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8
9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA

11
12 Robert M. Nelson, William Bruce) CASE NO. CV-07-05669 ODW (VBKX)
Banerdt, Julia Bell, Josette Bellan,)
13 Dennis V. Byrnes, George Carlisle, Kent) The Hon. Otis D. Wright II
Robert Crossin, Larry R. D'Addario,)
14 Riley M. Duren, Peter R. Eisenhardt,) CALIFORNIA INSTITUTE OF
Susan D.J. Foster, Matthew P.) TECHNOLOGY'S OPPOSITION TO
15 Golombek, Varoujan Gorjian, Zareh) PLAINTIFFS' MOTION FOR
Gorjian, Robert J. Haw, James Kulleck,) PRELIMINARY INJUNCTION
16 Sharon L. Laubach, Christian A.)
Lindensmith, Amanda Mainzer, Scott) Hearing Date: October 1, 2007
17 Maxwell, Timothy P. McElrath, Susan) Time: 4:00 pm
Paradise, Konstantin Penanen, Celeste M.) Courtroom: 11
18 Satter, Peter M.B. Shames, Amy Snyder)
Hale, William John Walker and Paul R.)
19 Weissman,)

20 Plaintiffs,

21 vs.

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

26 Defendants.

27
28

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INTRODUCTION

1
2 Plaintiffs are indeed well-respected and valued government contractors who
3 support very important public projects involving the United States' missions to outer-
4 space, while working on the federal government's property located at the Jet
5 Propulsion Laboratory ("JPL"). Caltech respects and values the contributions its
6 employees have made to the United States while working at JPL. Caltech hopes that
7 after Plaintiffs have dispassionately reviewed the specifics of the proposed
8 background checks as detailed in Caltech's brief and NASA's brief, Plaintiffs will file
9 for the federal identification badge necessary to have unescorted access to a federally-
10 owned property.

11 Given the nature of the work carried out for the government at JPL, however, it
12 is not unreasonable for the government to require some degree of assurance that
13 individuals with uncontrolled access to its facility are not a threat. In this case, the
14 federal government is asking Plaintiffs to provide their employment and educational
15 history, to disclose whether they have used illegal drugs in the last year, and to self-
16 select three references to attest to the fact that they are not a threat to others at JPL or
17 to the United States. Contrary to Plaintiffs' hypothetical concerns, the references are
18 not asked to disclose sensitive personal information.

19 Moreover, Plaintiffs have already voluntarily disclosed much of the information
20 requested by the government when they first applied for a job at JPL. Seven of the
21 plaintiffs also voluntarily disclosed much more detailed, potentially sensitive
22 information to the federal government when they sought heightened security
23 clearances in order to work on secret projects. And three other Plaintiffs have
24 completed SF 85, the very form at issue here.

25 Plaintiffs ask this Court to invalidate the federal government's background
26 check—a result which would have far-reaching implications—on the grounds that it
27 violates their constitutional right to privacy. But a number of cases not cited by
28 Plaintiffs have scrutinized the use of background checks and have found them to be

1 constitutional. Plaintiffs rely on several inapplicable cases involving forced drug
2 testing, but there is no forced search or seizure of any of the Plaintiffs here.

3 Plaintiffs' request for preliminary injunctive relief against Caltech fails for
4 several reasons:

5 *First*, Plaintiffs cannot demonstrate a likelihood of success against Caltech on
6 their Privacy Act claim. The Privacy Act only applies to federal government
7 agencies, and Caltech is not a federal government agency.

8 *Second*, Caltech is a private entity, and thus cannot be liable for any
9 constitutional violation alleged by Plaintiffs here, even assuming the government
10 actually violated some constitutional right. Caltech did not create the badge-issuance
11 process at issue here, Caltech does not conduct any background checks on any
12 individuals, and Caltech does not determine who receives a badge allowing access to
13 JPL.

14 *Third*, there is no constitutional case or controversy because Plaintiffs' claimed
15 injuries are hypothetical or conjectural. No one has asked Plaintiffs to provide their
16 most sensitive, private information relating to parenting decisions or sensitive medical
17 conditions, and no such information has been disclosed publicly.

18 *Fourth*, Plaintiffs cannot prevail on their 14th Amendment claim. This
19 amendment applies only to the states, and neither NASA nor Caltech is a state.
20 Similarly, Plaintiffs' 4th Amendment claim fails because the 4th Amendment restricts
21 searches and seizures by the federal government and the background check here is
22 neither a search nor a seizure.

23 *Fifth*, Plaintiffs attempt to assert an "informational" right of privacy that the
24 courts have narrowly recognized, primarily in cases involving forced disclosure of
25 highly personal medical information, or personal decisions regarding abortions or
26 birth control. Courts are skeptical about expanding that right beyond those narrow
27 circumstances, and no circuit court has done so in any case involving a background
28 check.

1 missions JPL handles. *Id.* It is therefore important for NASA to investigate the
2 background of those with unescorted privileges, even if those people will not have
3 access inside the sensitive facilities themselves.

4 **Heightened Security Requirements For Federally-Owned Facilities**

5 On August 27, 2004, the President of the United States issued Homeland
6 Security Presidential Directive 12 (“HSPD 12”). *See* Aden Decl. ¶ 9. Thereafter, the
7 Department of Commerce published Federal Information Processing Standards
8 Publication No. 201-1 (“FIPS 201-1”), which set forth a standard for personal identity
9 verification of federal employees and contractors. *Id.* To ensure compliance with
10 HSPD 12 and FIPS 201-1, NASA issued Procurement Information Circular 06-01,
11 which set forth requirements for contractor personnel working at JPL and other
12 NASA-related facilities to apply for and obtain uniform security access badges. *Id.*

13 **The Badge Issuance Process**

14 Under its contract with NASA, Caltech is required to comply with certain
15 government policies, including executive orders of the President. *See* Proia Decl. ¶ 5.
16 The contract also allows NASA to unilaterally modify the contract when exigent
17 circumstances exist. *Id.* With respect to the new badge issuance procedures, NASA
18 invoked the “exigent circumstances” provision of the contract and mandated JPL to
19 “immediately comply” with the new procedures set forth in PIC 06-01. *See* Proia
20 Decl. ¶¶ 6-10.

21 NASA created the processes required to obtain an access badge to NASA
22 facilities, but the bulk of the process is completed by the federal government’s Office
23 of Personnel Management or “OPM.” JPL has no control over: (1) the background
24 investigation required to obtain a badge, or (2) whether an individual will be approved
25 to receive a badge. *See* Aden Decl. ¶ 10.

26 Although the badge-issuance process is not JPL’s, JPL has regularly
27 communicated with its personnel regarding the steps they were required to take to
28 obtain a badge. On February 22, 2007, JPL advised all personnel that they would

1 have to obtain a new identification badge, which would “require [] significant changes
2 in the issuance of badges.” *See* Aden Decl. ¶ 12, Ex.3 thereto. On March 28, 2007,
3 JPL sent an e-mail to all personnel advising them of the requirements for obtaining a
4 new badge, including the need to complete a background investigation. *Id.*, Ex. 4.
5 JPL also posted on its internal website a chart which provided an overview of the
6 process. *Id.*, Ex. 5.

7 Before any applicant could apply for a badge, JPL had to make an initial
8 determination about the “risk classification” appropriate for any particular job. *See*
9 Aden Decl. ¶ 13. As requested by the government, JPL applied the criteria developed
10 by the federal government to determine which jobs should be classified as having low,
11 moderate, or high risk. *See* Hart Decl. ¶ 6. A very high percentage of those needing
12 badges in order to access JPL’s facilities have a “low” risk classification, which
13 results in the least intrusive background check available. *Id.* ¶ 8. Each of the
14 Plaintiffs in this case was classified as “low” risk.

15 Applicants for badges begin the application process on the federal government
16 Office of Personnel Management’s secure online system called “e-QIP,” which is
17 located at <http://www.opm.gov/e-qip/>. *See* Aden Decl. ¶ 15. Applicants cannot pre-
18 apply for clearance and can only access the e-QIP website to start the application
19 process when they are “invited to do so by an appropriate official at their sponsoring
20 agency.” *See* <http://www.opm.gov/e-qip/>. Even though JPL is not a federal agency,
21 NASA has delegated to JPL the ministerial task of serving as the “sponsoring agency”
22 because JPL was the only entity with knowledge of the identity of the employees who
23 needed access to the facility. *See* Aden Decl. ¶ 14. JPL’s Office of Protective
24 Services, therefore, sent out e-mail notices to various personnel on a rolling basis
25 notifying them when they could begin the application process on e-QIP. *Id.*

26 When applicants log on to the e-QIP system, they provide the requested
27 information directly to the federal government—not to JPL. *Id.* ¶ 16. Applicants have
28 10 days from the receipt of the initiation e-mail to complete the form.

1 The primary form that applicants are required to complete is Standard Form 85
2 (or “SF 85”), which is a standard form the federal government requires for those
3 seeking employment in low-risk positions with the government. *See* Aden Decl. ¶ 16.
4 JPL did not create SF 85, nor did JPL select SF 85 as the form to use for these
5 purposes. The applicants complete SF 85 on the secure e-QIP website. *Id.*¹

6 SF 85 contains a five-page questionnaire, which asks 14 different questions.
7 *See* Compl., Ex. 1; Aden Decl. ¶ 17. SF 85 also includes an Authorization for Release
8 of Information (“Authorization”). The Authorization states that any information
9 disclosed in response to the Authorization “is for official use by the Federal
10 Government only for the purposes provided in this Standard Form 85, and may be
11 redisclosed by the Government only as authorized by law.” *See* Compl., Ex.1. JPL
12 has specifically advised its personnel that the Authorization does not allow the
13 government to access medical or private financial records. *See* Aden Decl. ¶ 21.

14 After the applicant completes SF 85 in the e-QIP system, an authorized
15 individual in JPL’s OPS department is given access to the form to “approve” it. *See*
16 Aden Decl. ¶ 23. In this context, to “approve” the form simply means that someone
17 has reviewed the form for completeness, *i.e.* someone has confirmed that the applicant
18 provided all of the information requested in the form. *Id.* The approvers do not
19 disclose any information contained on the form to anyone else and no one at JPL takes
20 any steps to investigate or confirm the accuracy of any of the information provided on
21 SF 85. JPL has hired 22 contractors—who have at least secret clearances and are
22 approved by OPM—to fulfill this “approver” function. *Id.*

23 Once the approver confirms that an applicant’s SF 85 is complete, the
24 completed form is sent to the government’s OPM for further processing. *See* Aden
25 Decl. ¶ 23. Because all of the data is entered electronically by the applicants, it is

26 ¹ Plaintiffs’ assertion that Caltech faculty are not required to obtain a badge is
27 false. Caltech faculty must go through the same process as Plaintiffs. *See* Aden
28 Decl. ¶ 30.

1 maintained in OPM's e-QIP system. *Id.* ¶ 24. Although some of the approvers may
2 print the forms as part of their review process, once the forms have been approved, all
3 hard copies of the completed SF 85 are shredded. JPL maintains no record of the data
4 contained within SF 85. *Id.*

5 Once the completed SF 85s have been submitted and approved, OPM and
6 NASA "adjudicate" the application. JPL plays no role and has no say in the
7 adjudication process. *See* Aden Decl. ¶ 25. After OPM and NASA adjudicate an
8 application, the individuals are notified by NASA if they did not pass. Those who do
9 not pass can appeal the decision with NASA; JPL plays no role and has no say in the
10 appeal process. In fact, JPL is not even advised of the reasons why any applicant is
11 denied a badge, and JPL cannot participate in the decision-making process or appeal.
12 *Id.* ¶¶ 25-27.

13 **Status of the Badge Issuance Process at JPL**

14 Since April 2007, more than 4,100 individuals at JPL have submitted their SF
15 85s to the government. *See* Aden Decl. ¶ 28. Over 57,000 individuals are subject to
16 the new badge-issuance requirements at all NASA facilities. As of August 31, 2007,
17 over 46,000 of those individuals have applied for their badges. *Id.*

18 Of the named Plaintiffs in this case, three (Julia Bell, Amy Hale, and Peter
19 Shames) have already provided the information requested in SF 85 to the government.
20 *Id.* ¶ 29. Moreover, a number of the named Plaintiffs in this case have held security
21 clearances in the past, which means that these individuals underwent a far more
22 extensive background check than what is being asked of them here. *Id.* ¶ 31. To
23 receive a security clearance today, an applicant would complete, at a minimum,
24 Standard Form 85P, or Standard Form 86, both of which require more information
25 spanning more time than that required on SF 85. *Id.* ¶ 31; *id.* Ex. 6 (chart
26 summarizing differences between SF 85, SF 85P, and SF 86).

1 **Turnover of Personnel at JPL**

2 Like any large organization, JPL experiences turnover for a variety of reasons
3 and is accustomed to replacing various employees who change positions or leave. For
4 example, in 2006, approximately 178 employees were laid off, 61 retired, 155 left
5 voluntarily, and 15 left JPL for other reasons. *See* Hart Decl. ¶ 9. In total, more than
6 400 employees left JPL just last year. In addition, JPL received more than 5,300
7 inquiries for approximately 600 job openings last year; in other words, almost 10
8 qualified applications for every job. *Id.* While Caltech values its talented and
9 exceptional employees and works hard to retain them, Caltech has always been able to
10 find qualified individuals to take their place with minimal disruption to the important
11 projects that JPL handles. *Id.* JPL employees who choose not to apply for the
12 federally-required access badge will be considered to have a voluntarily resigned from
13 their employment. *Id.*

14 **ARGUMENT**

15 To obtain preliminary injunctive relief, a plaintiff must demonstrate: (1) a
16 combination of probable success on the merits and the possibility of irreparable injury;
17 or (2) the existence of serious questions going to the merits and a balance of hardships
18 tipping sharply in the moving party's favor. *See GoTo.com, Inc. v. Walt Disney Co.*,
19 202 F.3d 1199, 1204-05 (9th Cir. 2000). As detailed below, Plaintiffs have not
20 demonstrated likelihood of success or even a serious question on the merits or
21 irreparable harm.

22 **I. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON ANY OF THEIR**
23 **CLAIMS AGAINST CALTECH.**

24 In their moving papers, Plaintiffs claim Caltech violated the Privacy Act, the
25 Administrative Procedures Act, the 14th Amendment and the 4th Amendment. They
26 are not likely to succeed on any of these claims.²

27 _____
28 ² While Plaintiffs plead a cause of action under the California Constitution in their
(Continued...)

1 **A. Neither the Privacy Act nor the Administrative Procedures Act**
2 **Applies to Caltech Because Caltech is a Private Entity.**

3 Plaintiffs' fourth cause of action alleges that Caltech violated the Privacy Act.
4 *See* Compl. 21. But the Privacy Act, which is codified at 5 U.S.C. § 552a, applies
5 only to an "agency." *See* 5 U.S.C. § 552(f) ("agency" is defined as executive
6 departments of the federal government). Courts have refused to expand the Privacy
7 Act to apply to private entities like Caltech. *See Unt v. Aerospace Corp.*, 765 F.2d
8 1440, 1447 (9th Cir. 1985) (private not-for-profit corporation doing business with the
9 federal government not an agency subject to suit under the Privacy Act); *Dong v.*
10 *Smithsonian Inst.*, 125 F.3d. 877, 879 (D.C. Cir. 1997) (Smithsonian not an agency
11 under the Privacy Act). Plaintiffs present no argument that the Privacy Act should
12 apply to Caltech. Accordingly, this claim cannot serve as the basis for issuing a
13 preliminary injunction here.

14 Plaintiffs did not plead an Administrative Procedures Act claim against Caltech.
15 *See* Compl. 5. They do, however, group all "defendants" together in their brief,
16 suggesting they may intend to bring this claim against Caltech. But the
17 Administrative Procedure Act ("APA") only applies to government agencies—not
18 private universities like Caltech. *See* 5 U.S.C. §§ 701(b)(1), 702 (the APA defines
19 "agency" as "each authority of the Government of the United States. . . ." and the Act
20 only allows judicial review for persons "suffering legal wrong because of agency
21 action, or adversely affected or aggrieved by agency action. . . .");³ *see also Western*

22
23 complaint, they do not rely on or even mention it in their motion for a
24 preliminary injunction. Plaintiffs cannot raise arguments for the first time in
25 their reply that were not include in their opening brief. *See U.S. v. Romm*, 455
26 F.3d 990, 997 (9th Cir. 2006) ("arguments not raised by a party in its opening
27 brief are deemed waived."); *see also U.S. ex rel. Giles v. Sardie*, 191 F. Supp. 2d
28 1117, 1127 (C.D. Cal. 2000) ("It is improper for a moving party to introduce new
29 facts or different legal arguments in the reply brief than those presented in the
30 moving papers.").

31 ³ All internal citations and quotations are omitted in all citations throughout this
32 brief unless otherwise noted.

1 *State Univ. v. Am. Bar Ass'n*, 301 F. Supp. 2d 1129, 1133 (C.D. Cal. 2004) (“By its
2 own language, the APA does not extend to an entity that is not a federal agency. . . .”).

3 Thus, two of Plaintiffs’ four causes of action against Caltech fail as a matter of
4 law because the statutes they are based on do not apply to private entities like Caltech.
5 Accordingly, those claims cannot support the preliminary injunction Plaintiffs seek.

6 **B. Caltech Is A Private Entity and Is Not Engaging In Any Alleged**
7 **“Government” Conduct That Violates the Constitution.**

8 Neither the 4th Amendment nor the 14th Amendment applies to private entities.
9 *See, e.g., Flagg Bros., v. Brooks*, 436 U.S. 149, 156 (1978) (constitutional rights can
10 only be infringed by governments or those acting under the color of law).⁴ Plaintiffs
11 do not even attempt to explain how these constitutional provisions apply to a private
12 entity like Caltech. *See* Compl. ¶ 33 (“[Caltech] is a non-profit educational
13 institution.”).

14 The only exception to this bedrock principle is when a private entity is found to
15 be a “state actor.” The Supreme Court instructs that there should be “careful
16 adherence” to the state actor requirement in order to maintain “an area of individual
17 freedom by limiting the reach of federal law and federal judicial power.” *Lugar v.*
18 *Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). Indeed, courts start with the
19 “presumption that private conduct does not constitute governmental action.” *Sutton v.*
20 *Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999). “In order for
21 private conduct to constitute governmental action, ‘something more’ must be present.”
22 *Id.* (citing *Lugar*, 457 U.S. at 939).

23 Caltech does not fall within the exception. Caltech is a private contractor,
24 subject to federal regulations. It engages in no conduct implicating any constitutional
25

26
27 ⁴ *See also* discussion at sections I. D.(i) and I. D.(ii) explaining that the Fourteenth
28 Amendment only applies to the states, and that the Fourth Amendment restricts
searches and seizures by the federal government.

1 inquiry, and Plaintiffs point to none. Rather, Plaintiffs provide specific allegations
2 relating to their constitutional claims only with respect to *government* entities:

- 3 • the President signed the Homeland Security Presidential Directive 12
4 (HSPD-12) applicable to all Executive Branch departments and agencies;
- 5 • the US Department of Commerce promulgated the “Personal Identity
6 Verification” (“PIV”) standard, specifying the background investigation will
7 be a “National Agency Check with Inquiries” which requires completion of
8 SF 85;
- 9 • NASA issued Procurement Information Circular 06-01 establishing the new
10 policy for creation and issuance of federal credentials at NASA and
11 instituted a new identification badge known as the PIV or PIV II;
- 12 • A federal employee will perform an adjudication of employees’ suitability if
13 the badge issuance process yields unfavorable information; and
- 14 • NASA requires the implementation of a background investigation and
15 release of information.

16 There is not a sufficient nexus between Caltech and the federal government’s
17 actions with respect to HSPD-12 to find Caltech to be a state actor here. Caltech’s
18 only connection is that it operates JPL pursuant to a contract with NASA and, by law
19 and by contract, must abide by NASA’s required security measures for entering the
20 NASA facility. All of the alleged unconstitutional conduct—namely the creation,
21 implementation, and enforcement of the background check and records release—is
22 government conduct.

23 In *Sutton*, the Ninth Circuit held that a hospital’s decision not to hire the
24 plaintiff when he refused to provide his social security number, as required by federal
25 law, did not make the hospital a state actor. *See Sutton*, 192 F.3d at 843.
26 Governmental compulsion in the form of a generally applicable law, without more,
27 does not make a private entity a governmental actor. *Id.* at 841. Rather, a plaintiff
28 must show “some other nexus . . . [t]ypically . . . participation by the state in an action
ostensibly taken by the private entity, through conspiratorial agreement, official
cooperation with the private entity to achieve the private entity’s goal, or enforcement
and ratification of the private entity’s chosen action.” *Id.*

1 Caltech's ministerial conduct relating to the implementation of the badge
2 issuance process is like the hospital's conduct in *Sutton*. For instance, Caltech
3 contractors verify that the SF 85s are completed, but they do not conduct any
4 substantive review of the information in those forms. *See* Aden Decl. ¶ 23. This type
5 of passive participation does not turn Caltech into a state actor. Nor is Caltech a state
6 actor simply because it operates JPL pursuant to federal regulations or because it
7 receives federal funding. "Acts of such private contractors do not become acts of the
8 government by reason of their significant or even total engagement in performing
9 public contracts." *See Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982). Indeed,
10 Caltech's contract with NASA explicitly states that "[n]otwithstanding the special
11 relationship created by this sponsoring agreement, the California Institute of
12 Technology is acting as a contractor and not as an agent of the Government." *See*
13 Proia Decl. ¶ 3.

14 There are also potentially serious repercussions if this Court were to require a
15 private entity like Caltech to defend the constitutionality of a government-ordered
16 program. To do so would be to "convert every employer...into a governmental actor
17 every time it complies with a presumptively valid, generally applicable law." *Sutton*,
18 192 F.3d at 838. If that were the law, Caltech would be forced to "defend those laws
19 and pay any consequent damages, even though [it] bear[s] no real responsibility for
20 the violation of rights arising from the enactment of the laws." *Id.* at 838-39; *see also*
21 *Lugar*, 457 U.S. at 937 (cautioning that if courts do not enforce the state actor nexus
22 "private parties could face constitutional litigation whenever they seek to rely on some
23 state rule governing their interactions with the community surrounding them.")).
24 Private actors are entitled to rely on the presumptive validity of laws and regulations.
25 To hold a private party responsible for a law or regulation that it did not create
26 broadens the Constitution far beyond its intended limit.⁵

27
28 ⁵ This result also makes sense when one imagines the broad array of private
(Continued...)

1 **C. Plaintiffs Lack Standing Because There is No Article III Case or**
2 **Controversy Here.**

3 Even if the Court permitted Plaintiffs to assert some other constitutional claim
4 in their reply brief, Plaintiffs cannot show they are likely to suffer an imminent
5 constitutional violation that requires the issuance of a preliminary injunction.

6 Article III of the Constitution requires that Plaintiffs prove they have suffered
7 an injury sufficient to demonstrate a ripe “case or controversy.” *Casey v. Lewis*, 4
8 F.3d 1516, 1519 (9th Cir. 1993) (“Federal courts are presumed to lack jurisdiction,
9 unless the contrary appears affirmatively from the record.”). Plaintiffs must establish
10 standing by demonstrating an invasion of a legally protected interest which is:

11 (1) concrete and particularized and (2) actual or imminent, not conjectural or
12 hypothetical. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Courts
13 apply the standing requirement even more stringently in the context of a request for
14 injunctive relief. *See Coral Const. Co. v. King County*, 941 F.2d 910, 929 (9th Cir.
15 1991) (“Where only injunctive or declaratory relief is sought, a plaintiff must show a
16 very significant possibility of future harm in order to have standing to bring suit.”).

17 Here, Plaintiffs cannot demonstrate an actual or imminent injury because none
18 of Plaintiffs’ claimed wrongs have been implemented, or are likely to be. *See Thomas*
19 *v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (“Whether
20 the question is viewed as one of standing or ripeness, the Constitution mandates that
21 prior to our exercise of jurisdiction there exist a constitutional case or controversy,
22 that the issues presented are definite and concrete, not hypothetical or abstract.”).

23 There is no such imminent injury here. Hypothetical allegations of what might
24 happen are insufficient to block a relatively innocuous background check, backed by
25 legitimate security concerns. On its face, SF 85 and the follow-up Investigative

26 _____
27 contractors a sweeping directive like HSPD-12 will affect. Potential plaintiffs
28 could theoretically bring lawsuits against dozens of contractors who are not in a
position to defend the directive.

1 Request for Personal Information, are limited to verifying the truthfulness of the
2 information provided on those forms, raising no concerns about an unconstitutional
3 invasion of privacy. *See* Compl., Exs. 1, 2. The only “imminent” result of the HSPD-
4 12 implementation is that JPL employees will fill out their SF 85 and submit their
5 fingerprints.⁶ That does not amount to a concrete, particularized, actual injury.
6 Indeed, although more than 4,000 individuals have had their badge applications
7 processed at JPL, *none of them has suggested that the intrusive investigations*
8 *Plaintiffs have imagined has actually occurred.* Nor have any of the 46,000
9 personnel at other NASA facilities who have completed SF 85 complained about
10 improper, intrusive follow-up questions. *See* Aden Decl. ¶ 28.

11 Because Plaintiffs can point to no actual injury, they are mounting a de facto
12 facial challenge. “A facial challenge to a legislative Act is, of course, the most
13 difficult challenge to mount successfully, since the challenger must establish that no
14 set of circumstances exists under which the Act would be valid.” *United States v.*
15 *Salerno*, 481 U.S. 739, 745 (1987); *see also Nat’l Fed’n of Fed. Employees v.*
16 *Greenberg*, 983 F.2d 286, 295 (D.C. Cir. 1993) (“[I]n a facial challenge, the fact that
17 there may arguably be some invalid applications is beside the point; what matters is
18 whether there are any valid ones.”).⁷

19 Plaintiffs also ignore the myriad valid applications of the badge-issuance
20

21 ⁶ Many of the Plaintiffs applied for a previous badge (“OneNASA”) which
22 required them to provide their fingerprints. *See* Aden Decl. ¶ 32; *see also*
23 Compl. ¶ 42.

24 ⁷ Plaintiffs might attempt to characterize their claims as an “as applied” challenge.
25 However, this is belied by the fact that Plaintiffs’ purported class consists of 98%
26 of JPL’s employees and Plaintiffs’ claim, in essence, is that the NASA Directive
27 cannot lawfully be applied to any of them. Further, even an “as applied”
28 challenge fails where there is no application to address because no Plaintiffs have
undergone the complete background check. *See U.S. v. Coronado*, 461 F. Supp.
2d 1209, 1217 (S.D. Cal. 2006) (rejecting the argument the statute was
unconstitutional as applied as “premature because...the factual record has yet to
be developed in this case” and “[u]ntil an evidentiary record is created, neither
the court nor parties are able to determine whether the statute, as applied in an
evidentiary context, raises substantial constitutional issues”).

1 process. Instead, Plaintiffs point to a chart which at one time was displayed on an
2 internal JPL website, and claim this chart demonstrates an invalid application. *See*
3 Penanen Decl., Ex. R. Plaintiffs, however, have not established that the question areas
4 in this chart are being asked of any, much less all, applicants. Nor is there any
5 evidence that the type of extreme investigative tactics conjured by Plaintiffs will
6 actually be applied to them; the fact that thousands of individuals have had their
7 applications processed without those tactics is strong evidence that they will not be
8 used in the future. Further, while much of Plaintiffs' argument focuses on the
9 hypothetically impermissible standards that will be used to determine the "suitability"
10 of an employee for purposes of issuing a badge, Plaintiffs' pleadings provide no
11 evidence of any completed suitability analysis that they deem improper.

12 Plaintiffs also lack standing because they have no reasonable expectation of
13 privacy in the information requested by SF 85. *National Treasury Employees Union*
14 *v. U.S. Dept. of Treasury*, 25 F.3d 237, 244 (5th Cir. 1994) is on point here and
15 confirms that Plaintiffs' request for a preliminary injunction should be denied. In
16 *National Treasury Employees Union*, plaintiffs were IRS employees who were
17 required to complete SF 85P.⁸ *Id.* at 239. The court extensively analyzed whether the
18 plaintiffs had a reasonable expectation of privacy in responding to the questionnaire.
19 *Id.* at 243-45. In doing so, the court emphasized that the questionnaire required
20 employees "only to disclose information to the IRS, as their employer-not to anyone
21 else, and certainly not to the public." *Id.* at 244. "In other words, the IRS's
22 questionnaire makes only a minimal intrusion on the 'privacy' of its employees,
23 designed to satisfy its need for access." *Id.* Because these plaintiffs had no
24 reasonable expectation of privacy in the information requested in SF 85P, the court
25 dismissed plaintiffs' challenge on the grounds that "no individual employee . . . could

26 ⁸ SF 85P is a more comprehensive questionnaire and involves a more intrusive
27 background check as it is used for employees designated as "public trust"
28 employees.

1 have standing to bring a right to privacy claim individually.” *Id.*

2 Likewise, Plaintiffs here cannot have a reasonable expectation of privacy with
3 respect to the information requested in SF 85. This form requests that basic
4 information be disclosed to the government by the individuals who desire to do work
5 for the government at government facilities. *See* Aden Decl. ¶¶ 17-18; *see also* SF 85
6 (Compl., Ex. 1) (“I understand that the information released by records custodians and
7 sources of information is for official use by the Federal Government only for the
8 purposes provided in this Standard Form 85.”) Indeed, SF 85 requests less
9 information (and is less intrusive) than SF 85P, which was at issue in the Fifth
10 Circuit’s *National Treasury Employees Union* decision.

11 Because Plaintiffs have not suffered any imminent constitutional injury, and
12 because Plaintiffs have no reasonable expectation of privacy in the requested
13 information, they lack standing to bring these claims. Without standing, Plaintiffs are
14 not entitled to injunctive relief.

15 **D. Even If Caltech Were Subject to US Constitutional Limitations,
16 Which It Is Not, Plaintiffs’ Constitutional Claims Lack Merit.**

17 **(i) Plaintiffs’ 14th Amendment Claim Lacks Merit Because That
18 Amendment Only Applies to States.**

19 Plaintiffs’ second cause of action alleges a “Violation of U.S. Constitution,
20 Fourteenth Amendment.” *See* Compl. 19. But the 14th Amendment applies only to
21 the states, not the federal government. *See* U.S. Const. amend. XIV, § 1 (“nor shall
22 *any State* deprive any person of life, liberty, or property, without due process of
23 law.”); *see also* *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (“Fourteenth Amendment
24 . . . applies only to the states.”). Here, Plaintiffs allege no conduct by any state or state
25 agency, and they present no argument that the 14th Amendment should apply to the
26 federal government, a federal agency, or a private entity acting pursuant to a federal
27 directive. Accordingly, Plaintiffs are unlikely to succeed on the merits of their 14th
28

1 Amendment claim.⁹

2 (ii) **Plaintiffs' Fourth Amendment Claim Lacks Merit Because**
3 **There Has Been Neither A Search Nor A Seizure.**

4 Plaintiffs also allege violations of the Fourth Amendment to the United States
5 Constitution. *See* Compl. 19. The Fourth Amendment protects citizens from
6 unreasonable, warrantless searches and seizures by the federal government. U.S.
7 Const. amend. IV. But those protections do not apply to background checks, which
8 do not constitute a search or seizure.

9 Plaintiffs rely on six cases addressing whether the search of an employee's
10 body and seizure of bodily fluids through a forced urination or drug test constitutes an
11 unreasonable search and seizure.¹⁰ But not one of these cases discusses whether
12 requiring a person to fill out a background questionnaire could somehow constitute a
13 search, much less an unreasonable one. Plaintiffs bear the burden to demonstrate a
14 search or seizure has occurred, but Plaintiffs have not done so. *See U.S. v. Nerber*,
15 222 F.3d 597, 599 (9th Cir. 2000) ("To invoke the protections of the Fourth
16 Amendment, a person must show he had a legitimate expectation of privacy.").
17 Plaintiffs cite only physical intrusion cases that have been upheld as "searches." *See*
18 *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989) ("We have long
19 recognized that a compelled intrusion into the body for blood to be analyzed for
20

21 ⁹ As noted in footnote 2, Plaintiffs are not permitted to rectify their legal error by
22 correcting it, or adding new theories, in their reply brief.

23 ¹⁰ *See* Pls.' Br. 11-14; *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656
24 (1989) (random drug-testing of customs service agents); *Int'l Bhd. of Elec.
25 Workers v. U.S. Nuclear Regulatory Comm'n*, 966 F.2d 521 (9th Cir. 1992)
26 (random drug-testing of nuclear power plant workers); *Skinner v. Ry. Labor
27 Executives Ass'n*, 489 U.S. 602 (1989) (random drug-testing of railroad
28 employees); *Bluestein v. Skinner*, 908 F.2d 451 (9th Cir. 1990) (random drug-
testing of aviation employees); *Harmon v. Thornburgh*, 878 F. 2d 484 (D.C. Cir.
1989) (random drug-testing of Department of Justice employees); *Gonzalez v.
Metro. Transp. Auth.* 73 Fed. Appx. 986 (9th Cir. 2003) (random drug-testing of
metropolitan transportation authority employees). Each of these cases analyzes
whether the physical "search" of employees through forced drug-testing was an
unreasonable one.

1 alcohol content must be deemed a Fourth Amendment search.”). Plaintiffs make no
2 argument that a questionnaire, background check and authorization to release records
3 constitute a “search.”

4 Because the background check at issue here does not constitute a search or a
5 seizure, Plaintiffs’ Fourth Amendment claim fails.

6 **(iii) Plaintiffs’ Asserted Privacy Right Has Not Been Recognized In**
7 **This Context.**

8 Courts have noted “grave doubts as to the existence of a constitutional right of
9 privacy in the nondisclosure of personal information.” *Am. Fed’n of Gov’t*
10 *Employees, AFL-CIO v. Dept. of Housing & Urban Dev.*, 118 F.3d 786, 791 (D.C.
11 Cir. 1997). And courts have upheld the use of these standardized federal forms in the
12 employment context. *Id.* at 794 (use of SF 85P held to be constitutional); *Nat’l*
13 *Treasury Employees Union*, 25 F.3d at 244 (IRS’s use of SF 85P held constitutional);
14 *Willner v. Thornburgh*, 928 F.2d 1185 (D.C. 1991) (rejecting constitutional challenge
15 and finding extensive background investigation under SF 86 passes muster under
16 diminished expectation of informational privacy).

17 The *American Federation* case involved similar facts and claims as the instant
18 action. There, employees were required to undergo a background check, which
19 included a SF 85P form and an authorization for the release of records. *See Am. Fed’n*
20 *of Gov’t Employees*, 118 F.3d at 793. The D.C. Circuit rejected the employees’
21 constitutional challenges to the use of SF 85P, focusing, in part, on the fact that the
22 personal information that HUD was collecting would be maintained confidentially.
23 *Id.* (“[W]e hold that the individual interest in protecting the privacy of the information
24 sought by the government is significantly less important where the information is
25 collected by the government but not disseminated publicly.”). The D.C. Circuit in
26 *American Federation* also held that the employees have a “diminished interest in
27 resisting disclosure in cases in which disclosure is not likely to lead to public
28 dissemination” and went on to find that the agencies presented “sufficiently important

1 justifications” for the items on the questionnaires. *Id.* at 793.¹¹ Here, as in *American*
2 *Federation*, the information NASA is collecting from JPL personnel will be kept
3 confidential. *See* Aden Decl. ¶ 22.

4 Rather than citing to the D.C. Circuit’s 1997 opinion in *American Federation*,
5 Plaintiffs rely on 1993 District of Columbia district court decision, *National Treasury*
6 *Employees Union v. U.S. Dept. of Treasury*, 838 F. Supp. 631 (D.D.C. 1993). But the
7 district court’s holding in *National Treasury Employees Union* has never been
8 followed by any court. And its reasoning and holding were essentially rejected in the
9 *American Federation* decision, which held that a nearly identical background check
10 was constitutional.

11 The Ninth Circuit has recognized only a limited privacy right to keep certain
12 information confidential in cases involving the “most basic decisions about family and
13 parenthood . . . as well as bodily integrity.” *California v. FCC*, 75 F.3d 1350, 1361
14 (9th Cir. 1996) (no constitutional right to privacy with respect to telephone numbers).
15 Plaintiffs rely on four such Ninth Circuit cases involving highly personal areas to
16 support their privacy claim, but none of those cases involves the constitutionality of
17 background checks.¹²

18
19 ¹¹ One commentator noted:

20 Efforts to apply general restrictions on government data collection under
21 concepts of constitutional information privacy generally fail. Rather than
22 concentrate on the right to collect information, the constitutional analysis shifts,
in cases involving sensitive information, to an examination of whether the data
collection effort is accompanied by adequate safeguards to prevent unwarranted
disclosure of information collected.

23 Raymond T. Nimmer, *Law of Computer Technology* § 16:56 (2007).

24 ¹² *See* Pls.’ Br. 17-18. Plaintiffs also cite *Whalen v. Roe*, 429 U.S. 589 (1977), for
25 the broad proposition that “[i]ndividuals have a constitutionally protected interest
26 in avoiding disclosure of personal matters.” *See* Pls.’ Br. 17 (citing *Whalen*, 429
27 U.S. at 599). But the *Whalen* decision found no constitutional violation or
28 invasion of privacy with respect to a state program requiring “disclosures of
private medical information . . . to representatives of the State,” “even when the
disclosure may reflect unfavorably on the character of the patient.” *See Whalen*,
429 U.S. at 600, 602-04.

1 For example, Plaintiffs rely on *Planned Parenthood v. Lawall*, 307 F.3d 783,
2 789-90 (9th Cir. 1999), where the court recognized a limited right to informational
3 privacy in cases involving minors who seek abortions. *Planned Parenthood*,
4 however, held that compelled disclosures to the court did *not* violate the Constitution.
5 *Id.* Importantly, the court also rejected plaintiff's argument that a woman's private
6 information was disclosed because various government employees and agencies
7 would have access to court records that made up part of the judicial bypass
8 proceeding. *Id.* at 789 n. 5. The court noted that "[a]ccess does not necessarily mean
9 disclosure" and that a "procedure passes constitutional muster if it adequately protects
10 against *public* disclosure of the woman's identity." *Id.* (emphasis in original).

11 Plaintiffs rely on *Tucson Woman's Clinic v. Eden*, 379 F.3d 531 (9th Cir. 2004).
12 But there, the court held that forced disclosure of a woman's name in connection with
13 an incident report did *not* violate the Constitution, but that the government could not
14 force disclosure of a woman's unredacted medical records and fetal ultrasound prints.
15 *Id.* at 551. Plaintiffs' reliance on *Doe v. Attorney General*, 941 F.2d 780, 796 (9th
16 Cir. 1991), is misplaced, as the court noted that information regarding an individual's
17 "HIV-status or AIDS diagnosis would fall within the ambit of the privacy protection
18 afforded medical information."¹³

19 Plaintiffs also cite *In re Crawford*, 194 F.3d 954, 960 (9th Cir. 1999). In
20 *Crawford*, however, the court held that the compelled public disclosure of a
21 bankruptcy petition preparer's social security number did *not* violate the Constitution,

22 ¹³ Plaintiffs also cite a pair of cases involving a female police officer's Title VII
23 claim based on detailed questions she was required to answer regarding, among
24 other things, her sexual activities, a prior pregnancy, a miscarriage, a "female
25 problem," and an affair she had with a married police officer. See Pls.' Br. 17-18
26 (citing *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983) (*Thorne I*);
27 *Thorne v. City of El Segundo*, 802 F.2d 1131 (9th Cir. 1986) (*Thorne II*)). The
28 questioning at issue in the *Thorne* cases was a "broad and unregulated inquiry
into [plaintiff's] off-duty sexual activities." See *Thorne II*, 802 F.2d at 1138.
Nevertheless, the Ninth Circuit made clear that: "We do not hold that the City is
prohibited by the constitution from questioning or considering the sexual
morality of its employees." See *Thorne I*, 726 F.2d at 470.

1 concluding that “the speculative possibility of identity theft is not enough to trump the
2 importance of the governmental interest” *Id.* at 960.

3 Here, the background checks do not involve any inquiry into Plaintiffs’ medical
4 history.¹⁴ Nor will any of Plaintiffs’ information be distributed publicly. *See Aden*
5 *Decl.* ¶ 20. Instead, as SF 85 explains, the information provided will not be disclosed
6 and it will be protected under the Privacy Act. As the D.C. Circuit stated in *American*
7 *Federation*, there are “grave doubts” about whether that privacy right even exists in
8 the context of this type of background check. *See Am. Fed’n of Gov’t Employees*, 118
9 F.3d at 791. Of course, even if this Court found that a right to informational privacy
10 exists and that this right was impinged based on concrete proof of such highly
11 intrusive questions, the Court would then balance that intrusion against the
12 government’s interest in having the Plaintiffs complete the background check.

13 **(iv) The Background Check Program is Minimal and Reasonable.**

14 Plaintiffs demand that the Court block all implementation of the NASA
15 directive on the grounds that they can envision intrusive and unnecessary questions
16 that will violate their privacy rights. But Plaintiffs do not identify any particular
17 question on SF 85 that they find objectionable. Indeed, Plaintiffs concede they are
18 willing to provide some of the requested information, including “name, date of birth,
19 place of birth, social security number, etc.” *See Pls.’ Br.* 7. Plaintiffs leave
20 defendants and this Court to guess where the Plaintiffs would draw the line between
21 permissible and impermissible inquiries.

22 NASA’s request for Plaintiffs to self-select three references is reasonable. JPL
23 has advised its personnel that they can complete this question by listing three
24 co-workers. *See Aden Decl.* ¶ 18. Thus, Plaintiffs could provide each other as their
25 references. The references are mailed a one-page form which asks a series of simple
26

27 ¹⁴ SF 85 does not ask for the release of Plaintiffs’ medical records. *See* discussion
28 at p. 23 herein regarding requirements for release of medical records.

1 yes/no questions about the employee's substance abuse tendencies, financial integrity,
2 mental health and behavioral conduct. *See* Compl., Ex. 2 ("Investigative Request for
3 Personal Information"). The form does not require any further information. While
4 Plaintiffs argue this "intrusion" rises to the level of a constitutional violation, they
5 provide *no authority* establishing an extension of an already narrow privacy right to
6 questions asked to, or responses provided by, a third-party reference. Indeed, if
7 Plaintiffs' references have this information it is much less likely to be private.

8 Plaintiffs' already diminished privacy interest in providing confidential
9 information is further diluted where Plaintiffs are objecting to hypothetical answers
10 provided by third-parties referred to the government by Plaintiffs themselves. Indeed,
11 Plaintiffs have offered no evidence that a single reference for the 4,000 applicants that
12 have already been processed has ever been compelled or pressured to reveal intimate,
13 private details about any of those applicants.

14 With respect to the Authorization, it states that the background check is limited
15 to verifying the information provided by the applicant in SF 85. This limitation
16 further supports the constitutionality of the background check here. *See Am. Fed'n of*
17 *Gov't Employees*, 118 F.3d at 794 (relying on the government's representation that the
18 "legitimate use of the release form is limited to verifying information solicited by
19 other parts of the form" and holding the background check constitutional).

20 Nor are Plaintiffs handing over their medical histories by signing SF 85. The
21 words "medical," "doctor," "hospital," and "health" do not appear anywhere on the
22 Authorization. Health care providers are not authorized to release a patient's medical
23 records absent a specific authorization that complies with the Health Insurance
24 Portability and Accountability Act of 1996. *See* 45 CFR § 164.508. The
25 Authorization here does not even purport to meet these standards, and could not be
26 used to seek medical records.

27 SF 85 also asks for information about Plaintiffs' employment, education and
28 residential history. Plaintiffs have submitted dozens of declarations to this Court in

1 connection with this motion where they identify their educational and employment
2 history.¹⁵ And several of the Plaintiffs have written and publicly circulated letters to
3 members of Congress about this dispute, in which they include their home addresses.
4 *See, e.g.*, Pilmer Decl., Ex. 13 (3/17/07 letter from plaintiff Nelson to Congressman
5 Schiff); Pilmer Decl., Ex. 14 (9/12/07 letter from, among others, plaintiffs Paradise,
6 Hale & Mainzer to Senator Boxer).

7 Moreover, at least six of the Plaintiffs have previously sought secret security
8 clearances from the government. *See* Foster Decl. ¶¶ 6-9; Byrnes Decl. ¶ 12; Kulleck
9 Decl. ¶ 3; Satter Decl. ¶ 3; Weissman Decl. ¶ 12; Pilmer Decl., Ex. 11 (9/17/07 letter
10 from plaintiffs' counsel identifying plaintiff Mainzer as having held a security
11 clearance). In the course of doing so, they disclosed much more information to the
12 government than they are being asked to disclose here. For example, in order to
13 obtain a secret security clearance, Plaintiffs would have disclosed to the government
14 more than ten years of residential history (instead of the five requested here), more
15 than ten years of employment history (instead of five), information regarding their
16 family members (none of which is asked for here), and details about their travels
17 outside of the country (which is not part of SF 85). *See* Aden Decl. ¶ 31.

18 Plaintiffs suggest that SF 85 amounts to such a trampling of their constitutional
19 rights, that they will seek alternative employment. But if Plaintiffs were to seek
20 alternative employment in their community, for example at Starbucks, they would find
21 that private employers ask for nearly the same information in the course of an
22 employment application.¹⁶ *See* Pilmer Decl., Ex. 12 (Blank Starbucks Employment

23
24 ¹⁵ *See* Foster Decl. ¶¶ 2-4; Byrnes Decl. ¶¶ 2-4; Penanen Decl. ¶¶ 2-4; Nelson Decl.
25 ¶¶ 2-4; Banerdt Decl. ¶¶ 2-4; Bell Decl. ¶¶ 2-4; Bellan Decl. ¶¶ 2-4; Carlisle
26 Decl. ¶¶ 2-4; Crossin Decl. ¶¶ 2-4; D'Addario Decl. ¶¶ 2-4; Duren Decl. ¶¶ 2-4;
27 Eisenhardt Decl. ¶¶ 2-4; Golombek Decl. ¶¶ 2-4; Gorjian Decl. ¶¶ 2-4; Gorjian
28 Decl. ¶¶ 2-4; Hale Decl. ¶¶ 2-4; Hamkin Decl. ¶¶ 2-4; Haw Decl. ¶¶ 2-4; Kulleck
Decl. ¶¶ 2-4; Laubach Decl. ¶¶ 2-4; Lindensmith Decl. ¶¶ 2-4; Maxwell Decl.
¶¶ 2-4; McElrath Decl. ¶¶ 2-4; Paradise Decl. ¶¶ 2-4; Satter Decl. ¶¶ 2-4; Shames
Decl. ¶¶ 2-4; Walker Decl. ¶¶ 2-4; and Weissman Decl. ¶¶ 2-4.

¹⁶ It is appropriate for the Court to consider common practice in the private sector
(Continued...)

1 Application).

2 If any of the Plaintiffs were to apply for a job at Starbucks, he or she would
3 have to disclose his or her last three employers (including salary information at each),
4 whereas SF 85 asks for details regarding employment for five years (instead of the last
5 three employers) and does not ask for any salary information.¹⁷ Both Starbucks and
6 SF 85 would require that plaintiff disclose all of his or her education since high
7 school, and what other names he or she may have been known by. SF 85 asks for five
8 years of residential history, whereas Starbucks only asks for a current and
9 “permanent” address. Starbucks would ask that plaintiff whether he or she has any
10 criminal convictions within the past seven years; SF 85 does not, but requests
11 disclosure of illegal drug use within the past year. And Starbucks, like SF 85, would
12 ask that Plaintiff to provide three references.

13 Plaintiffs put much emphasis on SF 85’s Authorization for release of records.

14 But if that plaintiff applied for the position at Starbucks, he would:

15 authorize Starbucks to *thoroughly investigate my background*,
16 references, employment record and other materials related to my
17 suitability for employment. I authorize persons, schools, my current
18 employer (if applicable) and previous employers and organizations
19 contacted by Starbucks *to provide any relevant information* regarding
20 my current and/or previous employment and I release all persons,
21 schools, employers of any and all claims for providing such information.

19 See Pilmer Decl., Ex. 12.

20 The language of SF 85’s Authorization is similar, and allows government
21 investigators to:

22 obtain any information relating to my activities from schools, residential
23 managements agents, employers, criminal justice agencies, retail business

24 when evaluating the reasonableness of SF 85. *See O’Connor v. Ortega*, 480 U.S.
25 709, 730-732 (1987) (Scalia, J., concurring) (common practice in the private
26 sector is a measure of the degree of privacy job applicants reasonably can
27 expect).

26 ¹⁷ A sample declaration here discloses more information regarding employment
27 history than is required under SF 85, although it would not satisfy the Starbucks
28 form because this plaintiff did not disclose his last three employers in his
declaration. *See Duren Decl.*, ¶ 3.

1 establishments, or other sources of information. This information may
2 include, but is not limited to, my academic, residential, achievement,
3 performance, attendance, disciplinary, employment history, and criminal
4 history record information. . . . I understand that the information released
5 by records custodians and sources of information is of official use by the
6 Federal Government *only for the purposes provided in this Standard*
7 *Form 85*, and may be redisclosed by the Government only as authorized
8 by law.

9 See Compl., Ex. 1.

10 Balanced against the minimal privacy intrusion, the government can articulate
11 sufficient reasons to justify the background check in the context of allowing
12 unescorted access at a NASA facility. The NASA facility is an integral part of the
13 government's space and satellite program, with projects that range from sophisticated
14 satellites that analyze global weather patterns to NASA's Deep Space Network, an
15 international network of antenna complexes on several continents serving as the
16 communication gateway between distant spacecraft and the Earth-based teams that
17 guide them.¹⁸ The integrity of these projects and the security of the facility is
18 important enough to justify a background check of those who walk unescorted on the
19 lab.

20 **II. PLAINTIFFS SUFFER NO IRREPARABLE HARM BECAUSE THEY**
21 **HAVE ADEQUATE REMEDIES AT LAW.**

22 When a plaintiff's alleged injuries are compensable in damages, preliminary
23 injunctive relief is improper. Here, Plaintiffs claim irreparable harm through a
24 supposed loss of employment.¹⁹ But loss of employment does not constitute

25 ¹⁸ Courts instruct that the asserted government interest is entitled to deference
26 because courts may not be the best suited to review the substance of the
27 government's policy or security concerns. See *C.N. ex rel. J.N. v. Ridgewood Bd.*
28 *of Ed.*, 319 F. Supp. 2d 483, 497 (D.N.J. 2004) (court should not "improperly
inject itself into policy considerations"); *Dept. of the Navy v. Egan*, 484 U.S. 518,
527 (1988) (recognizing the Government's compelling interest in national
security); *Croddy v. FBI*, No. 00-651, 2006 WL 2844261 at *4 (D.D.C. Sept. 29,
2006) (court would not second-guess Secret Service's determination that inquiry
into the applicants' finances, drug use, health, and criminal history was
legitimate).

¹⁹ Any loss of employment will be purely voluntary on Plaintiffs' part. Should
Plaintiffs choose not to seek the federally required badge, then they will have
(Continued...)

1 irreparable harm.

2 In *Stanley v. University of Southern California*, 13 F.3d 1313 (9th Cir. 1994),
3 the plaintiff, a former women's basketball coach, brought claims for employment
4 discrimination, and sought to enjoin the university's termination of her position. The
5 Ninth Circuit upheld the district court's refusal to issue a preliminary injunction. *Id.*
6 at 1320 (money damages and back pay for loss of employment is an adequate remedy
7 at law); see also *Anderson v. U.S.*, 612 F.2d 1112, 1116 (9th Cir. 1979) ("if one can be
8 adequately compensated in back pay, a preliminary injunction should not be issued.").
9 Indeed, the loss of a job is quintessentially reparable by money damages. *Minn. Ass'n*
10 *of Nurse Anesthetists v. Unity Hosp.*, 59 F.3d 80, 83 (8th Cir. 1995) ("Regarding
11 preliminary injunction to prevent an employer from discharging an employee, we have
12 noted that while termination harms that employee, the harm is not necessarily
13 irreparable and can be compensated by money damages."); see also *Farris v. Rice*,
14 453 F. Supp. 2d 76, 79 (D.D.C. 2006) ("cases are legion holding that loss of
15 employment does not constitute irreparable injury.").

16 Nor is a preliminary injunction an appropriate remedy simply because Plaintiffs
17 allege a constitutional violation. In general, violations of constitutional rights
18 constitute irreparable harm only "where monetary damages could not remedy the
19 constitutional violation." *Am. Fed'n of Gov't Employees, Local 1857 v. Wilson*, No.
20 89-1274, 1990 WL 208749, at *14 (E.D. Cal. July 9, 1990). And here, if it turns out
21 that the government exceeds constitutional limits with respect to badge-issuance
22 decisions, Plaintiffs may have an available remedy. See, e.g., *Bivens v. Six Unknown*
23 *Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (establishing
24 damages liability for government officials who commit constitutional violations

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26 _____
27 chosen not to fulfill an essential requirement of their employment, in which case
28 Caltech will consider them to have voluntarily resigned. Only one of the
Plaintiffs, however, has indicated she intends to leave. Foster Decl. ¶¶ 16-18.
Thus, the claimed loss of employment is also speculative.

1 carried out by virtue of federal authority).

2 Because Plaintiffs have an adequate remedy at law if they ultimately prevail on
3 any of their claims at trial, injunctive relief should not be issued.

4 **III. THERE IS NO THREATENED IRREPARABLE HARM TO THE**
5 **PUBLIC.**

6 Caltech respects and is grateful for the contributions of all of its personnel.
7 Caltech would regret the loss of these 28 plaintiffs if they choose to resign by refusing
8 to obtain the requisite badge. But there are approximately 7,500 people who work
9 together to ensure the success of JPL's missions. All of JPL's missions are designed
10 and staffed so that no single employee is indispensable to any mission. Moreover,
11 JPL receives thousands of inquiries every year from qualified applicants in regard to
12 employment opportunities to fill the turnover of hundreds of jobs each year. *See* Hart
13 Decl. ¶ 19. Thus, JPL's programs—and therefore the public interest—will not be
14 irreparably damaged if these employees were to leave JPL.

15 There is a flip-side, of course, to the public harm equation: Will there be harm
16 to the public if the injunction is granted? The public has an interest in assuring the
17 judgment, integrity, and overall trustworthiness of government employees and
18 contractors. As detailed in NASA's Opposition to this motion, there are strong public
19 interests which would be negatively impacted if the badge-issuance process were
20 enjoined.

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CONCLUSION

For all the reasons stated above, Plaintiffs' motion should be denied.

DATED: September 21st, 2007

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