

1 Mark Holscher (S.B.N. 139582)  
R. Alexander Pilmer (S.B.N. 166196)  
2 Mark T. Cramer (S.B.N. 198952)  
KIRKLAND & ELLIS LLP  
3 777 South Figueroa Street  
Los Angeles, California 90017  
4 Telephone: (213) 680-8400  
Facsimile: (213) 680-8500  
5 E-mail: mholscher@kirkland.com  
E-mail: apilmer@kirkland.com  
6 E-mail: mcramer@kirkland.com

7 Attorneys for Defendant  
California Institute of Technology  
8

9 UNITED STATES DISTRICT COURT  
10 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
11 WESTERN DIVISION  
12

13 Robert M. Nelson, William Bruce ) Case No. CV-07-05669 ODW (VBKx)  
Banerdt, Julia Bell, Josette Bellan, )  
14 Dennis V. Byrnes, George Carlisle, Kent )  
Robert Crossin, Larry R. D'Addario, ) **CALTECH'S MOTION TO DISMISS**  
15 Riley M. Duren, Peter R. Eisenhardt, ) **FIRST AMENDED COMPLAINT**  
Susan D.J. Foster, Matthew P. ) **FOR INJUNCTIVE AND**  
16 Golombek, Varoujan Gorjian, Zareh ) **DECLARATORY RELIEF**  
Gorjian, Robert J. Haw, James Kulleck, ) **PURSUANT TO RULE 12(B)(6)**  
17 Sharon L. Laubach, Christian A. )  
Lindensmith, Amanda Mainzer, Scott )  
18 Maxwell, Timothy P. McElrath, Susan )  
Paradise, Konstantin Penanen, Celeste M. )  
19 Satter, Peter M.B. Shames, Amy Snyder )  
Hale, William John Walker and Paul R. )  
20 Weissman, )  
21 Plaintiffs, )  
22 vs. )  
23 National Aeronautics and Space )  
Administration, an Agency of the United )  
24 States; Michael Griffin, Director of )  
NASA, in his official capacity only; )  
25 Department of Commerce; Carlos M. )  
Gutierrez, Secretary of Commerce, in his )  
26 official capacity only; California Institute )  
of Technology; and Does 1-100, )  
27 Defendants. )  
28

Complaint Filed: August 30, 2007

Date: January 7, 2008

Time: 1:30 p.m.

Courtroom: 11

Judge Otis D. Wright, II

TABLE OF CONTENTS

Page

INTRODUCTION.....1

FACTUAL BACKGROUND .....2

ARGUMENT .....4

I. PLAINTIFFS’ ADMINISTRATIVE PROCEDURE ACT CLAIM SHOULD BE DISMISSED BECAUSE CALTECH IS NOT A FEDERAL AGENCY.....5

II. PLAINTIFFS’ FEDERAL CONSTITUTION CLAIMS SHOULD BE DISMISSED AGAINST CALTECH BECAUSE CALTECH IS NOT A STATE ACTOR.....5

    A. A Private Entity Like Caltech Is Not A Government Actor When It Follows Federal Law. ....6

    B. Plaintiffs’ Allegations Establish That Caltech Is *Not* A Willful Participant In A Joint Activity With The Government. ....9

    C. Caltech Does Not Determine Employee Suitability.....12

III. PLAINTIFFS’ CALIFORNIA CONSTITUTION CLAIM SHOULD BE DISMISSED BECAUSE THE CLAIM IS PREEMPTED BY FEDERAL LAW AND CALTECH IS NOT ENGAGING IN THE CHALLENGED CONDUCT, IN ANY EVENT.....13

    A. Federal Law Preempts State Law Where, As Here, There Is A Uniquely Federal Interest And The State Law Either Conflicts Or Interferes With That Federal Interest. ....13

        1. NASA And The Federal Government Have A Unique Interest In The Security Of NASA Facilities. ....14

        2. As Alleged In the First Amended Complaint, California Law Would Conflict With NASA’s Directives And Frustrate The Federal Interest In Uniform Security Measures In NASA Facilities. ....15

    B. The California Constitution Does Not Apply To Caltech Because The Challenged Conduct Is The Federal Government’s Conduct. ....17

CONCLUSION .....19

## TABLE OF AUTHORITIES

Page(s)

### CASES

1		
2		
3	<b>CASES</b>	
4	<i>Am. Title Ins. v. Lacelaw Corp.</i> ,	
5	861 F.2d 224 (9th Cir. 1988) .....	8
6	<i>Boggs v. Boggs</i> ,	
7	520 U.S. 833 (1997).....	15
8	<i>Boyle v. United Techs. Corp.</i> ,	
9	487 U.S. 500 (1988).....	14, 15
10	<i>Branch v. Tunnell</i> ,	
11	14 F.3d 449 (9th Cir. 1994) .....	2
12	<i>English v. Gen. Elec. Co.</i> ,	
13	496 U.S. 72 (1990).....	14
14	<i>Fidelity Fed. Sav. &amp; Loan Ass'n v. de la Cuesta</i> ,	
15	458 U.S. 141 (1982).....	14
16	<i>Flagg Bros., Inc., v. Brooks</i> ,	
17	436 U.S. 149 (1978).....	5
18	<i>Gartrell Constr. Inc. v. Aubry</i> ,	
19	940 F.2d 437 (9th Cir. 1991) .....	16
20	<i>George v. Pacific-CSC Work Furlough</i> ,	
21	91 F. 3d 1227 (9th Cir. 1996) .....	7, 8, 9
22	<i>Goodyear Atomic Corp. v. Miller</i> ,	
23	486 U.S. 174 (1988).....	14, 17
24	<i>Gospel Missions of Am. v. Los Angeles</i> ,	
25	328 F.3d 548 (9th Cir. 2003) .....	8
26	<i>Hancock v. Train</i> ,	
27	426 U.S. 167 (1976).....	17
28	<i>Hill v. Nat'l Collegiate Athletic Ass'n</i> ,	
	7 Cal. 4th 1 (1994) .....	18
	<i>Hines v. Davidowitz</i> ,	
	312 U.S. 52 (1941).....	15
	<i>In re Calpine Corp. Secs. Litig.</i> ,	
	288 F. Supp. 2d 1054 (N.D. Cal. 2003).....	5
	<i>In re VeriFone Secs. Litig.</i> ,	
	11 F.3d 865 (9th Cir. 1993) .....	4

**TABLE OF AUTHORITIES (CONT'D)**

		Page(s)
1		
2	<i>Jones v. Kmart Corp.</i> ,	
3	17 Cal. 4th 329 (Cal. 1998).....	18
4	<i>Leslie Miller, Inc. v. Arkansas</i> ,	
5	352 U.S. 187 (1956).....	16
6	<i>Lugar v. Edmondson Oil Co.</i> ,	
7	457 U.S. 922 (1982).....	5, 6, 7, 8
8	<i>McCauley v. Computer Aid Inc.</i> ,	
9	447 F. Supp. 2d 469 (E.D. Penn. 2006).....	7
10	<i>Mishler v. Clift</i> ,	
11	191 F.3d 998 (9th Cir. 1999) .....	2
12	<i>Plevy v. Haggerty</i> ,	
13	38 F. Supp. 2d 816 (C.D. Cal.1998) .....	2
14	<i>Sprewell v. Golden State Warriors</i> ,	
15	266 F.3d 979 (9th Cir. 2001) .....	4, 11
16	<i>Sutton v. Providence St. Joseph Med. Ctr.</i> ,	
17	192 F.3d 826 (9th Cir. 1999) .....	6, 7, 8, 9
18	<i>U.S. Postal Serv. v. Greenwich, Conn.</i> ,	
19	901 F. Supp. 500 (D. Conn. 1995) .....	16
20	<i>United States v. Virginia</i> ,	
21	972 F. Supp. 1008 (E.D. Va. 1997) .....	17
22	<i>W. State Univ. v. Am. Bar Ass'n</i> ,	
23	301 F. Supp. 2d 1129 (C.D. Cal. 2004) .....	5
24	<b>STATUTES</b>	
25	42 U.S.C. § 2455(a).....	14
26	5 U.S.C. § 701(b)(1).....	5
27	5 U.S.C. § 702 .....	5
28	Fed. R. Evid. 201(b).....	4

1 **INTRODUCTION**

2 Plaintiffs' suit against the California Institute of Technology ("Caltech") is  
3 directed to the wrong party—and Plaintiffs seem to know it. In just the first paragraph  
4 of their amended complaint, Plaintiffs allege that "they bring this action . . . to  
5 challenge *NASA's* requirement;" that the background investigation is "action by  
6 *NASA*;" and that "*NASA's* action violates" Plaintiffs' alleged constitutional rights.  
7 *See* FAC ¶ 1.<sup>1</sup> There are no comparable allegations against Caltech. Moreover, as  
8 Plaintiffs previously acknowledged to this Court, "an order enjoining *NASA* . . .  
9 would sufficiently . . . protect the plaintiffs' rights." *See* Request for Judicial Notice  
10 ("Judicial Not.") Ex. 4 at 1 (Plaintiffs' Reply to [Caltech's] Opposition to Motion for  
11 Preliminary Injunction).

12 Caltech's motion to dismiss should be granted for the following reasons:

13 ***First***, Plaintiffs' Administrative Procedure Act claim against Caltech fails  
14 because Caltech is not a federal agency subject to the requirements of that act.

15 ***Second***, Plaintiffs' federal Constitution claims against Caltech fail because  
16 Plaintiffs do not adequately allege that Caltech is engaging in government action.  
17 Moreover, Plaintiffs have made a number of judicial statements which preclude any  
18 finding that Caltech is a government actor. Caltech is a private entity and cannot be  
19 liable for the alleged constitutional violations, even if Plaintiffs could state a claim  
20 against the federal government defendants.

21 ***Third***, Plaintiffs' California state constitution claim against Caltech fails  
22 because it is preempted by federal law. Caltech cannot be subject to state laws that  
23 conflict with the federal regulations Caltech is obligated to follow in connection with  
24 its operation of a NASA facility.

25  
26  
27 

---

<sup>1</sup> All emphasis in this brief is supplied by Caltech unless otherwise noted.  
28

1 **FACTUAL BACKGROUND**

2 For purposes of this motion, Caltech assumes—as it must—the truth of the facts  
3 alleged in Plaintiffs’ First Amended Complaint (“FAC”) as well as those facts  
4 incorporated by reference into the FAC or subject to judicial notice.

5 Caltech is a non-profit educational institution. It operates the Jet Propulsion  
6 Laboratory (“JPL”) pursuant to a written contract as a NASA Federally Funded  
7 Research and Development Center. FAC ¶¶ 33, 37. JPL’s physical facilities are  
8 owned by NASA, which is a federal agency. *Id.* ¶ 31, 33, 37.

9 Plaintiffs admit that “the crux of this litigation is a dispute between [Plaintiffs],  
10 and the government....” *See* Judicial Not. Ex. 5 at 1 (Appellants’ Opening Brief).  
11 Indeed, Plaintiffs’ request for injunctive relief “is primarily addressed to the federal  
12 government, which is mandating and implementing the background investigation  
13 process.” Judicial Not. Ex. 4 at 1 (Reply Brief). Plaintiffs acknowledge that “an order  
14 enjoining *NASA* from continuing to require SF 85 and the investigation until a full  
15 hearing may be had, would sufficiently maintain the status quo and protect the  
16 plaintiffs’ rights.” *Id.*

17 NASA, not Caltech, requires that JPL employees obtain new access badges.  
18 *See* FAC ¶ 1. This requirement comes from a May 24, 2007 NASA Interim Directive  
19 (“NASA Interim Directive”) establishing a new “Agency-wide policy for the creation  
20 and issuance of federal credentials at NASA.” *Id.* ¶ 43.<sup>2</sup> The NASA directive

21  
22 <sup>2</sup> Plaintiffs refer to NASA Interim Directive in their complaint. *See* FAC ¶ 43.  
23 The Court is thus entitled to consider the entirety of this directive on a motion to  
24 dismiss under the incorporation by reference doctrine. *See Branch v. Tunnell*, 14  
25 F.3d 449, 453 (9th Cir. 1994); *Mishler v. Clift*, 191 F.3d 998, 1008 n.7 (9th Cir.  
26 1999) (“When a complaint alleges the contents of a document, but the document is  
27 not attached to the pleading, the court may consider the document in ruling on a  
28 Rule 12(b)(6) motion.”). The NASA Interim Directive references NASA  
Procedural Report 1600.1 (“NPR 1600.1”), a federal regulation, which may also be  
properly considered by the Court. *See Plevy v. Haggerty*, 38 F. Supp. 2d 816, 820-  
21 (C.D. Cal.1998) (observing that a “judicially noticed fact must be one not  
subject to reasonable dispute in that it is . . . capable of accurate and ready  
determination by resort to sources whose accuracy cannot reasonably be  
questioned”).

1 requires all employees classified as low risk, such as Plaintiffs here, to complete  
2 Standard Form (SF) 85, "OPM Questionnaire for Non-Sensitive Positions" and submit  
3 to a NACI background check. FAC ¶¶ 41, 43. Indeed, NASA's Procedural  
4 Requirements 1600.1 ("NPR 1600.1") state: "No one shall be issued a permanent  
5 NASA employee photo-ID, granted access to NASA Centers or facilities, granted  
6 access to NASA IT systems . . . without, at a minimum, immediate completion of a  
7 NAC and subsequent completion of a NACI within 6 months." *See* Judicial Not. Ex.  
8 3 (NPR 1600.1 § 3.1.4). Like all contractors subject to the government-imposed  
9 requirement, Caltech cannot permit employees to enter the NASA-owned JPL facility  
10 without a badge. *See* Judicial Not. Ex. 2 (NASA Interim Directive at § 6) ("All  
11 NASA employees and contractor employees will be required to comply with this  
12 Directive, and the implementing Directive of their respective Centers consistent with  
13 [HSPD-12] and with the Privacy Act, 5 U.S. Code section 552a."); *id.* § 9 (physical  
14 and logical access to NASA facilities only permitted after "proper issuance of a  
15 Badge.").

16 The government-mandated background check was instituted as a security  
17 measure for federal facilities. *See* FAC ¶ 1. Completion of the background check is a  
18 prerequisite for issuance of the badge that will permit federal employees and  
19 contractors to access designated federal facilities. *See* FAC ¶ 41 (alleging that the  
20 Department of Commerce "mandates that 'only an individual with a background  
21 investigation on record is issued a credential'"); *see also* Judicial Not. Ex. 1 (FIPS  
22 Pub 201-1 "Personal Identity Verification (PIV) of Federal Employees and  
23 Contractors" at § 2.1, p.5).

24 Plaintiffs also acknowledge that the federal government is "mandating and  
25 implementing the background investigation process." *See* Judicial Not. Ex. 4 at 1. In  
26 fact, it was the Department of Commerce that "impose[d] a background investigation  
27 requirement on all employees or contractors seeking to obtain the new form of  
28 identification." FAC ¶ 41. And "NASA is responsible for ensuring appropriate

1 investigations are conducted and access suitability determined for all contractor  
2 personnel.” See Judicial Not. Ex. 2 (NPR 1600.1 § 4.7.1). “At a minimum, NASA  
3 shall conduct the appropriate investigation required by position risk designation, but  
4 no less than a National Agency Check with Inquiries (NACI) and shall make an  
5 employment suitability determination of all NASA employees.” *Id.* § 3.1.4. Caltech  
6 plays no independent role in deciding who will be issued a badge or in selecting the  
7 standards utilized in the process; the government performs these functions.

8 As alleged by Plaintiffs, and confirmed by the documents Plaintiffs incorporate  
9 into their amended complaint, Caltech had nothing to do with the creation of the  
10 government’s background investigation that Plaintiffs are challenging as  
11 unconstitutional.

#### 12 ARGUMENT

13 A motion to dismiss tests the legal sufficiency of the claims asserted in the  
14 complaint. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).<sup>3</sup>  
15 “Conclusory allegations of law and unwarranted inferences are insufficient to defeat a  
16 motion to dismiss for failure to state a claim.” *In re VeriFone Secs. Litig.*, 11 F.3d  
17 865, 868 (9th Cir. 1993).

18 The Court also does not need to “accept as true allegations that contradict  
19 matters properly subject to judicial notice or by exhibit.” *Sprewell*, 266 F.3d at 988.  
20 Judicial notice may be taken of facts that are “not subject to reasonable dispute in that  
21 [they are] either (1) generally known within the territorial jurisdiction of the trial court  
22 or (2) capable of accurate and ready determination by resort to sources whose  
23 accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Documents  
24 appropriate for judicial notice include documents “on which allegations in the  
25 [complaint] necessarily rely, even if not expressly referenced in the [complaint],  
26

---

27 <sup>3</sup> All internal citations and quotations are omitted in all citations throughout this  
28 brief unless otherwise noted.

1 provided the authenticity of those documents are not in dispute.” *In re Calpine Corp.*  
2 *Secs. Litig.*, 288 F. Supp. 2d 1054, 1076 (N.D. Cal. 2003).

3 **I. PLAINTIFFS’ ADMINISTRATIVE PROCEDURE ACT CLAIM**  
4 **SHOULD BE DISMISSED BECAUSE CALTECH IS NOT A FEDERAL**  
5 **AGENCY.**

6 The Administrative Procedure Act (“APA”) applies only to government  
7 agencies—not private universities like Caltech. *See* 5 U.S.C. §§ 701(b)(1), 702 (the  
8 APA defines “agency” as “each authority of the Government of the United States”);  
9 *see also W. State Univ. v. Am. Bar Ass’n*, 301 F. Supp. 2d 1129, 1133 (C.D. Cal.  
10 2004) (“By its own language, the APA does not extend to an entity that is not a  
11 federal agency. . . .”). Plaintiffs do not allege that Caltech is a government agency,  
12 but rather acknowledge Caltech’s status as a “non-profit educational institution and  
13 one of the premier research institutes in the world.” FAC ¶ 33. Because the APA  
14 does not apply to Caltech, this claim must be dismissed.<sup>4</sup>

15 **II. PLAINTIFFS’ FEDERAL CONSTITUTION CLAIMS SHOULD BE**  
16 **DISMISSED AGAINST CALTECH BECAUSE CALTECH IS NOT A**  
17 **STATE ACTOR.**

18 Plaintiffs have sued Caltech for alleged violations of the Fourth and Fifth  
19 Amendments of the United States Constitution, as well as alleged violations of their  
20 “informational privacy” rights.<sup>5</sup> *See* FAC (First, Second and Third Claims for Relief).  
21 But the Constitution applies to the government, not private entities. *See, e.g., Flagg*  
22 *Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978) (most constitutional rights can only be  
23 infringed by governments or their agents).

24 In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), the Supreme Court  
25 directed that there should be “careful adherence” to the state action requirement in

---

26 <sup>4</sup> Plaintiffs did not name Caltech as a defendant to the APA claim in their original  
27 complaint. Amending their complaint to include Caltech on this claim is frivolous.

28 <sup>5</sup> Plaintiffs fail to identify a constitutional amendment under which their  
“informational privacy” claim arises. For purposes of this motion, Caltech  
assumes that Plaintiffs intended to bring the claim under the substantive due  
process clause of the Fifth Amendment, which only applies to federal government  
conduct.

