
No.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Robert M. Nelson, William Bruce Banerdt, Julia Bell, Josette Bellan, Dennis V. Byrnes, George Carlisle, Kent Robert Crossin, Larry R. D'Addario, Riley M. Duren, Peter R. Eisenhardt, Susan D.J. Foster, Matthew P. Golombek, Varoujan Gorjian, Zareh Gorjian, Robert J. Haw, James Kulleck, Sharon L. Laubach, Christian A. Lindensmith, Amanda Mainzer, Scott Maxwell, Timothy P. McElrath, Susan Paradise, Konstantin Penanen, Celeste M. Satter, Peter M.B. Shames, Amy Snyder Hale, William John Walker and Paul R. Weissman,
Plaintiffs-Appellants,

vs.

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

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

**EMERGENCY MOTION FOR STAY AND EXPEDITED APPEAL UNDER
CIRCUIT RULE 27-3**

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CIRCUIT RULE 27-3 CERTIFICATE

I, Virginia Keeny, hereby certify:

1. I am an attorney in good standing duly licensed to practice before all of the courts of this state, including the Ninth Circuit Court of Appeals, a member of the law firm of Hadsell & Stormer, Inc. and a counsel of record for the plaintiffs in this action. I have personal knowledge of the information set forth below and if called as a witness to testify would testify to the truth of the following:

Counsel for the Parties

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

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

4. Defendant California Institute of Technology is represented by Mark Holscher, Esq., and Alexander Pilmer, Esq., Kirkland & Ellis, 777 S. Figueroa, #3700, Los Angeles, California 90071, Telephone: (213) 680-8400; Facsimile: (213) 680-8500.

Existence and Nature of Emergency

5. Plaintiffs are renowned scientists and engineers, all of whom are long term employees of the California Institute of Technology (“Caltech”), who work at the Jet Propulsion Lab on NASA projects. They are being compelled to provide information to NASA as part of a recently instituted background investigation which, they contend, will violate their constitutional rights. All have been informed, and the district court below found, that they will be terminated if they do not provide the contested information by the end of the day on October 5, 2007. All of the plaintiffs will suffer irreparable harm, in the form of being compelled to make a Hobson’s choice between the loss of a unique and irreplaceable job and the loss of their constitutional rights, if a temporary stay and injunction is not entered while this appeal is heard. Neither defendants nor the public will suffer any harm if the background investigation process is temporarily enjoined, as none of the plaintiffs hold security clearances or work with classified materials and all have been designated by NASA as “low risk” employees, whose activities pose no threat to government programs and assets. The balance of hardships therefore tips sharply in favor of the grant of the temporary injunction and stay of the district court proceedings, allowing a hearing of the appeal.

Notification and Service on Opposing Counsel

6. I spoke with attorney Vesper Mei, counsel for all government defendants, on October 4 at 7:00 a.m. and informed her that we were filing a

notice of appeal and motion for emergency stay and expedited appeal pursuant to Circuit Rule 27-3. She stated that the government would not voluntarily enter into a stay and that it would oppose the motion for an emergency stay. She further agreed to accept service of all documents via electronic mail.

7. On October 4, 2007 at approximately 7:15 a.m., I communicated via email with Alex Pilmer, counsel for Caltech. I told him that we were filing a notice of appeal and motion for emergency stay and expedited appeal pursuant to Circuit Rule 27-3. Caltech's formal position with respect to this emergency request is filed herewith as Exhibit 16. Mr. Pilmer also agreed to accept service of all documents via electronic email.

Whether the grounds for the Motion were Submitted to the District Court

8. All of the relief sought by this emergency appeal was submitted to the district court in support of the motion for preliminary injunction. The court considered and rejected every ground advanced by plaintiffs in support of the motion for preliminary injunction. Attached hereto as Exhibit A is a true and correct copy of the Order Denying Plaintiffs' Motion for Preliminary Injunction.

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

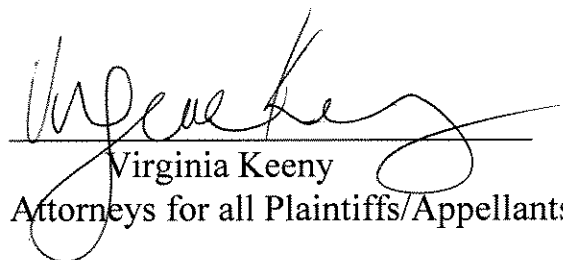

Virginia Keeny
Attorneys for all Plaintiffs/Appellants

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

By this emergency motion pursuant to Circuit Rule 27-3, plaintiffs-appellants (“plaintiffs”) seek a temporary injunction preserving the status quo, and a stay of the district court proceedings, so that this Court may hear an appeal of the district court’s denial of plaintiffs’ motion for preliminary injunction.¹

Plaintiffs are long-term employees of the Jet Propulsion Laboratory (“JPL”), a NASA Federally Funded Research and Development Center operated under the aegis of the National Aeronautics and Space Administration (“NASA”), who are research scientists, engineers, and administrative/clerical staff. California Institute of Technology (“Caltech”), a private university, has a contract with the federal government for the purpose of staffing JPL. Plaintiffs, and the class they represent, do not hold security clearances nor work with classified materials. Their work is published in journals and presented publicly at conferences. Indeed, 97-98% of the JPL workforce has been designated by NASA as non-sensitive, or “low-risk” positions – the lowest risk designation within the federal government. JPL itself has been and continues to be operated as an open, university-like facility, hosting streams of visitors daily, and imposes fewer physical security measures than the typical courthouse. Plaintiffs challenge a NASA directive

¹ The order denying the preliminary injunction is attached hereto as Exh. 1. Plaintiffs motion for preliminary injunction is attached as Exh. 2 and their reply brief is attached as Exh. 3.

imposing upon them an overly intrusive background check and open-ended waiver of privacy rights, and culminating in a similarly open-ended and subjective “suitability determination,” the results of which they have extremely limited rights to appeal.² Plaintiffs have brought constitutional claims alleging imminent violations of their informational privacy rights and their Fourth Amendment rights. Plaintiffs will suffer irreparable harm, in the form of being compelled to make a Hobson’s choice between the loss of a unique and irreplaceable job and the loss of their constitutional rights, if the temporary injunction is not entered. In fact, other governmental agencies have not enforced these identical requirements at other federal facilities around the country. Judge Wright acknowledged the need for immediate relief stating, “Here, it is undisputed that if Plaintiffs do not sign the SF-85 waiver by October 5, 2007 they will not receive their identification badges. Without their badges they will not have access to the JPL premises and will thus be deemed to have voluntarily resigned. It appears that this is a concrete injury that is imminent and not hypothetical.” (Order, at 8.)

A brief preservation of the current circumstances, without forcing plaintiffs to waive their constitutional rights, poses no conceivable harm. The balance of

² The extremely limited appeal rights from the “suitability determination” available to contractors, as opposed to federal employees, is set out in Exh. 9 (NPR 1600.1) at 13.4.2. A copy of the background investigation form (SF-85), waiver and investigation form, at issue in this appeal, are filed herewith as Exh. 4. A copy of the suitability criteria to be applied by NASA is filed herewith as Exh. 5. All exhibits submitted herewith were previously submitted to and considered by the district court.

hardships therefore tips sharply in favor of the grant of the temporary injunction and stay of the district court proceedings, allowing a hearing of the appeal.

II. FACTS

The plaintiffs in this action are scientists, engineers and administrative support personnel employed by Caltech to work at the JPL facility on NASA programs. Most of the plaintiffs have worked at JPL for more than twenty years. None of them have security clearances nor do they work with classified material of any kind.^{3 4} Many of the plaintiffs only agreed to work for NASA with the understanding that they would not have to work on classified materials or obtain security clearance.⁵ All research data generated by plaintiffs (collected from NASA missions and instruments) are in the public domain, and plaintiffs' scientific findings are freely shared with the scientific community and the public.⁶ Indeed, many of the plaintiffs have elected to do only non-classified work expressly so that their research is subject to peer review, and so that they can "collaborate with the best scientists worldwide and publish [their] results."

³ E.g., Bellan, ¶10; Lindensmith, ¶12; Banerdt, ¶14; Eisenhardt, ¶2; Bell, ¶9; Laubach, ¶8; Mishkin, ¶ 9; D'Addario, ¶7; Kulleck, ¶4; Z. Gorjian, ¶10; V. (Declarations submitted in support of the motion for preliminary injunction are attached hereto as Exh. 10.)

⁴ While a handful of plaintiffs held security clearances in the past, all their clearances expired more than 10 years ago and since that time they have elected not to work on classified projects. See plaintiffs Decls., Exh. 10.

⁵ See, e.g. Byrnes, ¶13; D'Addario, ¶10; Z. Gorjian, ¶10; Bell., ¶13.

⁶ See, e.g. Hale, ¶80; Weissman, ¶13; Nelson, ¶10; Penanen, ¶ 10.

Golombek, ¶15.

On August 27, 2004, President Bush signed Homeland Security Presidential Directive 12 (HSPD-12), entitled “Policy for a Common Identification Standard for Federal Employees and Contractors,” applicable to all Executive Branch departments and agencies. HSPD-12's stated purpose is to ensure that “secure and reliable forms of identification” are used by government employees and contractors. HSPD-12 directed the Department of Commerce to promulgate a Federal standard for “secure and reliable forms of identification.” Nowhere does HSPD-12 authorize or require implementation of a background investigation process for employees of contractors or even current or new federal employees, nor does it authorize or contemplate any requirement that applicants for the new identification form waive any of their privacy rights.

In response to HSPD-12, in March 2006, the Department of Commerce promulgated a standard entitled “Personal Identify Verification (PIV) of Federal Employees and Contractors,” codified at FIPS PUB 201-1. Exh. 7. The PIV standard explained that its sole authority was based on HSPD-12. While stating that it seeks to meet the four criteria for forms of identification set forth in HSPD-12, the PIV standard also proceeded, without explanation, to impose an unrequired background investigation requirement on all employees.⁷ The standard further

⁷ The actual identification confirmation process outlined in FIPS PUB 201-1 is fairly straightforward and hardly novel: a fingerprint check has to be completed; the applicant has to appear in person; and the applicant has to provide “two forms of identity source documents in original form,” at least one of which had to be a

specifies that the background investigation required will be a “National Agency Check with Inquiries,” or its equivalent, for which each applicant will be required to complete Standard Form (SF) 85, “OPM Questionnaire for Non-Sensitive Positions,” or its equivalent. Exh. 7, at 6 and 53.

Working separately to respond to HSPD-12, in 2006 NASA had instituted an identification badge system (the OneNASA badge), which could be used at all NASA facilities. Foster, ¶10, and Exh. A and H thereto, filed herewith as Exh. 8. To obtain one of these new badges, JPL employees had to provide basic personal information, submit two forms of approved identification, and submit to fingerprinting. *Id.*, at 10-11. None of the forms required that JPL employees waive their privacy rights in any way. *Id.* Plaintiffs had no objection to this process, which fully met the objectives of HSPD-12.

On May 24, 2007, NASA issued Interim Directive, NPR 1600.1, establishing a new “Agency-wide policy for the creation and issuance of federal credentials at NASA.” Exh. 9. This Directive and the accompanying policy of implementation are the focus of this action. The Directive states that it is being implemented in compliance with HSPD-12 and the PIV standard established by Commerce. Exh. 9, p. 1.

Prior to implementing the new PIV system, NASA and JPL had jointly established the risk level for each position at JPL. Byrnes Decl., and Exh. N, at

valid state or Federal government-issued picture identification.” (Exh.7, at 6.)

260, attached hereto as Exh. 11. Each position was to be designated as “high, moderate or low risk” based on the “overall responsibility of the position” and “any possible adverse impact the position could have in terms of integrity and efficiency of NASA assets/operations.” Exh. 11, at 262. All employees determined to be low risk level are now required to complete SF-85 and submit to a background check known as a “National Agency Check with Inquiries” (“NACI”). Exh. 11, at 264. It is undisputed that all plaintiffs have been notified that they have been deemed “non-sensitive personnel” by NASA and JPL and therefore required to go through a NACI and complete SF-85.⁸ Moderate and high risk employees are required to complete Standard Form SF-85 P and submit to a more extensive background investigation. *Id.* 97-98% of JPL personnel have been designated as “non-sensitive” or low risk level by JPL and NASA.⁹ Laubach Decl., ¶8, Exh. 10; *see also* Exh. 11, at 266; Foster Decl., and Exh. J thereto, attached as Exh. 8. All of plaintiffs and the class they represent fall within the low risk category.

Many of the plaintiffs had previously completed the more basic National Agency Check (“NAC”), which merely required that they provide their names, social security numbers and current addresses, but did not require any inquiries to

⁸ See, e.g. Foster, ¶14, Exh. 10.

⁹ Plaintiffs do not currently seek to represent employees who have been designated as moderate or high risk, and who have been informed that they must complete SF-85P and submit to the more rigorous background investigation.

be made of former employers, neighbors, medical information, consumer records, or references, nor did it include any privacy waiver.¹⁰

SF-85 requires various background information to which plaintiffs do not object, e.g., name, date of birth, place of birth, social security number, etc. Most significantly, applicants are also required to sign, as part of SF-85, an extremely broad “Authorization for Release of Information,” which authorizes the agency to collect “any information relating to my activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information.” *Id.*, p. 6 (emphasis added). The three references applicants are required to provide, together with their employers and landlords for the past 5 years, are then sent an Investigative Request for Personal Information, which asks that they report any adverse information they have on the plaintiff with respect to “abuse of alcohol or drugs,” “financial integrity,” “mental or emotional stability,” “general behavior or conduct,” and “other matters.” Foster Decl., and Exh. K thereto, filed herewith as Exh. 8.

NASA’s Interim Directive states that if the Badge issuance process yields any “derogatory or unfavorable information,” it will be forwarded to the Human Relations Officer for JPL, who will determine “employment suitability.” Exh. 9, §13.1.1 (p. 17). In public meetings regarding the new identification process, JPL employees have been informed that the adjudication of their suitability will instead

¹⁰ See plaintiffs Decls., at Exh. 10.

be performed by a “federal employee,” and a negative outcome “would prevent [the] individual from access to a federal facility.” Exh. 11 at 282. JPL has posted on its internal website the various grounds upon which an employee can be determined unsuitable. The grounds, enumerated on a federal government form promulgated by the Office of Personnel Management, include “infrequent, irregular but deliberate delinquency in meeting financial obligations,” “pattern of irresponsibility as reflected in . . . credit history,” “sexual misconduct with impact on job,” “sodomy,” “attitude,” “personality conflict,” “homosexuality,” “judgment, reliability and dependability issues,” “physical health issues,” “mental, emotional, psychological or psychiatric issues,” “issues . . . that relate to an associate of the person under investigation,” and “issues . . . that relate to a relative of the person under investigation.” Penanen, ¶20 and Exhibit R, filed as Exh. 12 hereto; see also Supp. Foster Decl, and Exh. B thereto, filed as Exh. 13.

III. ARGUMENT

A. The Balance of the Hardships Tips Sharply in Favor of a Grant of the Stay and Entry of a Temporary Injunction.

Plaintiffs will suffer irreparable harm, in the form of being compelled to choose between loss of a unique job and loss of their constitutional rights, if the temporary injunction is not entered. On the other hand, there will be no harm to the government or the public if the status quo is merely extended for a time sufficient for this Court to hear plaintiffs’ appeal of the denial of the preliminary injunction. A brief preservation of the current circumstances, without forcing

plaintiffs to waive their constitutional rights, poses no conceivable harm.

First, JPL already has in place an extensive badging and identification system, which applies to all JPL employees. Foster Supp. Decl., at ¶6, Exh. 13 hereto. Second, the new badges under HSPD-12, which are required for all federal facilities, are not being implemented by many agencies who are being informed that they have more than a year from this date to comply and others being informed that their contractors will never have to comply with the new badging system and background investigation. Importantly, the U.S. Department of Energy¹¹ has never required the background investigation and new badging requirement for contractor employees unless they have an “L or Q” access authorization (Secret or Top Secret security clearance), or are servicing the DOE headquarters in Washington D.C.¹² Indeed, Brookhaven National Laboratories’

¹¹ The DOE operates numerous FFRDC’s (while NASA operates only JPL as a FFRDC), including numerous facilities which are critical to our nation’s atomic energy and weapons programs, such as Los Alamos National Lab, Sandia National Lab, Fermilab, and Brookhaven National Lab. (See List of FFRDC facilities by controlling agencies, attached hereto as Exhibit 6 to Supp. Request for Judicial Notice, filed herewith as Exh. 14 .)

¹² U.S. DOE Notice 206.4, published by Office of the Chief Information Officer, Section 3.a, Exh. 4 to Supp. Request for Judicial Notice, filed herewith as Exh. 14; Memorandum for all Departmental Elements dated October 13, 2005, from the Deputy. Secretary of Energy attached to Supp. Req. for Judicial Ntc., as Exh. 5. Other examples of non-compliance or later compliance deadlines abound. For example, the United States Department of Agriculture has informed its employees that “all applicable USDA employees and contractors must obtain the new ID card by *October 2008*.” USDA HSPD-12 Informational website dated 9/19/07, Exh. 1 to Supp. Request for Jud. Ntc.. The Social Security Administration’s own Audit Report dated July 2007 states that SSA has not implemented the new PIV badge required by HSPD-12 and has obtained a new deadline of October 2008 for

internal reports indicate that the “requirements for contractors to comply with HSPD-12 were removed thanks to the effort of Deputy Secretary Clay Sell.” Report from the User’s Center, RHIC & AGS Open Forum Meeting, Supp. Req. For Jud. Ntc., Exh. 14, p. 3. The National Science Foundation, which operates four FFRDC’s around the country, requires only that those employees and contractors who work at its headquarters in Washington comply with the new badge and background investigation requirement. Federal Register: 11/1/06 (Vol. 71, No. 211), p. 64319-20, filed herewith as Exh. 14. Foreign nationals who have access to federal facilities are not required to have the new badge or comply with the NACI-background investigation or its equivalent, nor do the nearly 200,000 volunteers serving in the Department of the Interior Rpt. to the Chairman, Comm. on Government Reform, House of Rep., USGAO -06-178, p. 32, Exh. 14. Finally, as set out more fully in Section C *infra*, neither the security needs and practices at JPL, nor the nature of plaintiffs’ jobs and access to information and facilities, support any claim of impending harm.

On the other hand, all of the plaintiffs will lose their jobs if they do not submit to the SF 85 on October 5, 2007.¹³ All the plaintiffs will suffer the loss of a

compliance. (“Office of the Inspector General, SSA, “The Social Security Administration Progress in Implementing Homeland Security Presidential Directive 12, July 2007, A-14-07-27110 Audit Report, Exh. 8, to Supp. Req. for Jud. Ntc., at pp. 3 and 11.)

¹³ One plaintiff, Susan Foster, has already been forced to resign due to her refusal to sign SF-85 and the waiver. Foster, ¶18.

unique and irreplaceable job, and their pursuit of their life's work will be imperiled.¹⁴

Of equal if not greater significance, the public will suffer irreparable harm if JPL and NASA lose these critical employees, many of whom play indispensable roles on current space exploration missions and are irreplaceable because of their knowledge, experience, and intimate involvement with these missions over the past years. For example, JPL and NASA would lose Dennis Byrnes, whose technical expertise is “critical across essentially every project at JPL,” and who has been entreated not to leave by senior JPL management because of the importance of his contributions to the lab. Byrnes, ¶24.¹⁵ In addition, NASA will be deprived of the talents of other scientists and engineers who will be deterred from applying to work at JPL because of the newly-required background investigation and waiver of privacy rights, both of which are antithetical to the type of autonomy and academic freedom needed to maintain JPL's status as the preeminent research institution for space exploration. E.g., Laubach, ¶¶15-16.

¹⁴ See, e.g., Weissman, ¶18 (loss of job and access to telescope necessary to conduct NASA-funded research on comets and asteroids); Crossin, ¶10; Nelson, ¶16; Byrnes, ¶23. Exh. 11 hereto; Laubach, ¶13; Banerdt, ¶16.

¹⁵ See e.g. Bellan, ¶17; Maxwell, ¶17 (projects will face increased delay if he is forced to leave as he developed crucial software for the Mars Exploration Rover mission); Crossin, ¶11 (“high probability that quality testing could not be done to meet scheduled deadlines” causing delays to multiple programs); Haw, ¶19 (departure from JPL would upcoming mission to Mars because it would impact completion of the rough terrain landing system); D’Addario, ¶13; Laubach, ¶14; Banerdt, ¶17; Carlisle, ¶15.

The other horn of plaintiffs' dilemma poses an equally irreparable harm, in that plaintiffs will be forced to submit to violations of their constitutional rights. Courts in this Circuit have held that a violation of an individual's Fourth Amendment right categorically consists in irreparable harm. *AFGE, Local 1533 v. Cheney*, 754 F. Supp. 1409, 1416 (N.D. Cal. 1990). Accordingly, plaintiffs in the present case will suffer irreparable injury as a matter of law if defendants' acts constitute unreasonable searches. Violation of plaintiffs' informational privacy rights also constitute irreparable harm because "once this type of highly personal information is disclosed to the government, the revelation cannot be undone." *National Treasury Employees Union v. U.S. Dept. of Treasury*, 838 F. Supp. 631, 639 (D.D.C. 1993) (holding that in filling out an SF-85P form there is an "obvious threat of significant harm if the plaintiffs are forced to disclose this information to the Customs Service."). *See also, e.g., LaDuke v. Nelson*, 762 F.2d 1318, 1330 (9th Cir. 1985), *modified on other grounds*, 796 F.2d 309 (9th Cir. 1986) (violation of individuals right to be free from unconstitutional searches causes irreparable harm); *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992) (plaintiffs may establish irreparable harm based on an alleged violation of their Fourth Amendment rights); *McDonell v. Hunter*, 746 F.2d 785, 787 (8th Cir. 1984) (violation of privacy constitutes an irreparable harm); *Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency*, 663 F. Supp. 1560 (C.D. Cal. 1987) (government employees entitled to preliminary injunction against employer

instituting pre-employment test which potentially violated Fourth Amendment); *AFGE Local 1533 v. Cheney*, 754 F.Supp. 1409 (1990).

B. Plaintiffs have Standing to Challenge the Government's Acts.

The district court found that plaintiffs have standing to assert their constitutional claims as to SF 85, including both the required disclosures and the waiver of privacy rights. (Order at 8.)

C. Plaintiffs are Likely to Succeed in their Informational Privacy Claim.

This Circuit's decision in *Crawford v. United States Trustee*, 194 F.3d 954 (9th Cir. 1999), clearly establishes that informational privacy exists as a constitutionally protected interest. *Crawford*, 194 F.3d at 958. *Accord Roe v. Sherry*, 91 F.3d 1270, 1274 (9th Cir. 1996); *Doe v. Attorney General*, 941 F.2d 780, 795-96 (9th Cir. 1991). In so ruling, this Court noted that the majority of circuits to rule on the question concurred in finding that informational privacy warrants constitutional protection. *Id.*, at n. 4. The Supreme Court has defined this type of privacy interest as "the individual interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599 (1977).

Crawford further recognized that the constitutional right to informational privacy can be invoked against a federal agency. *Accord Roe v. Sherry*, 91 F.3d at 1274 (right invoked against U.S. Naval Investigative Services). The other circuits to recognize a constitutional right to informational privacy have likewise allowed the right to be invoked against a federal agency or employee. *See, e.g., U.S. v.*

Westinghouse, 638 F.2d 570 (3d Cir. 1980) (employer challenged order granting federal agency subpoena access to employee medical records).¹⁶

“[T]he government has the burden of showing that ‘its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate need.’” *Crawford*, 194 F.3d at 959. The relevant factors to consider include:

the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree or need for access, and whether there is an express statutory mandate, articulated public policy or other recognizable public interest militating toward access.

*Id.*¹⁷ The government cannot meet this burden in this case. First, the language of

¹⁶ The courts have grounded the right to informational privacy in various provisions of the Constitution. *See, e.g., Roe v. Wade* 410 U.S. 113,152 (1973) (finding the right to privacy in the Fourteenth Amendment); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (some personal rights “implicit in the concept of ordered liberty”); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)(right to associational privacy grounded in First Amendment); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (first, third, fourth, fifth and ninth amendments have emanations that constitute “zones of privacy”); *Whelan*, 429 U.S. at 600 (privacy interest arises from due process clause of 5th Amendment).

¹⁷ Plaintiffs also challenge the background investigation questions under the Fourth Amendment, for which courts apply the same analysis. The Fourth Amendment is triggered by infringing a reasonable expectation of privacy, regardless of whether there is physical trespass. *See, e.g., Katz v. United States*, 389 U.S. 347, 351 (1967) (rejecting government’s assertion that a search or seizure requires physical invasion, instead adopting reasonable expectation of privacy test); *Berger v. New York*, 388 U.S. 41 (1967) (wiretapping, absent physical search or seizure); *Skinner v. Railway Labor Executives Ass’n*, 489 U.S. 602, 617 (1989) (“host of private medical facts,” not nature of physical contact, renders collection of urine samples a Fourth Amendment violation); *Chandler v.*

the waiver is extraordinarily broad and necessarily implicates plaintiffs' privacy rights. The release provides:

I authorize *any investigator*, special agent or duly accredited representative of the authorized Federal agency conducting my background investigation to obtain *any information* relating to my activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or *other sources of information*. This information *may include but is not limited to*, my academic, residential, achievement, performance, attendance, disciplinary, employment and criminal history record information. . . . This authorization is valid for two (2) years from the date signed.

(Exh 4, emphasis added.) This waiver gives the government free rein to seek a vast amount of information about the plaintiffs' credit history, school activities, employment history, school attendance, as well as anything from any "other source of information" found germane to the government's investigation. The government actually asserted that this breadth is necessary to allow the government "flexibility to follow up on relevant leads." (Fed. Defts' Opp. at 23.) It cannot seriously be doubted that requiring citizens to provide the government with this type of blanket waiver so that it may, by its own admission, follow up on "any relevant leads" invades protected privacy interests.

Second, the federal government's questioning of plaintiffs' associates regarding plaintiffs' private lives also implicates protected privacy interests. Two

Miller, 520 U.S. 305 (1997); *Norman-Bloodsaw v. Lawrence Berkeley Laboratories*, 135 F.3d 1260, 1270 (9th Cir. 1998); *Overstreet v. Lexington-Fayette Urban County Govt.*, 305 F.3d 566 (6th Cir. 2002) (required disclosure of government employee's financial information was not ultimately a Fourth Amendment violation, but only because of the nature of facts disclosed, not the absence of a physical touching).

of those questions relate directly to medical condition. (Exh. K to Foster Decl., Exh. 8 hereto.) The associate is asked to divulge whether the plaintiff has any mental or emotional stability problems and whether he or she has ever abused alcohol or drugs. Both of these questions seek information that could require disclosure of information about the mental health of the plaintiff, medical problems, or alcohol/drug dependency (all protected conditions under the Americans with Disability Act). At oral argument NASA's counsel stated that this information is needed to determine the "mental stability" of plaintiffs – all of whom are long-term employees, some for as much as 39 years. This Circuit has held that it is unconstitutional for a governmental employer to obtain medical information about an employee without her consent. *Norman-Bloodsaw v. Lawrence Berkeley Lab*, 135 F.3d 1260, 1269 (9th Cir. 1998) (analyzing medical information requests under the Fourth Amendment) ("application of the balancing test requires not only considering the degree of intrusiveness and the state's interests in requiring that intrusion, but also "the efficacy of this [the state's] means for meeting" its needs.") *Id.* (quoting *Yin v. California*, 95 F.3d 864, 870 (9th Cir. 1996)). Other questions on the form relate to financial history.

Third, the questions posed to plaintiffs on the SF 85 itself include a request that the plaintiff disclose whether he or she has used any illegal drugs in the past year and also the nature of any counseling or treatment received. Not only does this compulsory disclosure violate plaintiffs' rights to privacy in their medical

histories (to the extent that it pertains to treatment and counseling), it also requires them to disclose potentially incriminating information regarding drug use. The courts are adamant that requiring drug testing of public employees is only justified for a relatively small subset of employees who are in “safety sensitive” positions. *See, e.g. Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656,679 (1989).¹⁸ If defendants cannot constitutionally subject these non-sensitive personnel to drug testing, they also cannot require that plaintiffs be forced to disclose information about any drug use, on penalty of losing their job if they do not answer the question truthfully. It would make no logical or legal sense to allow it in one context but to forbid it in another. A virtually identical question about drug use was analyzed and enjoined by the court in *National Treasury Employees Union v. United States Dept. of Treasury*, 838 F. Supp. 631 (D.D.C. 1993). Even though the form in question there also provided that answers would not be used in any criminal proceeding against the employee, the court concluded that the requirement that they disclose drug use was still compelled and violated, at a minimum, the employees’ Fifth Amendment rights against self-incrimination. *Id.* The court found it problematic that the form did not allow the employee to plead

¹⁸ *See also Harmon v. Thornburgh*, 878 F.2d 484 (D.C.Cir. 1989) (upholding preliminary injunction preventing DOJ from drug testing all federal prosecutors and all employees with access to grand jury proceedings while allowing drug testing only for those with top secret security clearances); *AFGE Local 1553 v. Cheney*, 944 F.2d 503, 506 (9th Cir. 1991) (upholding random testing of engineers required to hold top secret access clearance); *American Federation of Government Employees L-2110 v. Derwinski*, 777 F. Supp. 1493 (N.D.Cal. 1991) (enjoining random testing of employees at VA who are not in safety-sensitive positions).

his right against self-incrimination or to refuse to answer the question, and found the government's assertion that the information would not be used against the employee "disingenuous." *Id.*, at 639-40. The court concluded: "An employee who is discharged for refusing to answer under these circumstances is, in fact, being discharged for refusal to waive his constitutional privilege." *Id.*, at 639.

Fourth, defendants have not provided safeguards to ensure proper protection of the private information sought. For example, the government contends that "adverse information obtained in the credential issuance process 'shall not be disclosed to the individual's employer since it could effect the individual's employment and possibly subject NASA to legal liability'." (Fed. Defts' Opp. at 35.) Nonetheless, Caltech, plaintiffs' employer, admits that they are the repository for all information collected and that they will have access to this information. Indeed, at page 6 of Caltech's brief, Caltech admits that all of the private information provided by an employee on SF 85 goes to a JPL employee in their "Office of Protective Services." While Caltech asserts that print outs of the SF 85 are shredded after review by Caltech "approvers," it does not deny that the electronic form remains in retrievable form on the e-QIP system, to which the approvers have access. Thus, by their own admission, the government intends to and has *already put in place a process* by which plaintiffs' employers will have access to all of the private information which plaintiffs are required to disclose. This process directly violates the Privacy Act, which prohibits disclosure to non-

governmental agencies. 5 U.S.C. § 552a(b).

Finally, defendants cannot meet their burden of establishing that the vague, generalized governmental interests they seek to advance through the background check outweigh plaintiffs' substantial privacy interests. In the proceedings below, the federal defendants essentially asserted that the mere fact that JPL is a federal facility is sufficient grounds to require that plaintiffs relinquish their privacy rights. Fed. Dfts.' Opp. at 1, 27. Nowhere did defendants provide any evidence to support their assertion that the background investigation of these low-risk employees will improve security in any respect at JPL. Plaintiffs have no opposition to defendants instituting a badging system to ensure that only known employees access JPL's facilities, and indeed, all of the plaintiffs have photo identifications which they use to gain access. However, the background investigation, drug use inquiries, broad waiver, intrusive questions addressed to associates regarding mental health and financial problems, and suitability determination based on suspect criteria, have no nexus with determining whether plaintiffs pose security threats. There can simply be no explanation how any of this information renders it more or less likely that the individual applicant is who he purports to be or renders the facility buildings any more physically secure. There is also no justification for requiring all JPL employees to answer the questions regarding drug use and treatment. The government cannot justify requiring "low risk" individuals for whom they cannot point to any evidence of

safety related risks, to disclose information regarding drug use, especially under the legal standard that compelled disclosure of information regarding drug use must be tied to the public safety character of the position.

There is no evidence that these plaintiffs or any of the personnel designated as non-sensitive pose any threat to NASA facilities or databases. The JPL facility itself does not operate in any way like a secure government facility but rather prides itself on the openness of its campus and the streams of visitors it hosts every day. Duren Decl., Exh. 15 hereto. Mr. Duren notes that:

as an extension of Caltech, JPL is a unique combination of academia and government. JPL has always operated more as a university campus type environment than as a high security government facility and continues to do so to this day. . . . JPL has instituted [only] limited physical security precautions. For example, there are no metal detectors, no inspection of handbags, and vehicle inspections are cursory and for cars, only conducted randomly. . . . Many [] personnel including students and others who work part-time or only on lab several months per year, are only required to submit to a NAC check before being granted unescorted access to the lab including computer access. This includes foreign nationals.” *Id.*, at 6.

IV. CONCLUSION

For the foregoing reasons, plaintiffs respectfully urge this Court to grant an emergency stay of the district court proceedings and enter a temporary injunction preserving the status quo so that this Court may hear an emergency and expedited appeal of the denial of the motion for preliminary injunction.

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Respectfully Submitted,

By


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