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9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**  
11

12  
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Paradise, Konstantin Penanen, Celeste  
19 M. Satter, Peter M.B. Shames, Amy  
Snyder Hale, William John Walker and  
20 Paul R. Weissman,

21 Plaintiffs,

22 v.

23 National Aeronautics and Space  
Administration, an Agency of the United  
24 States; Michael Griffin, Director of  
NASA, in his official capacity only;  
25 Department of Commerce; Carlos M.  
Gutierrez, Secretary of Commerce, in his  
26 official capacity only; California Institute  
of Technology; and Does 1-100,  
27

28 Defendants.

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

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

**PLAINTIFFS' OPPOSITION TO  
CALTECH'S MOTION TO  
DISMISS**

**Date: January 7, 2008**

**Time: 1:30 p.m.**

**Courtroom: 11**

Complaint Filed: August 30, 2007

**TABLE OF CONTENTS**

**Page(s)**

1

2

3 TABLE OF AUTHORITIES ..... ii

4 I. INTRODUCTION ..... 1

5 II. FACTS ..... 2

6 A. Parties. .... 2

7 B. Caltech’s Involvement in the Challenged Policy. .... 3

8 III. LEGAL ARGUMENT

9 A. Plaintiffs May Bring Suit Against Caltech for Violations of the

10 Federal Constitution Because it is a Joint Actor with the Federal

11 Defendants ..... 7

12 CONCLUSION ..... 11

13

14

15

16

17

18

19

20

21

22

23

24

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28

1 **TABLE OF AUTHORITIES**

**Page(s)**

2 **FEDERAL CASES**

3

4 *Adickes v. S.H.Kress & Co.*  
398 U.S. 144 (1970) ..... 7, 8

5 *Blum v. Yaretsky*  
457 U.S. 991 (1982) ..... 7

6 *Brentwood Academy v. Tennessee Secondary School Association*  
7 531 U.S. 288 (2001) ..... 7

8 *Burton v. Wilmington Parking Authority*  
9 365 U.S. 715 (1961) ..... 7, 8

10 *Carlin Communication v. Mountain State Telephone & Telegraph Co.*  
827 F.2d 1291 (9th Cir. 1987), cert denied, 485 U.S. 1029 (1988) ..... 9

11 *Chan v. City of New York*  
12 803 F.Supp. 710 (S.D.N.Y. 1992) ..... 10

13 *George v. Pacific-CSC Work Furlough*  
91 F.3d 1227 (9th Cir. 1996) ..... 7, 11

14 *Gorenc v. Salt River Project Agricultural Improv. & Power District*  
15 869 F.2d 503 (9<sup>th</sup> Cir. 1989) ..... 7, 8

16 *Jackson v. Metropolitan Edison Co.*  
419 U.S. 345 (1974) ..... 7

17 *Jensen v. Lane County*  
18 222 F.3d 570 (9<sup>th</sup> Cir. 2000) ..... 10

19 *Lugar v. Edmondson Oil Co.*  
457 U.S. 922 (1982) ..... 7

20 *Mathis v. Pacific Gas & Electric Co.*  
21 891 F.2d 1439 (9<sup>th</sup> Cir. 1989) ..... 9

22 *Moose Lodge No. 107 v. Irvis*  
407 U.S. 163 (1972) ..... 7

23 *North Georgia Finishing, Inc. v. Di-Chemical, Inc.*  
24 419 U.S. 601 (1975) ..... 8

25 *Parks School of Business, Inc. v. Symington*  
51 F.3d 1480 (9<sup>th</sup> Cir. 1995) ..... 7

26 *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*  
27 483 U.S. 522 (1987) ..... 7

28 *Sutton v. Providence St. Joseph Medical Center*  
192 F.3d 826 (9<sup>th</sup> Cir. 1999) ..... 10

**FEDERAL STATUTES**

*Pub. L. 85-568*

§ 102

..... 2, 3, 5

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## I. INTRODUCTION

Defendant California Institute of Technology (“Caltech”) raises a single objection to plaintiffs’ First Amended Complaint, that Caltech is not a proper party to any of the causes of action stated therein because it is merely following the directives of NASA with respect to who may obtain access to JPL, a federally owned facility. While plaintiffs do not disagree that defendant Caltech is not a proper defendant as to the claim under the Administrative Procedures Act,<sup>1</sup> and plaintiffs are not contesting dismissal of the California Constitutional claims as to all parties, Caltech is a proper defendant for plaintiffs’ claims under the United States Constitution, as plaintiffs have adequately alleged joint action between Caltech and NASA.

Caltech’s opposition is premised on the claim that it is merely “following orders” and so is not a proper defendant in this action. This argument, however, ignores the degree of Caltech’s involvement in the entire background investigation process, which includes gathering and reviewing all of the background information submitted by plaintiffs and other JPL employees. More importantly, however, it is Caltech, and not the government defendants, which has made the decision that failure to complete the background investigation process will result in an employee’s termination. Indeed, the federal defendants make this point themselves, arguing that it is Caltech which has decided to impose termination, as opposed to some alternate or lesser consequence. (Gov. Defs’ Opposition Brief on Appeal, Exh. 1 to Plaintiffs’ Request for Judicial Notice, at 59.)

It must be kept in mind that all of the plaintiffs are employees of JPL, many of whom are long term employees who have engaged in significant scientific research, teaching, and publication activities on behalf of Caltech for decades. While the

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<sup>1</sup>Defendant Caltech acknowledges that it was not named as a defendant to the APA claim in plaintiffs’ original complaint. Plaintiffs did not intend to add Caltech to the APA claim in the First Amended Complaint and the reference to “all defendants” in the introduction to that cause of action was an oversight.

1 government has determined that failure to complete the background investigation will  
2 result in an individual being denied access to a federally-owned facility, it has not  
3 mandated that anyone be terminated by Caltech. It is Caltech which has made the  
4 decision that anyone who cannot obtain clearance to work at JPL will be terminated from  
5 Caltech's employment. It is Caltech which has decided how that termination will occur,  
6 when it will occur vis a vis denial of access, and what benefits, if any, will still be  
7 provided to the individual upon termination. Thus, Caltech cannot seriously claim that it  
8 has no role in the implementation of HSPD-12, or in determining the consequences for  
9 employees who refuse to comply with its terms.

## 10 II. FACTS

### 11 A. Parties

12 Defendant National Aeronautics and Space Administration ("NASA") was created  
13 by Congress in 1958 as a purely civilian agency. NASA's statutory mandate is as  
14 follows: "activities in space should be devoted to peaceful purposes for the benefit of all  
15 mankind." Pub. L. 85-568, § 102, 72 Stat. 433. Defendant Caltech is a non-profit  
16 educational institution and one of the premier research institutes in the world. JPL is an  
17 operating division of Caltech, staffed entirely by Caltech employees, whose  
18 compensation and benefit policies are established by Caltech. Since 1959, Caltech has  
19 operated JPL pursuant to a written contract as a NASA Federally Funded Research and  
20 Development Center (FFRDC). (First Amended Complaint ("FAC"), ¶ 37.) The  
21 laboratories' actual physical facilities are owned by NASA. (*Id.*)

22 The plaintiffs in this action are scientists, engineers and administrative support  
23 personnel employed by Caltech to work at the JPL facility on NASA programs. Joining  
24 this lawsuit as class representatives are some of JPL's most senior research scientists and  
25 leading engineers, who have been in the forefront of the Mars Exploration Rovers  
26 Project, and the Galileo, Messenger (Mercury) and Magellan missions. (FAC, ¶ 3-30,  
27 38.) As a group, the plaintiffs have published widely in scientific peer-reviewed  
28 journals, and have received hundreds of prestigious awards from NASA and the

1 scientific community. Many of them are pure research scientists, who have no direct  
2 contact with any of the vehicles or hardware created or operated by JPL. (FAC, ¶ 38.)

3 Most of the plaintiffs have worked at JPL for more than twenty years. None of  
4 them have security clearances nor do they work with classified material of any kind.  
5 (FAC, 38.) All research data generated by plaintiffs (collected from NASA instruments)  
6 are in the public domain; their scientific findings are freely shared with the scientific  
7 community and public. (*Id.*) Indeed, many of the plaintiffs have elected to do only non-  
8 classified work expressly so that their research is subject to peer review, and so that they  
9 can “collaborate with the best scientists worldwide.” (*Id.*)

10 **B. Caltech’s Involvement in the Challenged Policy**

11 On August 27, 2004, President Bush signed Homeland Security Presidential  
12 Directive 12 (HSPD-12), entitled “Policy for a Common Identification Standard for  
13 Federal Employees and Contractors.” HSPD-12’s stated purpose is to ensure that “secure  
14 and reliable forms of identification” are used by government employees and contractors.  
15 HSPD-12 directed the Department of Commerce to promulgate a Federal standard for  
16 “secure and reliable forms of identification.” Nowhere does HSPD-12 require or  
17 authorize implementation of a background investigation process, nor does it authorize or  
18 contemplate any requirement that applicants for the new identification form waive their  
19 privacy rights. (For a complete summary of plaintiffs’ allegations relating to the  
20 implementation of HSPD-12 and the various statutes and enactments which form the  
21 basis of the background investigation and suitability determination at issue here,  
22 plaintiffs incorporate by reference their statement of facts in the Opposition to Federal  
23 Defendants’ Motion to Dismiss. Plaintiffs will not repeat those allegations in this brief,  
24 except to the extent that they bear directly on Caltech’s involvement in the  
25 implementation plan.)

26 In response to HSPD-12, in March 2006, the Department of Commerce  
27 promulgated a standard entitled “Personal Identify Verification (PIV) of Federal  
28 Employees and Contractors,” codified at FIPS PUB 201-1. The standard further specifies

1 that the background investigation required will be a “National Agency Check with  
2 Inquiries,” or its equivalent, for which each applicant will be required to complete  
3 Standard Form (SF) 85, “OPM Questionnaire for Non-Sensitive Positions,” or its  
4 equivalent. (Def. Caltech’s Request for Judicial Notice, Exhibit 1 thereto.)

5 On May 24, 2007, NASA issued an Interim Directive amending NPR 1600.1 and  
6 establishing a new “Agency-wide policy for the creation and issuance of federal  
7 credentials at NASA.” The Interim Directive provides that JPL employees will be  
8 subject to the NACI, and thus to SF 85, and that the minimum background check process  
9 for all personnel under the PIV standard will be the NACI. (Exhibit 2 to Def. Caltech’s  
10 Request for Judicial Notice.)

11 As part of the implementation of the new PIV system, NASA and JPL jointly  
12 established the risk level for each position at JPL based on “the position’s impact on  
13 NASA operations.” Each position was designated as “high, moderate or low risk,” based  
14 on the “overall responsibility of the position” and “any possible adverse impact the  
15 position could have in terms of integrity and efficiency of NASA assets/operations.” All  
16 employees determined to be low risk level were required to complete Standard Form SF  
17 85 and submit to a background check known as a “National Agency Check with  
18 Inquiries” (“NACI”). Low risk positions are those positions which “have little affect on  
19 the efficiency of the agency’s programs and operations” and would include all “non-  
20 sensitive positions and all other positions involving IT systems whose misuse has limited  
21 potential for adverse impact.” Moderate and high risk employees were required to  
22 complete Standard Form SF 85 P and submit to a more extensive background  
23 investigation. (FAC, ¶ 44.)

24 All of the plaintiffs in this case have been notified that they have been deemed low  
25 risk, or “non-sensitive personnel,” by NASA and JPL and therefore required to complete  
26 Form SF 85. (FAC, ¶ 45.) Approximately 97-98% of JPL personnel have been  
27 designated as “non-sensitive personnel” by JPL and NASA. (FAC, ¶ 46.)

28 The Interim Directive states that “the PIV authorizer and supporting staff will

1 determine suitability for access.” (Exhibit 2 to Caltech’s Request for Judicial Notice, at  
2 0949.) It supplies no criteria for adjudication.

3 The only set of standards to fill this evaluative vacuum seems to be contained in a  
4 document titled “Issue Characterization Chart” and posted on JPL’s internal website for  
5 a “few months.” (FAC, ¶ 52-53.) The document sets out the various grounds upon  
6 which an employee can be determined unsuitable. The grounds, enumerated on a federal  
7 government form promulgated by OPM include “irregular but deliberate delinquency in  
8 meeting financial obligations,” “pattern of irresponsibility as reflected in . . . credit  
9 history,” “sexual misconduct with impact on job,” “carnal knowledge,” “sodomy,”  
10 “attitude,” “homosexuality,” “judgment, reliability and dependability issues,” “physical  
11 health issues,” “mental, emotional, psychological or psychiatric issues,” “issues . . . that  
12 relate to an associate of the person under investigation,” and “issues . . . that relate to a  
13 relative of the person under investigation.” (*Id.*, at ¶ 53.)

14 Defendants have never disavowed the criteria contained in the Chart. Indeed, at  
15 the hearing on the motion for preliminary injunction, defense counsel for the federal  
16 government admitted that the chart had been posted for a “few months” and that it was  
17 intended to inform employees of the status of NASA’s program. (Transcript of hearing  
18 dated October 1, 2007, Exhibit 2 to Plaintiffs’ Request for Judicial Notice, at 5.) Counsel  
19 for the federal defendants further admitted that such factors as medical history would be  
20 evaluated to determine suitability to work at JPL. (*Id.*, at 30-31.)

21 Plaintiffs have been provided conflicting information about Caltech’s role in  
22 determining their suitability. NASA’s Interim Directive regarding the implementation of  
23 the background investigation states that if the Badge issuance process yields any  
24 “derogatory or unfavorable information,” it will be forwarded to the Human Relations  
25 Officer for JPL who will determine “employment suitability.” In public meetings  
26 regarding the implementation process, JPL employees have been informed that the  
27 adjudication of their suitability, based on the background check, will instead be  
28 performed by a “federal employee,” not shared with JPL and a negative outcome “would

1 prevent [the] individual from access to a federal facility.” (FAC, ¶ 52.)

2 JPL employees were informed by Caltech senior management that no employee  
3 would be admitted to JPL facilities without a new PIV badge after October 27, 2007.  
4 Further, they were informed that if they did not complete all of the paperwork (Form 85  
5 and waiver) by September 28, 2007, JPL would not be able to process their requests by  
6 October 27, 2007 and they would be barred from the premises on that date. (FAC, ¶ 54.)

7 All of the plaintiffs have been informed at public meetings that if they did not  
8 have their PIV badge by October 27, 2007, that they will not only be barred from the  
9 premises but will be deemed to have terminated their employment with JPL. (FAC, ¶  
10 55.)

11 Plaintiffs further allege that Caltech is an indispensable party to these proceedings  
12 and to any injunctive relief order, should one be issued, as Caltech plays an integral part  
13 in implementing and enforcing the background investigation at issue here. Caltech  
14 employees are responsible for gathering and processing the SF 85 forms and for  
15 verifying that all of the information is complete. Caltech employees have repeatedly  
16 informed plaintiffs and other members of the class whom they seek to represent that they  
17 must complete the background investigation process and obtain a badge if they wish to  
18 continue their employment with Caltech. Caltech management has informed all JPL  
19 employees that if they do not comply with NASA’s badging requirement that Caltech  
20 will begin the process of finding their replacement and they will be deemed terminated.  
21 Caltech has further informed plaintiffs and other JPL employees that their failure to  
22 complete the background investigation process might effect their retirement dates and  
23 entitlement to various sick and leave benefits. If this court determines that injunctive  
24 relief is required as to any aspect of the background investigation process, or all of it,  
25 defendant Caltech is a necessary party to such injunction as Caltech controls the terms  
26 and conditions of employment for all of the putative class and must be required to  
27 conform its employment practices to accommodate and respond to any injunctive relief  
28 order. (FAC, ¶ 55.)

### III. LEGAL ARGUMENT

#### A. Plaintiffs May Bring Suit Against Caltech for Violations of the Federal Constitution Because it is a Joint Actor with the Federal Defendants

Defendant Caltech contends that it is a private actor and cannot be subject to a *Bivens* suit for violations of the Federal Constitution. However, the law is now well established that even private entities may be deemed "state actors" for purposes of suit for violations of the Federal Constitution where they can be fairly said to be acting jointly with the government.

The Supreme Court has observed many times that the actions of private entities can sometimes be regarded as governmental action for constitutional purposes. *See, e. g., Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 546 (1987); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972); *Adickes v. S.H.Kress & Co.*, 398 U.S. 144, 150 (1970). The Supreme Court has articulated four distinct approaches to the state action question: nexus, joint action, state compulsion, and public function. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982); *Brentwood Academy v. Tennessee Secondary School Ass'n*, 531 U.S. 288 (2001). As explained by the Ninth Circuit, the Supreme Court "has not indicated whether these approaches are merely factors or independent tests." *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227 (9<sup>th</sup> Cir. 1996), *citing Lugar* (declining to resolve whether the different approaches "are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry"). *See also Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1486 (9<sup>th</sup> Cir. 1995); *Gorenc v. Salt River Project Agricultural Improv. & Power Dist.*, 869 F.2d 503, 506 (9<sup>th</sup> Cir. 1989).

The nexus test inquiry asks "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so the action of the latter may be fairly treated as that of the state itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).

Under the joint action test, the Supreme Court has considered whether "the state

1 has 'so far insinuated itself into a position of interdependence with [the private entity]  
2 that it must be recognized as a joint participant in the challenged activity.'" *Gorenc*, 869  
3 F.2d at 507 (citation omitted) (alteration in original). This occurs when the state  
4 knowingly accepts the benefits derived from unconstitutional behavior. *Id.* In the  
5 leading case to apply the "joint action test," the Supreme Court held the discrimination  
6 by a private restaurant located in a publicly owned parking building was state action  
7 where the building was "dedicated to 'public uses' in performance of [the Parking  
8 Authority's] 'essential governmental functions' ", the restaurant was operated as an  
9 integral part of the public building devoted to a public parking service, and the rent was  
10 paid to the state. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722-24 (1961).

11 "A third approach is to examine whether the private actor is functioning as the  
12 government. . . . In order for the performance of a public function to result in state  
13 action, the function must traditionally be the exclusive prerogative of the state." *Parks*  
14 *School of Business*, 51 F.3d at 1486.

15 Finally, the state compulsion test asks whether a private actor who violates  
16 someone's constitutional rights is acting under the "compulsion" or framework of a state  
17 law or a state custom having force of law. *Adickes v. S.H. Kress and Company*, 398 U.S.  
18 144, 169-170 (1970); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601  
19 (1975). In *Adickes* a white woman was denied restaurant service and subsequently  
20 arrested for vagrancy because she was in the company of blacks. The court held that if  
21 she showed that Kress refused her service because of a state enforced custom compelling  
22 segregation of the races in Hattiesburg (Miss.) restaurants, she would meet her state  
23 action requirement. *Adickes*, 398 U.S. at 171. For state action purposes it makes no  
24 difference whether the racially discriminatory act by the private party is compelled by  
25 statutory provision or custom having the force of law, in either case the state has  
26 commanded the result by its law. *Id.* at 171. See also *Gorenc*, at 508-509. (This test is  
27 sometimes also described as the "close nexus" test, described above.

28 Under any of these tests, JPL must be deemed to be a "state actor." Caltech

1 operates JPL, a federally owned facility, on behalf of NASA, using funds provided by  
2 NASA and creating space programs for use by NASA scientists generally. JPL has  
3 jointly participated in the implementation of HSPD-12's background investigation and  
4 suitability check by managing the collection of information, reviewing data to insure  
5 completeness, jointly determining which of its employees are "low risk" or "moderate  
6 risk" and thus what background investigation form they must complete; and determining  
7 the consequence for failure to obtain a badge within the requisite time period. JPL has  
8 assumed a function traditionally associated with the state in this country, namely the  
9 scientific exploration of space. Finally, and most significantly, JPL has been compelled  
10 by its contractual relationship with NASA to enforce an allegedly unconstitutional  
11 background check – such compulsion does not exonerate it from suit under the Federal  
12 Constitution, but rather renders it a state actor amenable to suit. Indeed, Caltech admits  
13 that it is acting under compulsion of a government-imposed requirement, which  
14 mandates that it bar entry to any employee who has not obtained a badge after  
15 undergoing the NACI process. (Caltech's Brief, at 3.)

16 In this circuit, *Mathis v. Pacific Gas & Elec. Co.*, 891 F.2d 1439 (9<sup>th</sup> Cir. 1989), is  
17 controlling. There, contractors who performed work at a nuclear power plant operated  
18 by PG& E sought injunctive relief against the Nuclear Regulatory Commission ("NRC")  
19 and PG&E for violating their constitutional rights to due process when they were denied  
20 access to the facilities due to suspected drug use. As a result of being denied access, the  
21 plaintiffs had lost their jobs with PG&E contractors. The court held that plaintiffs had  
22 adequately alleged that PG&E should be deemed a governmental actor (for purposes of  
23 *Bivens* liability) based on the fact that the NRC had encouraged PG&E to implement a  
24 particular fitness for duty program, aimed at ferreting out and terminating drug users.  
25 Based on these facts alone, the court held that PG&E could be deemed a "state actor"  
26 and therefore liable for constitutional violations in a *Bivens* action. *Id.*, at 1434.

27 Similarly, in *Carlin Communication v. Mountain State Telephone & Telegraph*  
28 *Co.*, 827 F.2d 1291 (9<sup>th</sup> Cir. 1987), *cert denied*, 485 U.S. 1029 (1988), a case closely on

1 point, the Ninth Circuit held that the defendant telephone company's termination of the  
2 plaintiff's adult entertainment message service was state action because the termination  
3 resulted from the exercise of coercive state power in the form of a threat to prosecute.  
4 The fact that the company was compelled to terminate the service because it was being  
5 threatened with prosecution if it did not do so did not immunize the company from suit  
6 under Section 1983; rather, it rendered the company a "state actor" for purposes of a  
7 direct suit against it by the plaintiff in that case. *Accord Jensen v. Lane County*, 222  
8 F.3d 570, 575 (9<sup>th</sup> Cir. 2000)(physician found to be state actor where he provided  
9 contract services relating to involuntary commitments); *Chan v. City of New York*, 803  
10 F.Supp. 710 (S.D.N.Y. 1992)(plaintiff alleged that municipal defendants exercised  
11 coercive power over city contractor by insisting upon a maximum "person day rate" in  
12 contractor's contract with city that was so low as to make it financially impossible for  
13 contractor to pay prevailing wage rates mandated by federal law).

14 In light of these tests and substantial legal precedent, Caltech's reliance on *Sutton*  
15 *v. Providence St. Joseph Medical Center*, 192 F.3d 826 (9<sup>th</sup> Cir. 1999), is misplaced.  
16 While it is correct that *Sutton* announces that a private actor who merely follows a  
17 government directive, thereby violating the constitution, will not be a state actor for  
18 liability purposes, placing it at odds with other Ninth Circuit precedent, *Sutton* also holds  
19 that state action will be attributable to the private entity whenever there is "something  
20 more" than merely following a governmental directive. *Id.*, at 838. In the instant case,  
21 plaintiffs have clearly demonstrated that there is "something more" to Caltech's  
22 involvement than merely implementing an order, since Caltech has elected, on its own, to  
23 summarily and immediately terminate any employee who does not have a badge to enter  
24 JPL as of a given date. Caltech just as easily could have determined that employees who  
25 refused to undergo the investigation or who failed to obtain a badge would be allowed to  
26 work at other Caltech facilities or would be transferred to other comparable positions on  
27 the main campus. Selecting immediate termination as the sole consequence for those  
28 who failed to obtain a badge to work at JPL is undeniably the "something more" that

1 renders Caltech a joint participant in the violation of these employees' constitutional  
2 rights under *Sutton*.

3 *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227 (9<sup>th</sup> Cir. 1996), is also  
4 readily distinguishable. In that case, the plaintiff sought to hold a private prison liable  
5 for First Amendment violations resulting from his termination after he reported health  
6 and safety violations. Evaluating the case under the "nexus" approach, the Ninth Circuit  
7 concluded that the plaintiff could not establish any joint action between his employer,  
8 the private prison, and the County of San Diego because there was no evidence or  
9 allegation that the County had *any* involvement in the decision to terminate him. While  
10 the County did have the ability to regulate certain aspects of his employment, there was  
11 no evidence that it had ordered or coerced any of the decision-making that led to his  
12 termination. The relationship between the private prison and the county in *George*  
13 stands in marked contrast to that between NASA and Caltech, where it is undisputed that  
14 NASA has compelled Caltech to require all of its employees to submit to an allegedly  
15 unconstitutional background investigation and to participate in the collection and  
16 processing of information from that investigation.

### 17 CONCLUSION

18 In sum, plaintiffs respectfully submit that defendant Caltech's Motion to Dismiss  
19 should be denied as to all of the federal constitutional claims. Plaintiffs do not oppose  
20 dismissal of plaintiffs' state constitutional claims.

21 DATED: December 5, 2007

Respectfully Submitted,

22 HADSELL & STORMER, INC.

23  
24 By Virginia Keeny (SP)  
25 Virginia Keeny, Esq.  
26 Attorneys for All Plaintiffs  
27  
28

1 **PROOF OF SERVICE**

2 I am employed in the county of Los Angeles, State of California. I am over  
3 the age of 18 and not a party to the within action; my business address is 128 N. Fair  
4 Oaks Avenue, #204, Pasadena, California 91103.

5 On December 5, 2007, I served the foregoing document(s) described as:  
6 **PLAINTIFFS' OPPOSITION TO CALTECH'S MOTION TO DISMISS** on all  
7 interested parties in this action by a true copy thereof enclosed in a sealed box addressed  
8 as follows:

9 Vesper Mei, Esq. 10 Wendy Ertmer, Esq. 11 Mark Stern, 12 Trial Attorney 13 Federal Programs Branch 14 U.S. Department of Justice, Civil Division 15 20 Massachusetts Avenue, N.W. 16 Washington, DC 20530 Telephone: (202) 514-4686 Facsimile: (202) 616-8470	<b>Attorneys for Defendants 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</b>
17 Mark Holscher, Esq. 18 Alexander Pilmer, Esq. 19 Mark T. Cramer, Esq. 20 KIRKLAND & ELLIS, LLP 21 777 S. Figueroa, #3700 22 Los Angeles, California 90071 23 Telephone: (213) 680-8400 24 Facsimile: (213) 680-8500	<b>Attorneys for Defendant CALIFORNIA INSTITUTE OF TECHNOLOGY</b>

25 **XX BY E-MAIL:** I caused the foregoing document(s) to be emailed to Vesper Mei,  
26 Mark Holscher, Alexander Pilmer, Mark T. Cramer to email addresses:  
27 vesper.mei@usdoj.gov, wendy.ertmer@usdoj.gov, mark.stern@usdoj.gov  
28 mholscher@kirkland.com, apilmer@kirkland.com, mcramer@kirkland.com.

**XX BY OVERNIGHT DELIVERY:**

XX I am readily familiar with the firm's practice of collection and processing  
correspondence by Federal Express packages. Under that practice it would be picked up  
by an agent of Federal Express on the same day at our offices in Pasadena, California in  
the ordinary course of business for next day delivery.

Executed on December 5, 2007, at Pasadena, California.

**XX** (Federal) I declare that I am employed in the office of a member of the bar of  
this Court at whose direction the serve was made.

Yuritzy Anaya  
Declarant