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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10

11 Robert M. Nelson, William Bruce
Banerdt, Julia Bell, Josette Bellan,
12 Dennis V. Byrnes, George Carlisle, Kent
Robert Crossin, Larry R. D'Addario,
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16 Maxwell, Timothy P. McElrath, Susan
Paradise, Konstantin Penanen, Celeste
17 M. Satter, Peter M.B. Shames, Amy
Snyder Hale, William John Walker and
18 Paul R. Weissman,

19 Plaintiffs,

20 v.

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

26 Defendants.
27
28

Case No. CV-07-05669 ODW(VBKx)

[Assigned to the Honorable Otis D.
Wright II - Courtroom 11]

**PLAINTIFFS' JOINT REPLY IN
SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

Date: October 1, 2007
Time: 4:00 p.m.
Courtroom: 11

*[Plaintiffs' Declarations and Exhibits in
Support of Motion for Preliminary
Injunction and Request for Judicial
Notice filed separately]*

Complaint Filed: August 30, 2007

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FEDERAL STATUTES

42 U.S.C.
§ 2455 25

I. INTRODUCTION

Defendants' response to plaintiffs' motion is characterized by an uneasy combination of a) denials that the government is exercising or intends to exercise the extremely broad powers it has asserted to intrude upon plaintiffs' private lives outside their professions; and b) insistence that it is justified and necessary for it retain these broad powers. Yet defendants' brief largely ignore or fail to address the two key aspects of this intrusion: the extremely broad and open-ended waiver of privacy rights that accompanies the compulsory disclosure of information required by SF-85, and the determination of suitability for employment that will be made on the basis of the information gathered, using criteria that NASA has espoused and now, in litigation, disavows. The suitability determination conducted by NASA essentially imports wholesale the criteria used to issue security clearances, which are required in order for individuals to deal with classified information.

Defendants raise the specter of 9/11 and national security as the overarching justification for this unprecedented inquiry into irrelevant personal details of the lives of scientists and other non-sensitive personnel whose job descriptions—very close, indeed, to those of academicians—are truly on the opposite end of the conceptual spectrum from confidential, sensitive, leave aside security-related, government functions. The striking omission in defendants' response is the absence of any particularized showing relating to the plaintiff class' job functions, access to facilities, or access to information, that would supply any nexus whatever with the concern with "national security" that pervades their briefs.

In 1952, this nation's highest court rejected just such an over-broad invocation of the concept "national security." Considering the government's power under the National Security Act to suspend and terminate its employees, and rejecting a conception of the term "national security" that is "broad enough to include all activities of the Government," the Court further held:

We can find no justification for rejecting this implication of the limited purpose of the Act or for inferring the unlimited power contended for by the Government.

1 Where applicable, the Act authorizes the agency head summarily to suspend an
2 employee pending investigation and, after charges and a hearing, finally to
3 terminate his employment, such termination not being subject to appeal. There is
4 an obvious justification for the summary suspension power where the employee
5 occupies a 'sensitive' position in which he could cause serious damage to the
6 national security during the delay incident to an investigation and the preparation
7 of charges. Likewise, there is a reasonable basis for the view that an agency head
8 who must bear the responsibility for the protection of classified information
9 committed to his custody should have the final say in deciding whether to repose
10 his trust in an employee who has access to such information. On the other hand, it
11 is difficult to justify summary suspensions and unreviewable dismissals on loyalty
12 grounds of employees who are not in 'sensitive' positions and who are thus not
13 situated where they could bring about any discernible adverse effects on the
14 Nation's security. In the absence of an immediate threat of harm to the 'national
15 security,' the normal dismissal procedures seem fully adequate and the justification
16 for summary powers disappears. Indeed, in view of the stigma attached to persons
17 dismissed on loyalty grounds, the need for procedural safeguards seems even
18 greater than in other cases, and we will not lightly assume that Congress intended
19 to take away those safeguards in the absence of some overriding necessity, such as
20 exists in the case of employees handling defense secrets.

21 *Cole v. Young*, 351 U.S. 536, 546-47 (1956) (emphases added). The Court relied
22 explicitly upon the designation of "sensitive positions" as the demarcation for where and
23 when national security may be used as a justification for the expansion of the Executive's
24 powers *qua* employer. Of course, the power to so designate is well within the
25 Executive's reach, and it has chosen in its discretion not to designate the plaintiff class as
26 holding sensitive positions.

27 Plaintiffs by no means deny the legitimate interest of the state to safeguard the
28 nation's security, and to take necessary and appropriate measures to further those needs.
However, it is crucial precisely at this moment that the broad strokes with which
defendants would have the courts draw the notion of national security, not engulf the
personal liberties, freedom of association, and freedom to participate in the marketplace
of ideas that make this nation so worth guarding. Just yesterday, another district court
within this Circuit rejected a similar assertion of the government's power to electronically
surveil persons without a warrant pursuant to the Patriot Act, and notwithstanding the
Fourth Amendment. In so doing, the court in *Mayfield v. United States*, Civ. No. 04-
1427-AA (D. Ore. September 26, 2007), held that the relevant provisions of the Patriot
Act were facially unconstitutional (a far higher bar than the challenge to agency action
presented here). The district court, citing the Supreme Court, specifically rejected the

1 government's attempt to run together national security with criminal investigative
2 purposes – much as the government here asks this Court to run together national security
3 with a notion of suitability far broader and more problematic even than the notion of
4 criminal investigative processes. The district court endorsed the high court's rejection of
5 “the Executive Branch's arguments that internal security matters are too subtle and
6 complex for judicial evaluation.” Slip Op. at 32. The court went on to reject the
7 government's position that in “place of the Fourth Amendment, the people are expected
8 to defer to the Executive Branch . . . The defendant here is asking this court to, in essence,
9 amend the Bill of Rights, by giving it an interpretation that would deprive it of any real
10 meaning. The court declines to do so.” Slip Op. at 43.

11 In fact, no difficult balancing act faces this Court. The instant case does not
12 involve a national security agency, or even one charged with performing criminal
13 investigation. The security measures in effect at JPL do not by any means reflect the dire
14 concern with security expressed in the government's papers – further confirming its *post*
15 *hoc* character. Instead, the evidence before this Court is uncontroverted that the JPL
16 facility is organized and managed as an open, university-like environment, showcasing its
17 discoveries and technologies for the benefit of schoolchildren and the general public.
18 The government's dangerously vague intrusions upon loyal JPL employees' privacy are
19 utterly unnecessary.

20 II. ARGUMENT

21 A. Plaintiffs have Standing to Challenge the Government's Acts.

22 Defendants' standing argument seems to consist of two claims: that the injuries
23 alleged by plaintiffs are not really injuries (federal defendants), and that the controversy
24 is not ripe because the injuries have not yet come to pass and are hypothetical (federal
25 defendants and Caltech). Both claims fail. In fact, the injuries alleged by plaintiffs are
26 concrete, individualized, and imminent, on the undisputed facts. In particular, plaintiffs'
27 injuries consist in 1) the compulsory broad and open-ended waiver of their rights in
28 myriad private information unrelated to the performance of their jobs, together with the

1 mis-use of the information thus obtained in an inappropriate suitability determination;
2 and/or 2) the loss of their jobs that would result if plaintiffs refuse to comply with the
3 government's requirement. Both injuries are individualized, and they are concrete and
4 imminent by defendants' own admission – there is simply no dispute regarding the
5 requirements that are being placed upon JPL employees. Caltech also incorrectly
6 characterizes plaintiffs' constitutional challenge as a facial one.

7 First, defendants cite not a single case suggesting that employees who bring an
8 informational privacy claim based on impending background checks or other compulsory
9 disclosures of information do not have standing to do it. In fact, there is no such case.
10 *Hotel Employees and Rest. Employees Int'l Union v. Nev. Gaming Comm'n*, 984 F.2d
11 1507 (9th Cir. 1993), cited by defendants, stands merely for the proposition that a portion
12 of the plaintiffs' First Amendment claim was not ripe for review. Plaintiffs in that case
13 did not even bring a claim for informational privacy, which is the crux of the instant case,
14 and plaintiffs here do not bring a First Amendment claim.¹ The only other case cited by
15 defendants involving the general circumstances presented here – employees required to
16 undergo background checks or to make disclosures – is *Nat'l Treasury Employees Union*
17 *v. United States Dept. of the Treasury*, 25 F.3d 237 (5th Cir. 1994). That out of circuit
18 case involved 1) an extremely limited compulsory disclosure relating only to drug and
19 alcohol history; 2) government employees, not contractors; 3) a constitutional challenge
20 to the disclosure only – no waiver of privacy rights was at issue; and 4) “the members of
21 NTEU represented in this action are all “public trust employees . . . because they each
22 have access to the vast stores of financial and other personal and confidential information
23 contained in the tax records of individual taxpayers.” *Id.* at 244 (emphasis added). The
24 court's conclusion that the plaintiffs did not have a reasonable expectation of privacy in
25 the information required –drug and alcohol history only– relied crucially upon a specific

26
27 ¹ To the extent that the Court in that case discussed ripeness and did not even
28 suggest that the fact that the disclosures had not yet happened –or that all the
potential harms flowing from them had not yet happened– undermined plaintiffs'
standing, it actually supports plaintiffs' entitlement to standing in this case.

1 analysis of the legitimacy of inquiry into drug and alcohol history given the place of these
2 prohibitions in contemporary society; and upon the plaintiffs' status as public trust
3 employees. That plaintiffs here are not public trust employees, do not have security
4 clearances, do not deal with classified or otherwise confidential information of any sort,
5 has already been exhaustively catalogued in plaintiffs' moving papers. More, defendants
6 make absolutely no showing that plaintiffs do not have a reasonable expectation of
7 privacy in the far broader category of information implicated here, given the breadth of
8 the waiver required of plaintiffs.²

9 Second, plaintiffs have cited a slew of cases in their moving papers where courts in
10 fact exercised their jurisdiction to reach the merits of plaintiffs' information privacy
11 claims, arising in the employment context and challenging compulsory disclosures or
12 background checks. *See infra*, § B. As pointed out, defendants cite no case where a court
13 refused to exercise its jurisdiction in these circumstances.

14 Third, plaintiffs quite clearly meet the basic requirements of standing to bring their
15 claims before a court. Under the "modern law of standing," "no more is required than an
16 allegation that the challenged official action has caused the plaintiff injury in fact,
17 economic or otherwise." *U.S. v. Westinghouse Elec. Corp.*, 638 F.2d 570, 574 (3d Cir.
18 1980) (upholding employer's standing to challenge federal government order requiring
19 production to it of employees' private medical records on the basis of employees' privacy
20 rights). In that case, the Third Circuit held that the employer had standing to assert its
21 employees' privacy rights. Here, plaintiffs seek merely to assert their own privacy rights.

22 Yet defendants insist that plaintiffs have not alleged a "cognizable injury" while
23 conceding that "JPL has required them to complete the SF 85 and submit to an
24 investigation . . ." Fed. Dfts.' Opp. at 9. Of course it is defendants' ultimate position that

26 ² Indeed, that the Fifth Circuit engaged in the level of specific analysis it did to
27 find that plaintiffs did not have standing in that very different case, only supports
28 plaintiffs' position that a finding that employees do not have standing to bring an
informational privacy claim against their employer requires a far more extensive
showing than defendants suggest.

1 these acts do not in fact violate plaintiffs' informational privacy rights; however, simply
2 asserting that they do not, does not eviscerate plaintiffs' standing to have that very
3 question adjudicated. Again, if it did, then at least some of the cases cited by both sides
4 in this litigation would have been decided on standing grounds rather than on the merits.
5 It is plaintiffs' argument that precisely these acts, together with the improper use to which
6 this information will be put, violate their informational privacy rights. The question for
7 standing purposes is not whether the acts leading to the injury violate the law; the
8 question is whether an injury has factually been alleged. That is precisely why this
9 requirement is called "injury in fact": courts have long abandoned the archaic approach of
10 the traditional law of standing, under which the plaintiff was required to show that she
11 had suffered a legal injury. *See, e.g., Ass'n of Data Processing Service Org's. v. Camp*,
12 397 U.S. 150 (1970). The requirement of actual injury is a liberal one, and courts
13 recognize not only economic injury, but aesthetic, environmental, and emotional injuries
14 also. *See, e.g., Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59 (1978);
15 *Westinghouse Elec. Corp.*, 638 F.2d at 574 (disclosure of employees' medical records
16 sufficient to establish injury in fact under "modern law of standing"). Defendants do not
17 even attempt to attack the factual allegations of injury put forth in the complaint and the
18 moving papers, as insufficient.

19 Defendants also incorrectly separate "NASA's allegedly improper procedures for
20 evaluating information disclosed during a background investigation and evaluation of the
21 results" as a separate and distinct alleged injury, and assert that it is "hypothetical." Fed.
22 Dfts.' Opp. at 9-10. In fact, in virtually every case evaluating an informational privacy
23 claim, the courts have analyzed the government's purpose in eliciting the information as
24 one of the crucial elements of the constitutional analysis. The question whether the
25 purpose and the use is legitimate is inextricable from the question whether the invasion is
26 justified. *See, e.g., Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983) (holding
27 government employee's informational privacy rights violated where City made
28 determinations about individuals' employment using private information in question).

1 More, there is absolutely nothing “hypothetical” about the suitability determination
2 NASA intends to perform, and the archaic, vague, and irrelevant criteria it intends to
3 employ.

4 Similarly, Caltech argues that “none of Plaintiffs’ claimed wrongs have been
5 implemented” and are merely hypothetical, apparently referring to the breadth of the
6 privacy waivers required of all JPL employees. Caltech Opp. at 13. The form, on its
7 face, requires a waiver of rights of privacy in myriad (actually, all) matters. Caltech
8 argues that because any inquiry into the matters enumerated (and those not enumerated) is
9 merely hypothetical, and that the release is used only to check the basic information
10 provided on the form itself, plaintiffs have not alleged an injury in fact. Yet elsewhere,
11 defendants proffer as the justification for the breadth of the release form that “if a
12 background investigation is to serve the purpose of identifying potential security threats,
13 the release form must allow the investigators some flexibility to follow up on relevant
14 leads,” admitting that they intend to make use of its full breadth. Fed. Dfts.’ Opp. at 23.

15 **B. Plaintiffs are Likely to Succeed in their Informational Privacy Claim.**

16 **1. The Constitutional Right to Informational Privacy from Intrusions by**
17 **the Federal Government is Well-Established in this Circuit.**

18 Defendants’ assertion that there does not exist a constitutional right to
19 informational privacy runs contrary to the law of this Circuit and the majority of other
20 circuits. While defendants are correct that the Fourteenth Amendment does not apply to
21 the federal government, the right to privacy embodied in the United States Constitution
22 has been held to bind the federal government as well as the states.³ The Ninth Circuit
23 decision in *Crawford v. United States Trustee*, 194 F.3d 954 (9th Cir. 1999), disposes of
24 defendants’ argument that this court should not consider plaintiffs’ claims to

27 ³ The right to challenge actions of the federal government, its agencies and
28 employees under the United States Constitution is well established. *Bivens v. Six*
Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

1 informational privacy embodied in the United States Constitution.⁴ Indeed, defendants'
2 assertion that courts have expressed "grave doubts" as to the existence of a constitutional
3 right of informational privacy in the face of clear Ninth Circuit law borders on blatant
4 disregard of binding precedent. (See, e.g. Caltech Opp. at 18, relying on cases from other
5 circuits.)

6
7 ⁴ Should the Court find that plaintiffs' complaint has grounded their claimed right
8 to informational privacy in the wrong amendment to the Constitution (or failed to
9 cite each amendment that is a source of this clearly recognized right), this does not
10 affect plaintiffs' ability to seek relief for violation of this right, including
11 preliminary injunctive relief. Rule 8(a) of the Federal Rules of Civil Procedure
12 requires that a "pleading which sets forth a claim for relief . . . shall contain . . . a
13 short and plain statement of the claim showing that the pleader is entitled to
14 relief." Further, Rule 8(f) provides that "all pleadings shall be so construed as to
15 do substantial justice." Under this liberal system of notice pleading, a cause of
16 action is properly pled so long as the pleading gives the defendant fair notice of
17 what the cause of action is, and the grounds upon which it rests. *Leatherman v.*
18 *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168
19 (1993). Under this standard, plaintiffs have more than adequately pled a claim for
20 violation of their informational privacy rights; the federal government is well on
21 notice of the nature of plaintiffs' claims, given that plaintiffs' motion clearly cites
22 the body of case-law establishing the right.

23 More, Rule 15 of the Federal Rules of Civil Procedure, governing requests
24 for leave to file amended pleadings, provides that "leave shall be freely given
25 when justice so requires." The Ninth Circuit has stated that this policy should be
26 applied with "extraordinary liberality." *Morongo Band of Mission Indians v.*
27 *Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990). "If the underlying facts or
28 circumstances relied upon by a plaintiff may be a proper subject of relief, he ought
to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*,
371 U.S. 178, 182 (1962). Courts should grant leave to amend unless doing so
would cause undue prejudice to the opposing party, is futile, creates undue delay,
or if the movant acts in bad faith. *Id.*; *U.S. ex rel. Lee v. SmithKline Beecham Inc.*,
245 F.3d 1048, 1052 (9th Cir. 2001). Accordingly, "[a]bsent prejudice or a strong
showing of any of the remaining *Foman* factors, there exists a *presumption* under
Rule 15(a) in favor of granting leave to amend." *Id.*

Thus, plaintiffs have adequately pled the right to informational privacy;
even if they are required to later amend their pleadings to clarify each
constitutional amendment that is a source of the right, that is immaterial to the
Court's consideration of the instant motion.

1 In *Crawford*, the Ninth Circuit held that informational privacy exists as a
2 constitutionally protected interest. *Crawford*, 194 F.3d at 958. *Accord Roe v. Sherry*, 91
3 F.3d 1270, 1274 (9th Cir.1996); *Doe v. Attorney General*, 941 F.2d 780, 795-96 (9th Cir.
4 1991). In so ruling, the Ninth Circuit noted that the majority of circuits to rule on the
5 question concurred in finding that informational privacy warrants constitutional
6 protection. *Id.*, at n. 4 (collecting cases); *Accord Doe v. City of New York*, 15 F.3d 264,
7 267 (2d Cir. 1994); *Fadjo v. Coon*, 633 F.2d 1172, 1175-76 (5th Cir. 1981);
8 *Westinghouse*, 638 F.2d at 577; *Aid for Women v. Foulston*, 441 F.3d 1101, 1116 (10th
9 Cir. 2006) (informational privacy "protects the individual from governmental inquiry into
10 matters in which it does not have a legitimate and proper interest"). The Supreme Court
11 has defined this type of privacy interest as "the individual interest in avoiding disclosure
12 of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599 (1977).

13 *Crawford* further recognized that the constitutional right to informational privacy
14 could be invoked against a federal agency. In that case, the plaintiff had complained that
15 the United States bankruptcy court's requirement that he disclose his social security
16 number in bankruptcy filings violated his constitutionally protected privacy rights. While
17 ultimately concluding that the governmental interest in disclosure outweighed such rights,
18 the court approved the existence of this fundamental right and plaintiffs' concomitant
19 right to challenge violations of such right by the federal government. *Accord Roe v.*
20 *Sherry*, 91 F.3d at 1274 (right invoked against U.S. Naval Investigative Services). The
21 other circuits to recognize a constitutional right to informational privacy have likewise
22 invoked the right against a federal agency or employee. *See, e.g., Westinghouse*, 638 F.2d
23 (employer challenged order granting federal agency subpoena access to employee medical
24 records).⁵

25
26 ⁵ The courts have grounded the right to informational privacy in various
27 provisions of the Constitution. *See, e.g., Roe v. Wade* 410 U.S. 113,152 (1973)
28 (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

1 While it is true that the right to informational privacy is not absolute, “the
2 government has the burden of showing that ‘its use of the information would advance a
3 legitimate state interest and that its actions are narrowly tailored to meet the legitimate
4 need.’” *Crawford*, 194 F.3d at 959. The relevant factors to consider, as set forth by the
5 Ninth Circuit include:

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

12 **2. Defendants’ Proffered Justifications for the Intrusions Fail.**

13 Defendants raise two primary arguments to support NASA’s requirement that all
14 JPL employees submit private information and allow such information be used to
15 determine their suitability for employment they have held for many years. First,
16 defendants argue that plaintiffs’ challenge must fail because the questions posed on SF 85
17 do not directly require disclosure of information relating to “marriage, procreation,
18 contraception, family relationships [or] child rearing and education.” Second, defendants
19 contend that if the government states it will not disclose the information publicly, the
20 mere collection by the government does not raise any constitutional concerns. Fed. Defs.
21 Opp. at 32. Neither of these arguments has merit.

22 a. Protected Information is Not Limited in Content to Intimate Relationships.

23 With respect to defendants’ argument that only information relating to sex and
24 procreation falls within the zone of privacy protected by the Constitution, the case law
25 does not support such a broad assertion. In *Crawford*, the Ninth Circuit extended the
26 right to privacy to social security numbers. *Crawford*, 194 F.3d at 959. In *Barry v. City of*

27 associational privacy grounded in First Amendment); *Griswold v. Connecticut*,
28 381 U.S. 479 (1965)(first, third, fourth, fifth and ninth amendments have
emanations that constitute “zones of privacy”); *Whalan*, 429 U.S. at 600 (interest
in non-disclosure of private information arises from due process clause of 5th
Amendment).

1 *New York*, 712 F.2d 1554, 1562-63 (2d Cir. 1983), the court extended the right to include
2 financial reports. In *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978), the court held
3 that elected officials had a constitutionally protected privacy interest in their financial
4 affairs.

5 b. Collection by the Government, without Public Disclosure, is
6 Sufficient to Trigger the Informational Privacy Right.
7 Disclosure to the public or to a third party is not a required element of establishing
8 an unconstitutional intrusion on a plaintiff's informational privacy rights. Defendants
9 ignore the substantial body of law finding unconstitutional invasions of privacy in pre-
10 employment questioning by governmental agencies, even where there was no showing
11 that the information would be subsequently released to the public or any third party.

12 For example, in *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir.1983) the
13 court considered pre-employment questions directed to a police department applicant as
14 part of a polygraph examination. The court held that questions into the applicants'
15 private, off-duty personal activities violated constitutional guarantees of privacy and free
16 association; it was irrelevant to the court's analysis that the information remained internal
17 to the agency, for purposes of evaluating the applicant for employment. The process of
18 asking the questions, gathering the information, and subsequently using the information
19 to assess the applicant's suitability for employment (regardless of subsequent public
20 disclosure of such information) was sufficient to offend the Constitution and require the
21 cessation of such practices. *Id.* at 471. As the Circuit explained:

22 When the state's questions directly intrude on the core of a person's
23 constitutionally protected privacy and associational interests, as the questioning
24 of the polygraph examiner did in this case, an unbounded, standardless inquiry,
25 even if founded upon a legitimate state interest, cannot withstand the
26 heightened security with which we must view the state's action . . . The risk that
27 an infringement of an important constitutionally protected right might be
28 justified on the basis of individual bias and disapproval of protected conduct is
29 too great. The very purpose of constitutional protection of individual liberties
30 is to prevent such majoritarian or capricious coercion. *Id.* at 471 (citations
31 omitted). *Id.*

32 Similarly, in *Nat'l Treasury Employees Union v. United States Dept. of Treasury*,
33 838 F.Supp. 631 (D.D.C. 1993), the court found that Treasury Department employees had
34 demonstrated the likelihood of prevailing on the merits of their claim that requiring them

1 to fill out a very similar form (SF-85P) violated their right to privacy, regardless of
2 whether the information would subsequently be disclosed to any third party. The court
3 held that disclosure to the government alone was sufficient to raise constitutional
4 concerns: "there is an obvious threat of significant harm if the plaintiffs are forced to
5 disclose this information to the Customs Services. Obviously, *once this type of highly*
6 *personal information is disclosed to the government, the revelation cannot be undone.*
7 As plaintiffs correctly point out, 'the injury is the threatened loss of constitutional rights.
8 That injury occurs when plaintiffs are forced to choose between revealing their
9 constitutionally protected information by submitting completed forms and preserving
10 their rights at the cost of possible further discipline or discharge.'" *Id.* at 640.

11 Similarly, in *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269
12 (9th Cir. 1998), the court ruled that the nonconsensual collection of information about an
13 application for public employment constituted a violation of the Fourth and Fifth
14 Amendments, regardless of whether the information was subsequently disclosed to third
15 parties. The Ninth Circuit explained:

16 Although cases defining the privacy interest in medical information have
17 typically involved its disclosure to "third" parties, rather than the collection of
18 information by illicit means, it goes without saying that the most basic violation
19 possible involves the performance of unauthorized tests - that is, the non-
20 consensual retrieval of previously unrevealed medical information that may be
21 unknown even to plaintiffs. *Id.*

22 **3. Defendants Fail to Rebut Plaintiffs' Showing of Their Substantial
23 Interest in Maintaining the Privacy of the Information in Question.**

24 Defendants seek to trivialize the magnitude of the privacy invasion at issue by
25 ignoring many of the arguments advanced by plaintiffs and by failing to mention or
26 confront many aspects of the challenged conduct.

27 For example, defendants give short shrift to the issue of the waiver that is part of
28 SF 85. However, the language of 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

1 establishments, or *other sources of information*. This information *may include*
2 *but is not limited to*, my academic, residential, achievement, performance,
3 attendance, disciplinary, employment and criminal history record information.
4 . . . This authorization is valid for two (2) years from the date signed.

5 (Complaint, Exh. 1, emphasis added.) This waiver gives the government free rein to seek
6 a vast amount of information about the plaintiffs' credit history, school activities,
7 employment history, school attendance, as well as anything from any "other source of
8 information" found germane to the government's investigation. Defendants admit that
9 the release is "facially broad," and explain that this breadth is necessary to allow the
10 government "flexibility to follow up on relevant leads." (Fed. Defts' Opp. at 23.) It
11 cannot seriously be doubted that requiring citizens to provide the government with this
12 type of blanket waiver so that it may, by its own admission, follow up on "any relevant
13 leads" invades protected privacy interests, and that the injury to the individual is an actual
14 one.

15 Defendants also ignore the questions asked of associates whose names plaintiffs are
16 compelled to disclose, so that the federal government may question them about plaintiffs'
17 private lives. Two of those questions relate directly to potential medical issues affecting
18 plaintiffs and the class they seek to represent. (Complaint, Exh. 2.) The associate is asked
19 to divulge whether the plaintiff has ever abused alcohol or drugs and whether the plaintiff
20 has any mental or emotional stability problems. Both of these questions – the second one
21 quite directly – seek information that could require disclosure of information about the
22 mental health of the plaintiff, medical problems, or alcohol/drug dependency (all protected
23 condition under the Americans with Disability Act).

24 The Ninth Circuit has held that it is unconstitutional for a governmental employer to
25 obtain medical information about an employee without her consent. *Norman-Bloodsaw v.*
26 *Lawrence Berkeley Lab*, 135 F.3d at 1269 (analyzing medical information requests under
27 the rubric of the Fourth Amendment). "We must balance the government's interest in
28 conducting these particular tests," the court stated, "against the plaintiffs' expectations of
privacy. [citation omitted.] Furthermore, 'application of the balancing test requires not
only considering the degree of intrusiveness and the state's interests in requiring that

1 intrusion, but also “the efficacy of this [the state's] means for meeting” its needs.” *Id.*
2 (quoting *Yin v. California*, 95 F.3d 864, 870 (9th Cir. 1996)).

3 While defendants also downplay the questions posed to plaintiffs on the SF 85
4 itself, those questions include a request that the plaintiff disclose whether he or she has
5 used any illegal drugs in the past year and also the nature of any counseling or treatment
6 received. Not only does this compulsory disclosure violate plaintiffs’ rights to privacy in
7 their medical histories (to the extent that it pertains to treatment and counseling), it also
8 requires them to disclose potentially incriminating information regarding drug use. The
9 courts are adamant that requiring drug testing of public employees is only justified for a
10 relatively small subset of employees who are in “safety sensitive” positions. *See, e.g. Nat’l*
11 *Treasury Employees Union v. Von Raab*, 489 U.S. 656,679 (1989) (upholding drug testing
12 of employees who apply for promotion to positions directly involving the interdiction of
13 illegal drugs, or to positions that require the incumbent to carry a firearm but questioning
14 reasonableness of such testing for employees in non-sensitive positions).⁶ If defendants
15 cannot constitutionally subject these non-sensitive personnel to drug testing, they also
16 cannot require that plaintiffs be forced to disclose information about any drug use, on
17 penalty of losing their job if they do not answer the question truthfully. It would make no
18 logical or legal sense to allow it in one context but to forbid it in another. A virtually
19 identical question about drug use was analyzed and enjoined by the court in *National*
20 *Treasury Employees Union v. United States Dept. of Treasury*, 838 F. Supp. 631 (D.D.C.
21 1993). While the court there considered SF-85P (which is used for sensitive personnel)

23 ⁶*See also Harmon v. Thornburgh*, 878 F.2d 484 (D.C.Cir. 1989) (upholding
24 preliminary injunction preventing DOJ from drug testing all federal prosecutors
25 and all employees with access to grand jury proceedings while allowing drug
26 testing only for those with top secret security clearances); *AFGE Local 1553 v.*
27 *Cheney*, 944 F.2d 503, 506 (9th Cir. 1991) (upholding random testing of engineers
28 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).

1 and not SF 85, Form 85-P contained an identical question regarding drug use. *Id.*, at 638-
2 39. Even though that form also provided that answers would not be used in any criminal
3 proceeding against the employee, the court concluded that the requirement that they
4 disclose drug use was still compelled and violated, at a minimum, the employees' Fifth
5 Amendment rights against self-incrimination. *Id.* The court found it problematic that the
6 form did not allow the employee to plead his right against self-incrimination or to refuse to
7 answer the question, and found the government's assertion that the information would not
8 be used against the employee "disingenuous," "Kafkaesque," and evasive. *Id.*, at 639-40.
9 The court concluded: "An employee who is discharged for refusing to answer under these
10 circumstances is, in fact, being discharged for refusal to waive his constitutional
11 privilege." *Id.*, at 639. *See also Lefkowitz v. Cunningham*, 431 U.S. 801 (1977)
12 (government cannot penalize assertion of privilege against compelled self-incrimination
13 by imposing sanctions to compel testimony which has not been immunized).

14 Defendants' reliance on *National Treasury Employees Union v. United States Dept.*
15 *of Treasury*, 25 F.3d 237, 244 (5th Cir. 1994), for the proposition that plaintiffs have no
16 reasonable expectation of privacy in any of the information requested by SF 85 is
17 misplaced. That case is clearly distinguishable because all of the employees represented
18 there held "public trust" positions, positions which pursuant to OPM classification had
19 "been determined to involve employment circumstances in which misconduct or
20 misfeasance would prove costly to the public confidence in the civil service." *Id.*, at 244.
21 Because of their public trust positions, the court concluded that they had no reasonable
22 expectation in keeping confidential from the government the information sought by
23 questionnaire SF-85-P. By contrast, here, NASA has expressly designated all of the
24 plaintiffs and 97% of JPL's employees as "non-sensitive positions." This designation
25 means that the position has "little affect on the efficiency of the Agency's programs and
26 operations." Exh. N, at 266. The question of what reasonable expectation of privacy a
27 non-sensitive contract employee might have in his or her personnel information was not
28 anywhere addressed or even indicated by the Fifth Circuit's decision in *National Treasury*.

1 The D.C. Circuit's analysis in *Am. Fed'n of Gov't Employees, AFL-CIO v. Dept. of*
2 *Housing and Urban Dev.*, 118 F.3d 786, 791 (D.C. Cir. 1997), also does not aid
3 defendants. First, the court prefaced its analysis of the constitutional claims by noting that
4 it doubted the existence of any constitutionally based privacy right, in contrast to the
5 clearly established law of this Circuit. Also, all the employees at issue at HUD had the
6 ability to misdirect funds to program beneficiaries, and the court elected to defer to
7 Executive decision-making as it related to plaintiffs from the Department Defense.
8 Defendants simply mis-cite *Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir. 1991),
9 claiming that it held that an "extensive background investigation under SF 86 passes
10 muster" under the Constitution. That issue was not before the court in *Willner*, which
11 considered only the question of pre-employment urine testing for DOJ employees and not
12 the constitutionality of Form SF 86, or any other written background investigation.

13 **4. Defendants have not Provided Adequate Safeguards to Ensure the**
14 **Proper Protection of the Private Information Sought.**

15 Here, the safeguards for protection of the information obtained are plainly
16 inadequate, on the basis of concessions made in defendants' own briefs. For example, the
17 government contends that "adverse information obtained in the credential issuance process
18 'shall not be disclosed to the individual's employer since it could effect the individual's
19 employment and possibly subject NASA to legal liability'." (Fed. Defts' Opp. at 35.)
20 Nonetheless, Caltech, plaintiffs' employer, admits that they are to be the repository for all
21 information collected as part of the background investigation and that they will have
22 access to this information. Indeed, at page 6 of Caltech's brief, Caltech admits that all of
23 the private information provided by an employee on SF 85 goes to a JPL employee in their
24 "Office of Protective Services." While Caltech asserts that any print outs of the SF 85 are
25 shredded after being reviewed by Caltech "approvers," it does not deny that the electronic
26 form remains in readable and retrievable form on the e-QIP system, to which the approvers
27
28

1 have access.⁷ (See also Decl., of Aden.)

2 Thus, by their own admission, the government intends to and has *already put in*
3 *place a process* by which plaintiffs' employers will have access to all of the private
4 information which plaintiffs are required to disclose and the private information collected
5 about them from colleagues, former employers, friends, etc. as part of the background
6 investigation process. This process directly violates the Privacy Act, which prohibits
7 disclosure to non-governmental agencies. 5 U.S.C. § 552a(b).

8 Finally, while defendants assert that none of this information will be disclosed to
9 third parties, the instances of serious breaches of confidential information systems are
10 legion. News reports of disclosure of private information gathered by the government
11 underscore the gravity of this problem.⁸ Various federal agencies have also experienced
12 this problem. In May 2006, the Veteran's Administration announced that nearly 26.5
13 million social security numbers of veterans were put at risk when a computer brought
14 home by an employee was stolen.⁹ NASA itself has experienced this quite recently. A
15 June 14, 2007 memorandum from the Ames Research Center memo Chief Information

16
17 ⁷ Defendants' cavalier attitude towards plaintiffs' private information is further
18 exemplified by their decision to publish in court records the home addresses of
19 several of the plaintiffs as well as uninvolved JPL employees. (Declaration of
20 Linda J. Spilker, ¶ 12-16, and Exhibit A thereto, describing JPL's invasion of her
21 privacy rights by publishing her home address, which appeared as a return address
22 in a letter she copied to Dr. Elachi, director of JPL.)

23 ⁸ On July 20, 2007, Consumer Affairs reported a story of SAIC accidentally
24 transmitting the personal data of 580,000 military personnel and their families
25 over the internet without encrypting. Martin Bosworth, *Contractor Mishandles*
26 *Private Data on 580,000 Military Personnel*, CONSUMER AFFAIRS.COM, July 21,
27 2007, available at
28 http://www.consumeraffairs.com/news04/2007/07/saic_data.html. In February
2005, the Washington Post reported an SAIC announcement warning 45,000
employees their personal information had been put at risk by a computer break-in.
<http://www.washingtonpost.com/wp-dyn/articles/A17506-2005Feb11.htm>.

⁹ Bob Sullivan, *All Veterans at Risk of Id Theft after Data Heist*, May 22, 2006,
<http://www.msnbc.msn.com/id/12916803>.

1 Officer notified 426 contractor employees that their personal information had potentially
2 been compromised when it was accidentally emailed to other employees.^{10 11}

3 **5. Defendants Have Not Established that there Exists A Compelling Need**
4 **for the Information Sought from these Non-Sensitive Personnel.**

5 Defendants have not met their burden of establishing that the governmental interests
6 they seek to advance through the background investigation process outweigh plaintiffs'
7 substantial privacy interests. *O'Connor v. Ortega*, 480 U.S. 709, 719 (1987) (government
8 must establish "compelling need" to infringe on individual's constitutional rights).

9 The federal defendants essentially assert that the mere fact that JPL is a federal
10 facility is sufficient grounds to require that plaintiffs relinquish their privacy rights. Fed.
11 Dfts.' Opp. at 1, 27. Plaintiffs have no opposition to defendants instituting a badging
12 system to ensure that only known employees access JPL's facilities, *and indeed, all of the*
13 *plaintiffs have photo identifications which they use to gain access.* However, the
14 background investigation, drug use inquiries, broad waiver permitting the government to
15 obtain any records without limitation, intrusive questions addressed to associates
16 regarding mental health, financial problems, and other conduct, and suitability

17 ¹⁰ NASA ARC Memo: Personally Identifiable Information (PII) Incident, June 14,
18 2007, *available at* <http://www.spaceref.com/news/viewsr.html?pid=24526> .

19 ¹¹ UCLA warned 800,000 individuals (including at least one of the Plaintiffs in
20 this suit) that their social security numbers were accessed by a hacker who
21 penetrated their computer system with the intent of gathering such information –
22 forcing many of them to file fraud alerts. The UCLA CIO subsequently testified
23 before Congress on this event. [http://www.identityalert.ucla.edu/
24 Congressional_testimony_Jim_Davis.pdf](http://www.identityalert.ucla.edu/Congressional_testimony_Jim_Davis.pdf). Perhaps most disturbing are reports of
25 security violations affecting over 35,000 Californians affected by information
26 contained in the databases of the Choicepoint corporation. The Plaintiffs have
27 been informed from colleagues at NASA's Johnson Space Center that Choicepoint
28 is one of the subcontractors tasked with compiling the HSPD-12 information.
<http://www.consumeraffairs.com/news04/2005/choicepoint.html>. Nor are these
isolated incidents. The Privacy Rights Clearinghouse conservatively estimated that
in 2006, over 100 million personal records were potentially compromised.
<http://www.privacyrights.org/ar/ChronDataBreaches.htm>.

1 determination based on the foregoing, have no nexus with determining whether any of the
2 plaintiffs are terrorists – which is the sole animating force behind HSPD-12, by
3 defendants’ own admission. *Id.*, at 5; and Exh. 1 to Fed. Defts’ Opp. Indeed, defendants
4 do not once state how any of this information renders it more or less likely that the
5 individual applicant is who he purports to be or renders the facility buildings any more
6 physically secure.¹²

7 Parsing defendants’ justification for various aspects of the background
8 investigation, it becomes apparent that many aspects have no justification at all, much less
9 the type of strong nexus required where individual privacy rights are at issue.
10 For example, SF 85’s requirement that individuals indicate where they have lived, worked
11 and gone to school for a period of 3-5 years as a means to “establish a history with that
12 individual to confirm that he or she has not falsified credentials.” *Id.*, at 6. Plaintiffs do
13 not take issue with these narrow questions, nor with a waiver which would be directed at
14 past employers and would require them to verify and provide dates of employment.¹³ Such
15 a request would be narrowly tailored to meet the government’s interest in verifying
16 identification without requiring the type of broad release required of JPL employees here,
17

18 ¹² While the government defendants vaguely assert in one sentence in their brief
19 that plaintiffs have “access to government data systems,” there is no citation for
20 this assertion or evidentiary support. By contrast, plaintiffs have submitted
21 numerous declarations attesting to the fact that many of JPL’s scientists have
22 access only to public data or data which will become public and have no ability to
23 alter any of that data. *See, e.g.* Weissman, ¶16; McElrath, ¶12; V. Gorjian, ¶4. For
24 those JPL employees who work more closely with spacecraft, NASA and JPL have
25 instituted a sophisticated set of checks and balances which effectively ensure that
26 neither human error nor espionage could jeopardize any of the government’s space
27 missions. Duren Supp. Decl., at ¶ 10.

28 ¹³ Defendants also raise a red herring that plaintiffs are objecting to criminal
background checks, pointing out that such information might indicate that
someone was a terrorist suspect. Plaintiffs, however, expressly stated in their
moving papers and in their supporting declarations that they were not objecting in
anyway to the National Agency Check, to which all submitted prior to being hired,
which includes a criminal background check.

1 which can be sent to anyone, without limitation on scope or time and request any type of
2 record or information. Indeed, the current waiver could be used to send a request to a past
3 employer to produce an employees' entire personnel file, which inevitably would include
4 not only performance reviews but medical, insurance, tax, familial and other private
5 information which could not conceivably have any bearing on confirming the individuals'
6 identity or confirming that he or she was not a known or suspected terrorist. Similarly, a
7 request to an individuals' school could result in the production of personal records
8 regarding performance, health, family problems, information relating to a minor.

9 Indeed, in their briefs defendants barely mention the waiver form which plaintiffs
10 are required to sign, offering absolutely no justification for the broad language contained
11 therein, or why the waiver had not been narrowly tailored to only seek confirmation of
12 prior employment, date and places of residence and educational background. Defendants
13 have not established any reason to maintain such a broad waiver when a narrowly tailored
14 one would suit the government's same purpose in verifying basic background information
15 regarding employment, residence and education.

16 Turning to the questions regarding drug use and treatment on SF 85, defendants
17 offer no justification whatsoever as to why all JPL employees need answer this question.
18 Given the numerous decisions refusing to allow the government to obtain information
19 about drug use from current employees and applicants for employment (*see supra*) unless
20 they are in public safety positions, defendants cannot justify requiring individuals who
21 they have designated as "low risk" personnel and for whom they cannot point to any
22 evidence of safety related risks to disclose information regarding drug use.

23 Defendants offer not one shred of evidence or argument to justify that aspect of the
24 background investigation which asks three associates of each employee questions about
25 that employees' mental health, financial integrity, and general conduct. Their briefs are
26 utterly silent on this offensive and intrusive form which the government requires of
27 plaintiffs and their close associates.

28 Similarly, the government does nothing at all to justify the suitability determinations

1 required of all JPL employees, which allow the government to consider numerous
2 impermissible factors, including “delinquency in meeting financial obligations,” “sexual
3 misconduct with impact on job,” “sodomy,” “attitude,” “personality
4 conflict,” “homosexuality,” “judgment, reliability and dependability issues,” “physical
5 health issues,” “psychological or psychiatric issues.” Exh. R to moving papers.

6 The suitability determination, indeed, lies at the core of plaintiffs’ challenge to the
7 current background investigation. The government defendants do not even address the
8 suitability determinations, beyond stating that plaintiffs lack standing to challenge them.
9 Caltech seek to distance itself from the Suitability Matrix posted for all employees on
10 JPL’s official website. (Caltech Opp. at 15, lns 1-2.) The suitability matrix at issue here,
11 however, was posted on the JPL internal website by JPL’s Director, Charles Elachi, in
12 response to questions from JPL employees as to which OPM criteria JPL would use.
13 (Susan Foster Decl., ¶ 2-4.) In now dismissing these criteria as merely “a chart” once
14 displayed on a JPL website, defendants are clearly hoping to hide suitability criteria
15 currently being applied to JPL employees from any type of review.

16 However, it should be noted that none of the defendants have presented any
17 admissible evidence that the suitability matrix criteria, set forth at Exh. R to plaintiffs’
18 moving papers, are not currently being implemented at JPL. Therefore, the only
19 admissible evidence before the court is that these criteria are being applied to evaluate
20 plaintiffs and the class they seek to represent.

21 Review of the statutory basis relied upon by defendants, however, quickly reveals
22 that the suitability matrix which JPL has informed its employees is in use far exceeds the
23 criteria on which the government can lawfully rely in determining employment suitability
24 (where appropriate). Specifically, NASA adopted NASA Procedural Requirements
25 (“NPR”) 1600.1, which included the provision that NASA’s contractor “reliability”
26 determination is based on the same criteria applied to civil service “suitability
27 determinations.” Fed. Defts’ Opp. at 4, citing to NPR 1600.1, ¶ 13 (“The substantive
28 criteria set forth at 5 C.F.R. 731.202 will be used to determine physical and/or logical

1 access to NASA-controlled facilities and/or information systems.) Section 13.1.2 in turn
2 incorporates the criteria set forth at CFR 731.202, comprised of “misconduct or negligence
3 in employment,” “criminal or dishonest conduct,” “false statement or deception or fraud in
4 examination or appointment,” “refusal to furnish testimony,” “alcohol abuse” of sufficient
5 duration; illegal use of narcotics or drugs; and acts designed to overthrow the U.S.

6 Government by force. The suitability matrix currently being used by NASA by contrast,
7 includes numerous criteria which could not conceivably fall within these specific criteria.

8 While NASA claims that the need for heightened physical security at the lab is a
9 compelling government need, warranting the intrusions at issue here, the government has
10 presented little to no evidence that these plaintiffs or any of the personnel designated as
11 non-sensitive pose any threat to NASA facilities or data bases. The JPL facility itself does
12 not operate in any way like a secure government facility but rather prides itself on the
13 openness of its campus, the university like setting, and the streams of visitors it hosts
14 every day. Supp. Duren Decl. (filed concurrently herewith). Mr. Duren, a Principle
15 Systems Engineer at the Lab, notes that “as an extension of Caltech, JPL is a unique
16 combination of academia and government. JPL has always operated more as a university
17 campus type environment than as a high security government facility and continues to do
18 so to this day. . . . JPL has instituted [only] limited physical security precautions. For
19 example, there are no metal detectors, no inspection of handbags, and vehicle inspectors
20 are cursory and for cars, only conducted randomly.” Duren Supp. Decl., ¶ 3. Trucks and
21 busses receive only a cursory inspection at the guard shack and then are waived inside.
22 Trucks delivering heavy equipment, chemicals, etc, are lined up in front of the guard shack
23 for their paperwork to be processed, during which time they are parked within 50 feet of
24 the Spacecraft Assembly facility. *Id.* at 4. While permanent JPL/Caltech contractor
25 employees are now being told they must go through the NAC-I background check,
26 “[m]any other personnel including students and others who work part-time or only on lab
27 several months per year, are only required to submit to a NAC check before being granted
28 unescorted access to the lab including computer access. This includes foreign nationals.”

1 *Id.*, at 6. Once a year, JPL opens its doors for an “entire weekend to all members of the
2 public in a widely advertised free event. In the past few years, tens of thousands of
3 visitors have had unrestricted access to the lab on these open house weekends. None of
4 the visitors are required to show identification nor are they issued badges.” *Id.*, at 7. No
5 metal detectors are used and vehicle and bag checks are limited to cursory random checks.
6 (*Id.*) Through these actions, NASA demonstrates that it has very limited concerns
7 regarding increasing security of the JPL facilities; that it encourages visitors and workers
8 who have not undergone background investigation to make use of the facilities; and that it
9 continues to maintain JPL in an open, campus type setting with few security barriers.

10 While defendants do make mention of the sophisticated flight hardware and
11 software that JPL creates, presumably as justification for instituting background
12 investigation checks on employees, many of whom have worked at the facility for decades
13 without incident or suspicion, defendants fail to point out the numerous sophisticated
14 safeguards already in place to ensure that human error or malfeasance could not damage a
15 space mission. As Duren explains: “JPL’s experience dealing with these unique technical
16 challenges over many decades has led to a formal set of flight Project Practices which
17 govern every aspect of a mission’s design, development, test and operations. While
18 voluminous in content, these Practices are based on one central tenant: all critical
19 activities must be peer-reviewed and independently validated, . . . [including] All
20 software is verified by independent testers before use in flight;” Personnel working on or
21 around flight hardware must follow the ‘buddy system’ to ensure there is always a
22 minimum of two sets of eyes (and brains) involved;” “all spacecraft maneuvers (including
23 detained trajectory calculations) must be peer-reviewed by a set of independent, non-
24 advocate peers.” *Id.* at ¶ 10. These practices are considered so effective by NASA that
25 they have influenced the NASA-wide processes for Systems Engineering and Mission
26 Assurance and resulted in training courses for other federal agencies. *Id.* at ¶11.

27 Finally, defendants make the argument that this court must defer to determinations
28 made by the Executive and NASA regarding security decisions and the degree of

1 employee privacy rights which must be abrogated to protect those decisions. But the
2 judiciary has steadfastly refused to abdicate the critical role it must play to critically
3 evaluate claims of government need when they impinge on the rights of the citizenry. As
4 the court announced in *Nat'l Fed'n of Fed. Employees v. Greenberg*, 983 F.2d 286 (D.C.
5 Cir.1993):

6 All questions of government are ultimately questions of ends and means. The
7 end may be legitimate, its accomplishment may be entrusted solely to the
8 President, yet the judiciary still may properly scrutinize the manner in which the
9 objective is to be achieved. Suppose the President has unlimited and judicially-
10 unreviewable constitutional power to determine which Executive Branch
11 employees will be given access to the nation's secrets. No one would suggest the
12 government therefore could, despite the Fourth Amendment, conduct random
13 searches without warrants in the hope of uncovering information about
14 employees seeking security clearances. Still less would anyone consider such
15 unconstitutional searches and seizures to be immune from judicial review. The
16 government may have considerable leeway to determine what information it
17 needs from employees holding security clearances and how to go about getting
18 it. But a large measure of discretion gives rise to judicial deference, not
19 immunity from judicial review of constitutional claims.

20 **C. Plaintiffs are Likely to Succeed in their APA Claim.**

21 Defendants' argument that plaintiffs are not likely to succeed in their claim that
22 defendants' acts were "not in accordance with law" under the Administrative Procedure
23 Act amounts primarily to the claim that a 1958 provision of the Space Act justifies the
24 present agency action although the agency clearly did not rely upon this provision.¹⁴

25 First, the Space Act at 42 U.S.C. § 2455, which defendants claim as the primary
26 justification for NASA's action, does not justify the broad-based suitability check in which

27 ¹⁴ point of clarification which should inform the Court's analysis of each issue
28 arising under the APA is that the action under review here is not the typical case of
agency action, arising under its enabling statute and relating to its area of expertise
(the subject area in which Congress may delegate power to it). Rather, the
agency's action clearly and by its own open admission flows from HSPD-12,
which a) is an executive order and not a statute and; b) is aimed at the
administration of internal federal government operations, rather than outward-
directed governance. To the extent that HSPD-12 designates an implementing
agency, it is the Department of Commerce. HSPD-12(1). Other agencies are
referenced in the Order only insofar as they must follow the directives contained
in it and in the implementing regulation; they are tasked with no implementing or
interpretive power.

1 NASA plans to engage. Section 2455 allows the agency to conduct investigations for
2 purposes of security, not suitability: the irrelevant and inappropriate criteria adopted by
3 the agency in the Suitability Matrix and elsewhere, on the other hand, bear no rational
4 relation to security concerns.

5 Second, even if § 2455 of the Space Act authorizes the NASA administrator to
6 conduct investigations of its contractors for security purposes at his discretion, the
7 evidence is already clear that NASA did not rely or act on this provision when
8 promulgating NPR 1600.1.¹⁵ Indeed, the agency has represented that it had no choice of
9 its own in implementing the background checks at issue, and instead that its hands were
10 tied by HSPD-12 and FIPS PUB 201-1. The federal defendants' present reliance upon §
11 2455 of the Space Act is no more than a "litigating position" the agency has taken once its
12 act is challenged in court, a position to which court accord none of the deference
13 defendants claim. *See, e.g., Smiley v. Citibank (South Dakota)*, 517 U.S. 735, 741 (1996).

14 Third, defendants' arguments that the agency action cannot be challenged because
15 HSPD-12 does not provide for judicial review and that it does not contain "law to apply,"
16 thus leaving the agency with unfettered discretion, fail. Defendants first argue that
17 plaintiffs cannot challenge agency action as inconsistent with a presidential directive
18 unless that directive does not preclude judicial review, has a statutory basis, and contains
19 law to apply, citing *City of Carmel-by-the-Sea v. United States Dept. of Transp.*, 123 F.3d
20 1142 (9th Cir. 1997). However, that decision states that an executive order itself is treated
21 as agency action only under the foregoing circumstances. *Id.* at 1166. The rest of the
22 court's analysis deals with an agency's factual findings under the executive order, and
23 holds that the standard of review for such findings is whether they are arbitrary,
24 capricious, or an abuse of discretion. However, the agency action challenged here is not a
25 mere localized factual finding, but a full-fledged regulation and agency-wide policy.

26
27 ¹⁵ Defendants' arguments that HSPD-12 and FISMA justify the agency acts are
28 non-starters; both relate only to information security and say nothing whatever
about (or related to) background checks or investigations.

1 There is absolutely no requirement, as defendants intimate, that HSPD-12 must “create any
2 enforceable rights” in order for plaintiffs to challenge agency action taken pursuant to it.
3 Indeed, in *City of Carmel*, the Court held the agency action reviewable despite the fact that
4 the executive order created no cause of action. Importantly, plaintiffs do not seek to
5 enforce here any right created by HSPD-12; rather, they claim only that the agency
6 outstripped the authority granted it by that Order.

7 Similarly, defendants’ claim that NASA’s administration of the presidential
8 directive is committed to its discretion, by law, fails. Defendants cite *Heckler v. Chaney*,
9 470 U.S. 821, 830 (1985), for this proposition; yet that decision explicitly states that the
10 exception to reviewability for agency actions “committed to agency discretion” is “very
11 narrow” and “it is applicable in those rare instances where statutes are drawn in such broad
12 terms that in a given case there is no law to apply.” *Id.* at 830. Defendants then rely on
13 the fact that broad discretion is granted to the Department of Commerce by FISMA in
14 establishing “information security standards” for their conclusion that there is no law to
15 apply. Fed. Dfts.’ Opp. at 18. This obscures the main point, which is that the challenged
16 agency action is not an information security measure at all, but an investigation and
17 suitability determination that is not contemplated by the statute. The Space Act also does
18 not qualify for the extremely narrow exception to reviewability that defendants invoke: it
19 provides a meaningful standard of review insofar as it clearly states that the investigations
20 undertaken by the agency must be in the interest of national security, rather than the vague
21 concept of ‘suitability.’

22 Finally, plaintiffs come within the zone of interests protected by HSPD-12 because
23 that directive explicitly cites privacy rights as one of its objectives.

24 **D. Plaintiffs Have Established Irreparable Harm.**

25 The Supreme Court has determined that a threat of discharge for exercising First
26 Amendment rights is sufficient to establish irreparable harm. *Elrod v. Burns*, 427 U.S.
27 347, 373-74 (1976); accord *Giron v. Ruiz*, 834 F.2d 238, 239-240 (1st Cir. 1987). Courts
28 have also held that a plaintiff can demonstrate that a denial of an injunction will cause

1 irreparable harm if the claim is based upon a violation of the plaintiff's constitutional
2 rights. *See, e.g., LaDuke v. Nelson*, 762 F.2d 1318, 1330 (9th Cir. 1985), *modified on other*
3 *grounds*, 796 F.2d 309 (9th Cir. 1986) (violation of individuals right to be free from
4 unconstitutional searches causes irreparable harm); *Connection Distrib. Co. v. Reno*, 154
5 F.3d 281, 288 (6th Cir. 1998) (recognizing that the loss of First Amendment rights, for
6 even a minimal period of time, constitutes irreparable harm); *Covino v. Patrissi*, 967 F.2d
7 73, 77 (2d Cir. 1992) (plaintiffs may establish irreparable harm based on an alleged
8 violation of their Fourth Amendment rights); *McDonell v. Hunter*, 746 F.2d 785, 787 (8th
9 Cir. 1984) (finding that a violation of privacy constitutes an irreparable harm);
10 *Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency*, 663 F. Supp. 1560
11 (C.D.Cal. 1987)(government employees entitled to preliminary injunction against
12 employer instituting pre-employment test which potentially violated 4th Amendment);
13 *AFGE Local 1533 v. Cheney*, 754 F.Supp. 1409 (1990).

14 The cases relied upon by the government defendants provide no guidance
15 whatsoever to this court. For example, in *Carribbean Marine Services Co. v. Baldrige*, 844
16 F.2d 668, 674 (9th Cir. 1988), the Ninth Circuit reversed a preliminary injunction
17 preventing the government from placing a female inspector on a tuna boat where the
18 district court made no findings of irreparable harm and the only harm alleged was that it
19 would disrupt the domestic harmony of the male crew to have a woman on board. Not
20 surprisingly, there was no finding nor evidence that any constitutional deprivation of any
21 magnitude would occur as a result of inspection by a female official. Similarly, in *L.A.*
22 *Mem'l Coliseum Comm'n' v. Nat'l Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980),
23 the moving party did not present any evidence to support its claim that the football team it
24 sought to attract would likely be disapproved by the NFL, given that it only submitted the
25 declaration of one commissioner and there was no evidence that the other commissioners
26 would disapprove such a transfer.

27 By contrast here, plaintiffs have presented overwhelming testimony that they will be
28 terminated if they do not complete SF 85 and waiver by October 5, 2007 and complete the

1 background investigation check by October 27. Laubach Decl., ¶12; Foster, Exh. J at 46-
2 47. Although the government disingenuously states (without any supporting evidence)
3 that the only consequence to plaintiffs is that they will no longer have access to JPL,
4 access which could be restored if they prevail, Caltech's opposition papers plainly state
5 that any employee who does not comply will be terminated or deemed to have voluntarily
6 resigned. Caltech Opp. at 8, citing Hart Decl., at ¶ 9. While Caltech may want to sugar
7 coat the result by calling it "voluntary resignation," the result is the same – the person who
8 does not comply will lose their employment with Caltech. All JPL employees are being
9 required in the next month to complete the SF 85 form, waiver and background
10 investigation. If such process violates the constitution in anyway, plaintiffs will have
11 suffered the irreparable injury resulting from that constitutional violation.

12 Moreover, defendants cannot establish any reason why preserving the status quo
13 would not meet its current security needs, if any, at JPL. JPL already has in place an
14 extensive badging and identification system, which applies to all JPL employees. "Every
15 person entering the facility must wear a badge appropriate for his or her employment
16 status. There are three types of photo badges for regular JPL employees. . . . All three of
17 these badge types have a picture of the employee, employee number and a bar code. The
18 employee must wear the badge at all times while at JPL, . . . in a visible location above the
19 waist." (Foster Supp. Decl., at ¶ 6.) Those badges include: the "planet badge" which
20 allows access to unrestricted JPL facilities; and the One NASA badge which allows access
21 to all NASA centers and requires fingerprints. (*Id.*, ¶ 6.)

22 Nor is there any reason that the implementation of the new badging system cannot
23 be delayed while this matter is heard and fully considered. The new badges under HSPD-
24 12, which are required for all federal facilities, are being implemented in a piece meal
25 nature across the country, with many agencies being informed that they have more than a
26 year from this date to comply and others being informed that their contractors will never
27 have to comply with the new badging system and background investigation. For example,
28

1 the U.S. Department of Energy¹⁶ has not required the background investigation and new
2 badging requirement for contractor employees unless they have an “L or Q” access
3 authorization (Secret or Top Secret security clearance), or are servicing the DOE
4 headquarters in Washington D.C.¹⁷ Indeed Brookhaven National Laboratories’ internal
5 reports indicate that the “requirements for contractors to comply with HSPD-12 were
6 removed thanks to the effort of Deputy Secretary Clay Sell.” (Report from the User’s
7 Center, RHIC & AGS Open Forum Meeting, Req. For Jud. Ntc., Exh. 7, p. 3.) The
8 National Science Foundation, which operates four FFRDC’s around the country, is
9 requiring that only those employees and contractors of more than six months who are
10 working at its headquarters (Stafford Place) in Washington comply with the new badge
11 and background investigation requirement. Federal Register: 11/1/06 (Vol. 71, No. 211),
12 p. 64319-20, Exh. 9 to Supp. Req. For Jud. Ntc.

13 Foreign nationals who have access to federal facilities are not required to have the
14

15 ¹⁶The DOE operates numerous FFRDC’s (while NASA operates only JPL as a
16 FFRDC), including numerous facilities which are critical to our nation’s atomic
17 energy and weapons programs, such as Los Alamos National Lab, Sandia National
18 Lab, Fermilab, and Brookhaven National Lab. (See List of FFRDC facilities by
controlling agencies, attached hereto as Exhibit 6 to Request for Judicial Notice.)

19 ¹⁷ U.S. DOE Notice 206.4, published by Office of the Chief Information Officer,
20 Section 3.a, attached to Supp. Request for Judicial Notice, filed concurrently
21 herewith, as Exh. 4; Memorandum for all Departmental Elements dated October
22 13, 2005, from the Deputy Secretary of Energy attached to Supp. Req. for Judicial
23 Ntc., as Exh. 5. Other examples of non-compliance or later compliance deadlines
24 abound. For example, the United States Department of Agriculture has informed
25 its employees that “all applicable USDA employees and contractors must obtain
26 the new ID card by *October 2008*.” USDA HSPD-12 Informational website dated
27 9/19/07, Exh. 1 to Supp. Request for Jud. Ntc.. The Social Security
28 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 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.)

1 new badge or comply with the NACI-background investigation or its equivalent, nor do
2 the nearly 200,000 volunteers serving in the Department of the Interior (Report to the
3 Chairman, Comm. on Government Reform, House of Representatives, USGAO -06-178, p
4 32, Exh. 3 to Supp. Req. for Judicial Ntc.) Even NASA admits it will only have partial
5 compliance with HSPD-12 by the end of October 2007. (NASA Office of Institutions and
6 Management website, dated 9/18/07, Exh. 2 to Supp. Req. For Jud. Ntc. at 3.)

7 The cases relied upon by Caltech are easily distinguishable. In *Stanley v. Univ. of*
8 *S. Cal.*, 13 F.3d 1313 (9th Cir. 1994), the plaintiff had already been terminated as an
9 employee of USC when she sought a preliminary injunction returning her to their
10 employment at a higher salary than she had previously received; because such an
11 injunction did not maintain the status quo but placed the plaintiff in a *better position* than
12 she had been when employed, the court found that a preliminary injunction was not
13 appropriate. *Anderson v. United States*, 612 F.2d 1112 (9th Cir. 1979) suffers from the
14 same problems as the plaintiff there also sought a mandatory injunction placing her in a
15 promotion position for which she had applied but never held and barring the Air Force
16 from ever considering anyone else for the position. Again, because this preliminary
17 injunction went far beyond maintaining the status quo, the court disapproved preliminary
18 injunction relief. *Minn. Ass'n. of Nurse Anesthetists v. Unity Hospital*, 59 F.3d 80, 83 (8th
19 Cir. 1995), in fact found that preliminary injunctions might be appropriate in certain
20 termination cases but not based on the record before the court.

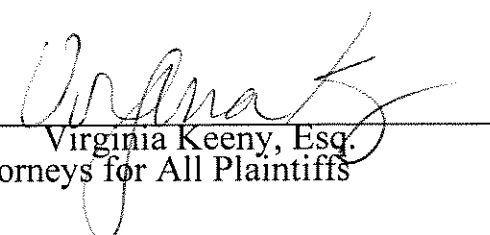
21 **E. Plaintiffs' Privacy Act Claims.**

22 While plaintiffs intend to pursue their Privacy Act claims, they do not seek
23 injunctive relief for violations of the Privacy Act at this time.

24 DATED: September 27, 2007

Respectfully Submitted,

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26
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