27 *Secretary of HHS*, 780 F.Supp. 978, 979 (E.D.N.Y. 1992) (“nearly two and a half months”). With

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1 seven months of delay now upon us, the time is long past for defendants to request certification of the
2 July 2, 2008 order for an interlocutory appeal.

3 During the case management conference of January 23, 2009, defense counsel argued that this
4 Court's "discussion of the [FISA] preemption issue" in the July 2, 2008 order "was – shall we say –
5 dicta, because you dismissed the case without prejudice, and, in effect, at that moment in time, the
6 Government won." Doc. #67 at 18. If defense counsel meant to suggest that defendants could not
7 have sought certification of the July 2, 2008 order for an interlocutory appeal on the FISA preemption
8 issue because they were the prevailing parties at that point and thus had no standing to file an appeal
9 challenging a dictum in a decision that they had won, then defense counsel was wrong, for multiple
10 reasons.

11 First, the July 2, 2008 ruling on FISA preemption was *not* a dictum. A statement in a judicial
12 decision is a dictum if it is "unnecessary to the decision." *The Cetacean Community v. Bush*, 386 F.3d
13 1169, 1173 (9th Cir. 2004). This Court's July 2, 2008 ruling on FISA preemption was necessary to
14 the Court's decision to allow plaintiffs to file an amended complaint, *see In re National Security*
15 *Agency Telecommunications Records Litigation*, 564 F.Supp.2d at 1137, which the Court could not
16 have permitted absent FISA preemption. As such, it was a ruling adverse to defendants, even though
17 defendants had "prevailed" in the July 2, 2008 order to the extent it dismissed the case without
18 prejudice. The Ninth Circuit has recognized that a prevailing party has standing to appeal an adverse
19 ruling in an otherwise favorable order "[i]f the adverse ruling can serve as the basis for collateral
20 estoppel in subsequent litigation." *Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 520 (9th Cir.
21 1999); *accord, Environmental Protection Information Center, Inc. v. Pacific Lumber Company*, 257
22 F.3d 1071, 1076 (9th Cir. 2001). This Court's July 2, 2008 ruling on FISA preemption can serve as
23 the basis for collateral estoppel in the "delisting" lawsuit by plaintiff Al-Haramain Islamic Foundation,
24 Inc. now pending in the Oregon district court, which challenges Al-Haramain's designation as a
25 Specially Designated Global Terrorist organization. *See Al-Haramain Islamic Foundation, Inc. v.*
26 *United States Dept. of Treasury, et al.*, Civ. Case No. 07-CV-1155-KI (D. Ore). Defendants thus had
27 standing to seek an interlocutory appeal of that ruling in an attempt to prevent collateral estoppel.

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1 Second, even if the July 2, 2008 FISA preemption ruling *were* a dictum, defendants still would
2 have had standing to seek an interlocutory appeal of the ruling, on two different theories: One theory
3 is based on the rule that a prevailing party has standing to seek appellate “reformation” of a favorable
4 district court judgment (other than review on the merits of the judgment) as to a discussion within the
5 opinion that is “immaterial to the disposition of the cause” but establishes “rights or liabilities” of the
6 parties. *Environmental Protection Information Center*, 257 F.3d at 1075; see *Electrical Fittings*
7 *Corporation v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939.) If the July 2, 2008 FISA preemption
8 ruling were a dictum, then it was immaterial to the disposition of the cause, yet it established a right
9 of the plaintiffs – the right to file an amended complaint in an attempt to invoke 50 U.S.C. section
10 1806(f) despite the state secrets privilege – thus giving defendants standing to seek appellate
11 reformation of the ruling. Another theory is based on the rule that a prevailing party has standing to
12 seek appellate review of a dictum where the district court lacked Article III jurisdiction. See
13 *Environmental Protection Information Center*, 257 F.3d at 1077. If defendants thought the July 2,
14 2008 FISA preemption discussion was a dictum, they certainly also thought this Court lacked Article
15 III jurisdiction entirely, and thus they could have sought interlocutory appellate review on that theory.

16 Either way – whether or not this Court’s FISA preemption ruling was a dictum – defendants
17 could have, but have not, sought interlocutory appellate review of that ruling.

18 **IV. DEFENDANTS’ MOTION FOR A STAY PENDING THEIR APPEAL FILED ON**
19 **JANUARY 16, 2009 IS MOOTED BY THIS COURT’S HOLDING THAT THE**
20 **APPEAL IS A NULLITY.**

21 We turn now to the portion of defendants’ motion requesting a “stay pending appeal.” That
22 request is expressly based solely on defendants’ purported direct appeal filed on January 16, 2009 from
23 this Court’s order of January 5, 2009. See Defs.’ Memo. at 1, Doc. #60 at 8 (“On January 16, 2009,
24 the Government noticed an appeal of the Court’s January 2009 order. [Citation.] The Government now
25 respectfully moves for a stay pending disposition of *this appeal*.” (emphasis added)). This Court,
26 however, determined at the case management conference of January 23, 2009 that the January 16, 2009
27 notice of appeal *is a nullity* because the January 5, 2009 order is not directly appealable. See Doc. #67
28 at 41. That determination moots defendants’ stay request, for there is no valid appeal on which a stay

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1 pending appeal could be based. There could be a stay pending appeal only if this Court were to grant
2 the portion of defendants' motion requesting certification of an interlocutory appeal.

3 **V. EVEN IF THE COURT CERTIFIES AN INTERLOCUTORY APPEAL, NO STAY**
4 **SHOULD ISSUE.**

5 Defendants have *not* requested a stay pending appeal if this Court were to certify an
6 interlocutory appeal of the January 5, 2009 order. We nevertheless address, for the Court's assistance,
7 the question whether the Court should issue such a stay if the Court certifies an interlocutory appeal
8 from that order (which, of course, we oppose).

9 The procedural context of this question is as follows: If this Court certifies an interlocutory
10 appeal, defendants then must timely file in the Court of Appeals a petition for permission to appeal
11 under Rule 5 of the Federal Rules of Appellate Procedure. If the appellate court grants the petition,
12 jurisdiction over the issues addressed in the January 5, 2009 order is transferred from this Court to the
13 Court of Appeals, as of the moment the petition is granted. *City of Los Angeles, Harbor Division v.*
14 *Santa Monica Baykeeper*, 254 F.3d 882, 885-86 (9th Cir. 2001). Until then, however, this Court
15 retains jurisdiction to reconsider or modify its January 5, 2009 order. *Id.* at 886. And even upon a
16 transfer of jurisdiction to the Court of Appeals, this Court would still retain jurisdiction, absent a stay,
17 to enforce the provisions of the January 5, 2009 order requiring defendants to process security
18 clearance applications and to consider possible declassification. *See Lara v. Secretary of Interior of*
19 *U.S.*, 820 F.2d 1535, 1543 (9th Cir. 1987). Thus, the precise question here is whether – if this Court
20 certifies an interlocutory appeal from the January 5, 2009 order – the Court should stay enforcement
21 of the order's provisions (1) pending the Ninth Circuit's decision whether to permit the appeal, and
22 (2) thereafter, if such permission is granted. The answer on both counts should be *no*.

23 To obtain a stay pending a proposed interlocutory appeal, the moving party must show both
24 “a probability of success on the merits” of the appeal and “the possibility of irreparable injury” absent
25 a stay. *Artukovic v. Rison*, 784 F.2d 1354, 1355 (9th Cir. 1986). The weaker the showing on the
26 probability of success, the stronger the showing of irreparable injury must be. *Dr. Seuss Enterprises,*
27 *LP v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1397, n. 1 (9th Cir. 1997). Here, defendants make
28 no effort at all to demonstrate a probability of success on the merits of an interlocutory appeal.

1 Defendants merely argue that the issue of FISA's preemption of the state secrets privilege, which was
2 not even decided in the order they seek to appeal, is an important issue of "constitutional dimension,"
3 Defs.' Memo. at 8, Doc. #60 at 15, even though this Court has already rejected defendants' arguments
4 regarding the purported "constitutional dimension" of the state secrets privilege, *see In re National*
5 *Security Agency Telecommunications Records Litigation*, 564 F.Supp.2d at 1120-24. Having utterly
6 failed to demonstrate the requisite probability of success, defendants bear a very heavy burden of
7 demonstrating a possibility of irreparable injury. They have shown no such possibility at all.

8 Defendants assert a threat of "irreparable harm" from two aspects of the January 5, 2009 order
9 – the Court's decision to proceed with an adjudication whether plaintiffs were subjected to unlawful
10 electronic surveillance and thus have Article III standing, and the Court's decision that plaintiffs'
11 counsel should obtain security clearances so that they may have essential access to classified
12 information. *See* Defs.' Motion at 7, Doc. #60 at 14. According to defendants, without a stay of the
13 standing adjudication, the Nation's security will be irreparably harmed by a disclosure to "plaintiffs
14 and the public at large" as to whether "certain individuals" were "subject to surveillance." Defs.'
15 Motion at 9-10, Doc. #60 at 16-17. Further, according to defendants, without a stay of the security
16 clearances, the Nation's security will be irreparably harmed by "disclosure" of classified information
17 to plaintiffs' counsel (never mind that they have already seen the Sealed Document itself, making
18 defendants' use of the word "disclosure" in this context more than a little ironic). Defs.' Motion at
19 11-12, Doc. #60 at 18-19.

20 But if this Court were to certify, and the Court of Appeals were to permit, an interlocutory
21 appeal of the January 5, 2009 order, *neither* of those purported harms could occur, because of the
22 consequent transfer of jurisdiction from this Court to the Court of Appeals. During the pendency of
23 the interlocutory appeal, this Court would lack jurisdiction to adjudicate plaintiffs' Article III standing
24 or to disclose any classified information to plaintiffs, because both of those matters would be embraced
25 in the transfer of jurisdiction. The very pendency of the interlocutory appeal would prevent the
26 "irreparable harm" that defendants assert. There would be no need for a stay.

27 The only way the purported "irreparable harm" could occur would be if this Court were to
28 certify an interlocutory appeal but then proceed so rapidly with a disclosure to plaintiffs' counsel and

1 an adjudication of Article III standing that the Court of Appeals would not have enough time to grant
2 permission to appeal and deprive this Court of jurisdiction to proceed. This Court, however, has made
3 clear that there is no danger of premature disclosure to plaintiffs' counsel, having assured defense
4 counsel during the case management conference of January 23, 2009 that the Sealed Document will
5 not be reviewed by plaintiffs' counsel prior to the security clearance determinations, after which the
6 Court will "evaluate what to do in the next step." Doc. #67 at 33-34. Further, the Court can – and the
7 January 5, 2009 order gives ample assurance that the Court will – employ the security measures
8 authorized by section 1806(f) to prevent any damaging disclosure to the public at large. *See* Doc. #57
9 at 23. And plaintiffs' proposal in their case management statement for the sequence of briefing on the
10 adjudication of Article III standing contemplates that such adjudication will occur no sooner than May
11 of 2009, Doc. #64 at 8, which gives ample time for the Court of Appeals to transfer jurisdiction before
12 that can happen. There is no threat of any "harm" at all, irreparable or not – and thus there is no need
13 for a stay pending a decision by the Court of Appeals whether to permit a certified interlocutory
14 appeal.

15 Nor would there be any need for a stay of enforcement of the January 5, 2009 order if the Court
16 of Appeals were to permit a certified interlocutory appeal. All that could be enforced during the
17 pendency of the appeal would be the provisions of the January 5, 2009 order requiring the processing
18 of security clearance applications by February 13, 2009, and requiring defendants to review the Sealed
19 Document and their classified submissions for possible declassification and to report to the Court by
20 February 19, 2009. *See* Doc. #57 at 24-25. Those events almost certainly will have occurred by the
21 time an interlocutory appeal were perfected, and even if they had not yet occurred there would be no
22 need for a stay because there would be no threat of any harm. The mere grant of security clearances
23 would not in itself result in any disclosure, and any declassification would make consequent disclosure
24 voluntary on defendants' part and thus nothing for them to complain about.^{1/}

25 _____
26 ^{1/} Plaintiffs do acknowledge, however, that new personnel at the Department of Justice may
27 need more time to review the Sealed Document and classified submissions for possible
28 declassification (with redactions, as appropriate), and plaintiffs are willing to stipulate to an
appropriate extension of the deadline for defendants to report to the Court on such declassification.

1 To summarize: If this Court denies certification of an interlocutory appeal, defendants' request
2 for a stay pending appeal will be wholly moot, for want of a valid direct appeal or a certified
3 interlocutory appeal. If the Court were to grant such certification, there would be no need for the Court
4 to issue a stay – either during the pendency of a motion in the Ninth Circuit for permission to appeal,
5 or thereafter if permission were granted – because there would be no danger of this Court disclosing
6 classified information to plaintiffs' counsel and the public at large or adjudicating plaintiffs' Article
7 III standing during proceedings in the Ninth Circuit.

8 **CONCLUSION**

9 For the foregoing reasons, this Court should deny defendants' requests to certify an
10 interlocutory appeal pursuant to 28 U.S.C. section 1292(b) and for a stay pending appeal.

11 DATED this 6th day of February, 2009.

12
13 /s/ Jon B. Eisenberg

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