

1 Dan Stormer, Esq. [S.B. #101967]  
dstormer@hadsellstormer.com  
2 Virginia Keeny, Esq. [S.B. #139568]  
vkeeney@hadsellstormer.com  
3 Sanjukta Paul, Esq. [S.B. #243861]  
sanjukta@hadsellstormer.com  
4 HADSELL & STORMER, INC.  
128 North Fair Oaks Avenue, Suite 204  
5 Pasadena, California 91103-3645  
Telephone: (626) 585-9600  
6 Facsimile: (626) 577-7079

7 Attorneys for All Plaintiffs

8  
9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**  
11

12  
13 Robert M. Nelson, William Bruce  
Banerdt, Julia Bell, Josette Bellan,  
14 Dennis V. Byrnes, George Carlisle, Kent  
Robert Crossin, Larry R. D'Addario,  
15 Riley M. Duren, Peter R. Eisenhardt,  
Susan D.J. Foster, Matthew P.  
16 Golombek, Varoujan Gorjian, Zareh  
Gorjian, Robert J. Haw, James Kulleck,  
Sharon L. Laubach, Christian A.  
17 Lindensmith, Amanda Mainzer, Scott  
Maxwell, Timothy P. McElrath, Susan  
18 Paradise, Konstantin Penanen, Celeste  
M. Satter, Peter M.B. Shames, Amy  
19 Snyder Hale, William John Walker and  
Paul R. Weissman,

20 Plaintiffs,

21 v.

22  
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  
FEDERAL DEFENDANTS'  
MOTION TO DISMISS**

**Date: January 7, 2008**

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

**Courtroom: 11**

Complaint Filed: August 30, 2007

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## I. INTRODUCTION

1  
2 The crux of this litigation is a dispute between scientists and engineers employed  
3 by the California Institute of Technology (“Caltech”) and the government, regarding a  
4 newly instituted policy whereby plaintiffs must submit to an overly broad, dangerously  
5 vague, and ill-designed investigatory and evaluatory scheme as a condition of their  
6 employment. The policy in question stems ultimately from Homeland Security  
7 Presidential Directive 12, which mandated the creation of a new identification system for  
8 federal employees and contractors. In the cascade of regulations created as this mandate  
9 made its way through the various agencies involved, its implementation grew  
10 increasingly byzantine and in the process, came to encompass a highly problematic  
11 “suitability determination.” The package of investigative and evaluative actions that  
12 constitutes the “suitability” investigation/determination violates the Fourth Amendment  
13 and the constitutional right to privacy and violates the Administrative Procedures Act’s  
14 prohibition against agencies acting without statutory or executive order authority.

15 The “suitability” investigation/determination being implemented by the  
16 government has three primary components: 1) the requirement that workers fill out  
17 Standard Form 85, and execute the accompanying, extremely broad authorization  
18 permitting the government’s agents to obtain *any information* relating to their activities,  
19 from schools, landlords, employers, criminal justice agencies, retail business  
20 establishments, or *other sources of information, including but not limited to* academic  
21 information, employment records, and other categories of information; 2) the execution  
22 of a background investigation of the employee, including questioning of his or her  
23 associates regarding highly personal information including medical and mental health  
24 issues, financial information, and/or associational activities; and 3) an actual  
25 determination of the subject’s suitability for access to the JPL facility, encompassing a  
26 host of inappropriate and vague criteria. Strikingly, these criteria have never been  
27 disavowed by the federal defendants, either in the papers or at oral argument on the  
28 motion for preliminary injunction. Moreover, the striking breadth of the authorization to

1 gather private information about individual plaintiffs has been explicitly endorsed by the  
2 federal defendants, who stated in their papers in opposing that motion that this breadth is  
3 necessary to allow the government “flexibility to follow up on relevant leads,” and who  
4 stated at the hearing on the motion that investigation into medical conditions and  
5 treatment is necessary because “to the extent that you have somebody whose mental  
6 health may unstable, you’d want to know that with respect to a person working in the  
7 facility.” (Plaintiffs Request for Judicial Notice, Exhibit 2, pp. 30-31.).

8 Defendants’ motion to dismiss confronts the Court with a governmental policy  
9 that vests unfettered discretion in government officials to gather information about  
10 individuals’ private lives outside work, and to condition employment upon an arbitrary  
11 determination of the “suitability” of the contents of their private lives. The danger of  
12 such unchecked power is heightened in the instant case. Plaintiffs are among the  
13 foremost scientific thinkers of this generation. The threat to their intellectual freedom  
14 inherent in the challenged policy endangers not only their individual liberties but, as  
15 importantly, a basic value of modern society: the undistorted operation of the  
16 marketplace of ideas, free from governmental manipulation, influence, favor or disfavor.

## 17 **II. FACTS**

### 18 **A. Parties**

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

1 The plaintiffs in this action are scientists, engineers and administrative support  
2 personnel employed by Caltech to work at the JPL facility on NASA programs. Joining  
3 this lawsuit as class representatives are some of JPL's most senior research scientists and  
4 leading engineers, who have been in the forefront of the Mars Exploration Rovers  
5 Project, and the Galileo, Messenger (Mercury) and Magellan missions. As a group, the  
6 plaintiffs have published widely in scientific peer-reviewed journals, and have received  
7 hundreds of prestigious awards from NASA and the scientific community. Many of them  
8 are pure research scientists, who have no direct contact with any of the vehicles or  
9 hardware created or operated by JPL. (FAC, ¶3-30, 38.)

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

17 **B. Regulatory and Procedural History of the Challenged Policy**

18 On August 27, 2004, President Bush signed Homeland Security Presidential  
19 Directive 12 (HSPD-12), entitled "Policy for a Common Identification Standard for  
20 Federal Employees and Contractors." HSPD-12's stated purpose is to ensure that "secure  
21 and reliable forms of identification" are used by government employees and contractors.  
22 HSPD-12 directed the Department of Commerce to promulgate a Federal standard for  
23 "secure and reliable forms of identification." Nowhere does HSPD-12 require or  
24 authorize implementation of a background investigation process, nor does it authorize or  
25 contemplate any requirement that applicants for the new identification form waive their  
26 privacy rights.

27 In response to HSPD-12, in March 2006, the Department of Commerce  
28 promulgated a standard entitled "Personal Identify Verification (PIV) of Federal

1 Employees and Contractors,” codified at FIPS PUB 201-1. ER 0842-0931. The PIV  
2 standard explained that its sole authority was based on HSPD-12, yet it proceeded, PIV  
3 without explanation, to impose a background investigation requirement on all  
4 employees. The standard further specifies that the background investigation required  
5 will be a “National Agency Check with Inquiries,” or its equivalent, for which each  
6 applicant will be required to complete Standard Form (SF) 85, “OPM Questionnaire for  
7 Non-Sensitive Positions,” or its equivalent. (Def. Caltech’s Request for Judicial Notice,  
8 Exhibit 1 thereto.)

9 Working separately to respond to HSPD-12, in 2006 NASA had instituted an  
10 identification badge system (the OneNASA badge), which could be used at all NASA  
11 facilities. (FAC, ¶ 42.) To obtain this badge, JPL employees were required to provide  
12 basic personal information, submit two forms of approved identification, and submit to  
13 fingerprinting. *Id.* None of the forms required that JPL employees waive their privacy  
14 rights in any way. *Id.* Plaintiffs had no objection to this process, which fully met the  
15 objectives of HSPD-12.

16 On May 24, 2007, NASA issued an Interim Directive amending NPR 1600.1 and  
17 establishing a new “Agency-wide policy for the creation and issuance of federal  
18 credentials at NASA.” The Interim Directive states that it is being implemented pursuant  
19 to HSPD-12 and the PIV standard established by Commerce, ER 933. The Interim  
20 Directive provides that JPL employees will be subject to the NACI, and thus to SF 85,  
21 and that the minimum background check process for all personnel under the PIV  
22 standard will be the NACI. (Exhibit 2 to Def. Caltech’s Request for Judicial Notice.)  
23 ER 0518; ER 0941-0946.

24 All plaintiffs have been notified that they have been deemed “non-sensitive  
25 personnel” by NASA and JPL and therefore required to go through a NACI and complete  
26 SF-85. Indeed, 97-98% of JPL personnel have been designated as “non-sensitive” or  
27 low risk level by JPL and NASA. (FAC, ¶ 45-46.)

28 SF 85 requires various background information to which plaintiffs do not object,

1 e.g., name, date of birth, place of birth, social security number, etc. The form also  
2 requests information regarding the applicant's drug use history, as well as "treatment and  
3 counseling" for the same. Most significantly, applicants are required to sign, as part of  
4 SF 85, an extremely broad "Authorization for Release of Information," which authorizes  
5 the agency to collect "any information relating to my activities from schools, residential  
6 management agents, employers, criminal justice agencies, retail business establishments,  
7 or other sources of information." (Exh. 1 to FAC.) The three references applicants are  
8 required to provide, together with their employers and landlords for the past 5 years, are  
9 then sent an Investigative Request for Personal Information, which asks that they report  
10 any adverse information they have on the plaintiff with respect to "abuse of alcohol or  
11 drugs," "financial integrity," "mental or emotional stability," "general behavior or  
12 conduct," and "other matters." (Exh. 2 to FAC.)

### 13 **C. The Suitability Determination Implemented by NASA**

14 The Interim Directive states that "the PIV authorizer and supporting staff will  
15 determine suitability for access." (Exhibit 2 to Caltech's Request for Judicial Notice, at  
16 0949.) It supplies no criteria for adjudication.

17 The only set of standards to fill this evaluative vacuum seems to be contained in a  
18 document titled "Issue Characterization Chart" and posted on JPL's internal website for  
19 a "few months." (FAC, ¶52-53.) The document sets out the various grounds upon which  
20 an employee can be determined unsuitable. The grounds, enumerated on a federal  
21 government form promulgated by OPM include "irregular but deliberate delinquency in  
22 meeting financial obligations," "pattern of irresponsibility as reflected in . . . credit  
23 history," "sexual misconduct with impact on job," "carnal knowledge," "sodomy,"  
24 "attitude," "homosexuality," "judgment, reliability and dependability issues," "physical  
25 health issues," "mental, emotional, psychological or psychiatric issues," "issues . . . that  
26 relate to an associate of the person under investigation," and "issues . . . that relate to a  
27 relative of the person under investigation." *Id.*

28 Defendants have never disavowed the criteria contained in the Chart. Indeed, at

1 the hearing on the motion for preliminary injunction, defense counsel admitted that the  
2 chart had been posted for a “few months” and that it was intended to inform employees  
3 of the status of NASA’s program. (Transcript of hearing dated October 1, 2007, Exhibit  
4 2 to Plaintiffs’ Request for Judicial Notice, at 5.) Counsel for the federal defendants  
5 further admitted that such factors as medical history would be evaluated to determine  
6 suitability to work at JPL. (*Id.*, at 31-32.)

7 **D. Harms Caused by NASA’s Policy**

8 All of the plaintiffs have been informed that if they do not complete SF 85 and the  
9 background investigation process, they will be deemed to have voluntarily resigned from  
10 employment with Caltech, and will lose all access to JPL as well as their livelihood.  
11 (FAC, ¶ 57-58.) For all of the plaintiffs, loss of their position at JPL will deprive them  
12 of a unique and irreplaceable job, which will imperil their ability to continue their  
13 research and remain active in space exploration.

14 **III. LEGAL ARGUMENT**

15 **A. Plaintiffs May Challenge All Aspects of NASA’s New Suitability**  
16 **Investigation/Determination Policy**

17 The complex of policies challenged by plaintiffs include 1) a compulsory  
18 requirement that all non-sensitive employees respond to all questions on Form 85,  
19 including Question 14 which requires disclosure of drug use and treatment; 2) the  
20 requirement that all employees sign a broad waiver giving the government the right to  
21 obtain any records from any source at any time; 3) a requirement that they provide the  
22 names of three close associates so that those associates can respond to intrusive  
23 questions about plaintiffs’ “financial integrity,” “mental or emotional stability,” “general  
24 behavior or conduct,” and “other matters” (FAC, Exh. 2); and 4) the government’s  
25 conditioning their ability to work for NASA on a suitability determination which  
26 considers such private information as medical and mental health; undefined “issues”  
27 relating to their associates; credit history; and sexual proclivities, among others.

28 In each aspect of NASA’s new background investigation, the injury to plaintiffs  
and the class they seek to represent is actual and imminent. As this court previously

1 found in ruling on the motion for preliminary injunction, if the plaintiffs do not comply  
2 with every aspect of the process – from completion of Form 85 through successful  
3 passage of the suitability determination – they will be denied a badge, banned from JPL  
4 premises and “deemed to have voluntarily resigned” their employment at JPL. (Order  
5 Denying Plaintiffs’ Motion for Preliminary Injunction, at 8.) Based on this finding, this  
6 court has already held ripe for review the question of whether SF-85 and the written  
7 release improperly invade plaintiffs’ constitutional right and found that plaintiffs had  
8 standing to bring such a challenge. These aspects of the court’s prior ruling should not  
9 be disturbed, as standing requires only that the plaintiff show that he has “personally . . .  
10 suffered some actual or threatened injury as a result of the putatively illegal conduct of  
11 the defendant,” that can be “fairly” traced to the defendant’s challenged conduct, and  
12 which “is likely to be redressed by a favorable decision.” *Valley Forge Christian*  
13 *College v. Americans United For Sep. of Church and State, Inc.* 454 U.S. 464 (1982).

14 Also ripe for review, however, is the constitutionality of the background  
15 investigation and suitability determination. There is overwhelming evidence in the  
16 record, including the admissions of defendants, that all employees are subject to  
17 suitability determinations, that the vague criteria cited in the matrix posted at JPL are  
18 currently in use, and that the background investigators will pursue all sources of  
19 information as far as they see fit. Indeed, at the hearing on the preliminary injunction,  
20 counsel for NASA admitted that these policies are in force, that background  
21 investigations of a personal nature including consideration of mental health are in  
22 process, and that the government will use the written waiver to follow up in obtaining  
23 personal information from third party sources whenever it desires. Exh. 2 to Plaintiffs’  
24 Request for Judicial Notice, at 30-31.

25 In evaluating similar background investigations, courts have found entire  
26 investigatory schemes ripe for review, without splicing the schemes into individual  
27 components. For example in *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967), the  
28 Supreme Court reviewed and struck down a set of regulations created by New York to

1 investigate faculty members for alleged participation in “subversive” organizations. The  
2 plaintiffs’ continued employment with the state had been conditioned upon their  
3 “compliance with a plan, formulated partly in statutes and partly in administrative  
4 regulations, which the State utilized to prevent the appointment or retention of  
5 “subversive” persons in state employment.” *Id.*, at 592. Although plaintiffs had only  
6 refused to sign a certificate stating they were not communists, a form no longer even in  
7 use at the time of the appeal, the court concluded that the “substance of the statutory and  
8 regulatory complex remains” in place and was ripe for review. *Id.*, at 596. Finding the  
9 “regulatory maze created by New York . . . wholly lacking in ‘terms susceptible of  
10 objective measurement’” (*id.*, at 604), and that the “repressive impact of the threat of  
11 discharge” from public employment raised serious constitutional concerns (*id.*, at 607, n.  
12 11), the Court struck down the background investigation regulations in their entirety.

13 In this circuit, the Court has held that a group of seamen had standing to challenge  
14 the United State Coast Guard’s enforcement of a background investigation and security  
15 clearance requirement for service on merchant vessels. *Parker v. Lester*, 227 F.2d 708  
16 (9th Cir. 1955). Pursuant to an executive order, the Coast Guard had implemented a  
17 requirement that all seamen be screened for security clearance, according to various  
18 criteria aimed to ferret out “unsafe and unsuitable” persons. *Id.*, at 709. The court  
19 rejected the government’s position that plaintiffs lacked standing to challenge the entire  
20 screening process. *Id.*, at 713.

21 The question of whether non-critical employees could be subject to a full field  
22 security investigation in order to receive a promotion was also found ripe for review in  
23 *Flake v. Bennett*, 611 F.Supp. 70 (D.D.C. 1985), despite the fact that the government  
24 stated it would not impose the personnel security requirements on the plaintiffs  
25 themselves and they *had been promoted* by the time the case was heard. The court  
26 concluded that “a live controversy remains because the defendants have not conceded  
27 what the plaintiffs asked the Court to declare – that the challenged security program is  
28 unlawful.” *Id.*, at 73-74. Further, the court concluded that there was a “concrete

1 question susceptible to judicial review: whether or not the Department of Education may  
2 lawfully impose a security investigation requirement on applicants for a position that  
3 does not implicate national security concerns.” *Id.*, at 75. *See also Nat'l Treasury*  
4 *Emples. Union v. Chertoff*, 371 U.S. App. D.C. 463 (rejecting Homeland Security  
5 Department’s argument that a challenge to its human resources management system was  
6 not ripe for review because the system might never come to a decision adverse to the  
7 interests of the plaintiffs); *Muller v. Conlisk*, 429 F.2d 901 (7<sup>th</sup> Cir. 1970) (police officer  
8 had standing to bring facial challenge to personnel rule imposing discipline against those  
9 who criticized the department, regardless of whether he was subjected to discipline, since  
10 mere threat of sanctions could infringe his right to speak out on matters of public  
11 concern); *Buono v. Kempthorne*, – F.3d – (9<sup>th</sup> Cir. 2007)(controversy ripe for review  
12 because it “would not go away on its own,” and the government had expressed every  
13 intent to go through with the plan); *Santa Fe Dist. v. Doe*, 530 U.S. 290, 313-14  
14 (2000)(upholding pre-enforcement review of a statute where the governmental purpose  
15 in enacting the statute evidenced an unconstitutional intrusion on protected rights).<sup>1</sup>

16 **B. Plaintiffs Have Adequately Plead a Fourth Amendment Violation**

17 Defendants’ primary attack on plaintiffs’ 4<sup>th</sup> amendment claim is that the definition  
18 of search and seizure cannot encompass a background investigation. However, there is  
19

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20 <sup>1</sup> The few cases cited by the federal defendants on the question of standing or  
21 ripeness do not adequately address the distinct controversy presented here or  
22 actually favor a determination of “ripeness.” *National Federation of Federal*  
23 *Employees v. Greenberg*, 983 F.2d 286 (D.C.Cir. 1993), considered a challenge to  
24 a questionnaire by defense department civilian employees who held security  
25 clearances. Even though the plaintiffs were told that filling out the form was  
26 voluntary and there was no evidence that they would suffer *any* adverse  
27 consequences for refusing, the court reached the merits of the underlying  
28 constitutional challenge. Likewise, in *Hotel Employees and Restaurant*  
*Employees Int’l Union v. Nevada Gaming Comm’n*, 984 F.2d 1507, 1518 (9<sup>th</sup> Cir.  
1993), this Circuit found ripe for review a First Amendment facial challenge to a  
Nevada state requirement that money handlers in casinos register with the state  
and provide a personal history statement and fingerprints.

1 simply no *per se* rule supporting defendants' position. A "search" occurs "when an  
2 expectation of privacy that society is prepared to consider reasonable is infringed."  
3 *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). This is distinct from the  
4 subsequent question whether the intrusion was reasonable, in light of an important  
5 government purpose. The legitimacy of an intrusion for Fourth Amendment purposes  
6 thus consists of two questions of reasonableness: whether the expectation of privacy in  
7 the information or area in question is reasonable; and secondly (if the first is in answered  
8 in the affirmative), whether the intrusion by the government into the information or area  
9 in question is reasonable in light of an important government purpose.

10 Just as importantly, the first reasonableness inquiry is a disjunctive one: whether  
11 the individual has a reasonable expectation of privacy in the physical area or in the non-  
12 physical information invaded by the government. In other words, the government may  
13 violate the Fourth Amendment by taking non-private information from a protected place,  
14 or by taking private information from a non-protected place. This proposition was  
15 clearly enunciated in *Katz v. United States*, 389 U.S. 347 (1967). The Court there  
16 rejected the formulation of the question in terms of whether a person has a reasonable  
17 expectation of privacy in the physical area intruded upon, holding that:

18 . . . [T]his effort to decide whether or not a given "area," viewed in the abstract, is  
19 "constitutionally protected" deflects attention from the problem presented by this  
20 case. For the Fourth Amendment protects people, not places . . . what he seeks to  
preserve as private, even in an area accessible to the public, may be  
constitutionally protected.

21 389 U.S. at 351. In so doing, the Court acknowledged that it was departing from its  
22 earlier "narrow" physical conception of the area invaded for Fourth Amendment  
23 purposes, and concluded that the reach of the Fourth Amendment "cannot turn upon the  
24 presence or absence of a physical intrusion into any given enclosure." *Id.* at 353.

25 An accurate synthesis of *Katz* with the earlier line of cases analyzing physical  
26 intrusions is then as follows: while intrusion into a physical area in which one has a  
27 reasonable expectation of privacy is sufficient to render the intrusion a "search for  
28 Fourth Amendment purposes, it is not necessary to do so. *See also Berger v. New York*,

1 388 U.S. 41 (1967) (analyzing warrant for electronic surveillance of conversations under  
2 Fourth Amendment probable cause requirement, regardless of physical trespass or  
3 intrusion onto constitutionally protected “place”); *Skinner v. Railway Labor Executives’*  
4 *Ass’n*, 489 U.S. 602, 617 (1989) (Court relied both upon nature of information extracted  
5 –“a host of private medical facts”– and upon method of extraction, to conclude that  
6 regulations for “collecting and testing urine samples” triggered a Fourth Amendment  
7 query) (emphasis added); *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d  
8 1260, 1269-70 (9th Cir. 1998) (while routine medical examinations of employees may be  
9 constitutional, performing particular tests eliciting particular, private areas of  
10 information would violate Fourth Amendment).

11       Instead, defendants rely upon a single Seventh Circuit case for the simplistic  
12 proposition that “questioning” cannot ever constitute a search for Fourth Amendment  
13 purposes. In fact, *Greenawalt v. Ind. Dep’t of Corr.*, 397 F.3d 587 (7th Cir. 2005), held  
14 essentially that because there was no “physical touching,” however *de minimis*, the  
15 psychological exam administered did not constitute a search. Crucially, the disclosure of  
16 private information at issue in *Greenawalt* was not compulsory, as it is here: the court’s  
17 precise holding there was that the “putting of questions to a person, even when the  
18 questions are skillfully designed to elicit what most people would regard as highly  
19 personal private information,” does not constitute a search. *Id.* at 590. However, the  
20 search here is constituted not by the putting of questions, but by the compulsory  
21 answering of them (along with the compulsory waiver allowing the government access to  
22 private records). There is no indication in the *Greenawalt* decision that the subject was  
23 compelled to give actual answers to particular questions seeking private information.

24       Here, plaintiffs are compelled to provide private information, such as drug  
25 treatment, and compelled to sign a blanket authorization empowering defendants to  
26 access their private records. Defendants fail to address the fact that the procurement of  
27 physical records itself constitutes the search of items in which plaintiffs have a protected  
28 privacy interest. More importantly, defendants fail entirely to address plaintiffs’

1 argument that the intrusion into areas of information in which plaintiffs have a protected  
2 privacy interest, regardless of the method of accessing and whether a physical touching  
3 or intrusion is involved, is sufficient to constitute a search for 4<sup>th</sup> Amendment purposes.

4 Finally, plaintiffs clearly have reasonable expectations of privacy in the types of  
5 information elicited by the government here. As set out in Section III.C, *infra*, courts  
6 have recognized that individuals have reasonable expectations of privacy in medical,  
7 financial and intimate associational information. People's reasonable expectations of  
8 privacy in their individual medical information is also reflected in the plethora of  
9 statutory schemes protecting such information, and in an equal plethora of judicial  
10 decisions protecting private medical information from disclosure. *See, e.g., Skinner v.*  
11 *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989). Further, a person's expectation  
12 that information relating to her mental health and treatment, to highly personal medical  
13 conditions or treatment, to intimate associations and sexual activities, and to private  
14 financial affairs be kept private is clearly reasonable in light of the basic social  
15 assumptions and organization of our culture. That the private information is here  
16 collected from third party custodians of plaintiffs' records, i.e., from places in which  
17 plaintiffs do not have a privacy interest, is immaterial, as set forth *supra* in this Section.

18 **C. Plaintiffs Have Adequately Alleged Violation of Their Privacy Rights**

19 As this Court has previously acknowledged, the Ninth Circuit recognizes a  
20 constitutionally protected interest in avoiding disclosure of personal matters. ER 0021-  
21 0022, citing *In re Crawford*, 194 F.3d 954 (9th Cir. 1999). In *Crawford*, the Ninth  
22 Circuit held that informational privacy exists as a constitutionally protected interest.  
23 *Crawford*, 194 F.3d at 958. *Accord Roe v. Sherry*, 91 F.3d 1270, 1274 (9th Cir.1996);  
24 *Doe v. Attorney General*, 941 F.2d 780, 795-96 (9th Cir. 1991). The Ninth Circuit noted  
25 that the majority of circuits to pass on the question concurred in finding that  
26 informational privacy warrants constitutional protection. *Id.*, at n. 4 (collecting cases);  
27 The Supreme Court has defined this type of privacy interest as "the individual interest in  
28 avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599 (1977).

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,  
and whether there is an express statutory mandate, articulated public policy or  
other recognizable public interest militating toward access. *Id.*

10 This Circuit has found that public employees have a right to informational privacy,  
11 which protects them from unwarranted questioning during the employment application  
12 process and from having public employment conditioned on the relinquishment of  
13 constitutionally protected rights. *Thorne v. City of El Segundo*, 726 F.2d 459, 469 (9th  
14 Cir. 1983). In *Thorne*, a police department typist applying to be a police officer  
15 challenged the department’s pre-employment investigation process, which included a  
16 polygraph examination in which she was questioned about sexual relations with others in  
17 the department. Defendant attempted to justify these questions by arguing that sexual  
18 relations in a paramilitary organization could undermine morale and indicate deviancies  
19 which would render the applicant unsuited to serve as a police officer. The court  
20 rejected this justification as not narrowly tailored to meet legitimate interests in selecting  
21 qualified candidates. The court’s analysis is directly applicable here:

22 The City has set no standards, guidelines, definitions or limitations, other  
23 than the polygraph examiner’s own personal opinion, as to what might be  
24 relevant to job performance in a particular case. When the state’s questions  
25 intrude on the core of a person’s constitutionally protected privacy and  
26 associational interests, as the questioning of the polygraph examiner did in  
27 this case, an unbounded, standardless inquiry, even if founded upon a  
28 legitimate state interest, cannot withstand the heightened scrutiny with  
which we must view the state’s action. . . . *Id.*, at 470.

Indeed, this Circuit has consistently held that the government cannot force  
disclosure of personal information except in rare circumstances. *See, e.g., Tucson  
Woman’s Clinic v. Eden*, 379 F.3d 531 (9th Cir. 2004); *Doe v. Attorney General*, 941

1 F.2d at 796 (information regarding an individual’s medical diagnoses would fall within  
2 the ambit of the privacy protection).

3 While defendants concede that information relating to sex and procreation falls  
4 within the zone of privacy protected by the Constitution, they argue that the right is  
5 limited to familial and sexual issues. However, the right to privacy is much broader. In  
6 *Crawford*, the Ninth Circuit extended the right to privacy to social security numbers. 194  
7 F.3d at 959; accord *Barry v. City of New York*, 712 F.2d 1554, 1562-63 (2d Cir. 1983),  
8 (financial reports); *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978), (elected officials  
9 have privacy interest in their financial affairs). Alternatively, defendants argue that if the  
10 government has established “adequate safeguards” against information reaching third  
11 parties, a citizen cannot object to the government collecting his or her private  
12 information. However, disclosure to a third party is not a required element of  
13 establishing an unconstitutional intrusion on a plaintiff’s informational privacy rights.  
14 Defendants ignore the substantial body of law finding unconstitutional invasions of  
15 privacy in pre-employment questioning by governmental agencies, regardless of  
16 potential release to third parties.

17 For example, in *Thorne, supra*, the court held that questions into the applicants’  
18 private, off-duty personal activities violated constitutional guarantees of privacy; it was  
19 irrelevant to the court’s analysis that the information remained internal to the agency. *Id.*  
20 at 471. Similarly, in *Nat’l Treasury Employees Union*, the court found that plaintiffs had  
21 demonstrated the likelihood of prevailing on the merits of their claim that requiring them  
22 to fill out a very similar form (SF-85P) violated their right to privacy, regardless of  
23 whether the information would subsequently be disclosed to any third party. The court  
24 held that disclosure to the government alone was sufficient to raise constitutional  
25 concerns: “there is an obvious threat of significant harm if the plaintiffs are forced to  
26 disclose this information to the Customs Services. Obviously, *once this type of highly*  
27 *personal information is disclosed to the government, the revelation cannot be undone.*  
28 As plaintiffs correctly point out, ‘the injury is the threatened loss of constitutional rights.

1 That injury occurs when plaintiffs are forced to choose between revealing their  
2 constitutionally protected information by submitting completed forms and preserving  
3 their rights at the cost of possible further discipline or discharge.” *Id.* at 640.

4 The cases cited by defendants do not counsel a different result. In *Whalen*, the  
5 court considered a New York statute which required that doctors provide the department  
6 of health with information about patients who were prescribed certain narcotic drugs.  
7 While the Court concluded that the numerous safeguards implemented by New York to  
8 protect information removed any serious concern about patients’ privacy, those  
9 safeguards were far more extensive than present here, including the requirement that the  
10 data be kept in a vault, surrounded by a monitored fence, that any computerized review  
11 of the data occur “off line” so that no one could access that data, that all data be  
12 destroyed within five years and that no one could access the data other than the  
13 department of health, with significant criminal penalties for any other use of the  
14 information. 429 U.S. at 594. *Whalen* nowhere suggests that these safeguards *alone*  
15 would remove any constitutional concerns: rather, the court determined that the State’s  
16 underlying interest in public health justified its decision to collect information about the  
17 use of powerful narcotic drugs by a small section of its population.

18 *Planned Parenthood v. Lawall*, 307 F.3d 783 (9<sup>th</sup> Cir. 2002), also cannot be cited  
19 for the blanket rule that adequate safeguards against dissemination to the public allay all  
20 privacy concerns. The court merely held that it was permissible to establish a procedure  
21 to maintain the confidentiality of court records relating to minors who sought court  
22 approval for abortions. The court certainly did not hold that the minor had no  
23 constitutionally protected interest in her reproductive history. The D.C. Circuit court  
24 opinion in *AFL-CIO v. Dept. of Housing and Urban Devel.*, 118 F.3d 786, 793 (D.C.Cir.  
25 1997), is also entitled to little weight given that the court commenced its discussion by  
26 announcing that it did not believe that there exists a right to privacy in personal  
27 information, placing it squarely at odds with Supreme Court and Ninth Circuit precedent.  
28

1 Turning to the claim that adequate safeguards exist here, the record is otherwise.  
2 For example, SF 85 notifies individuals that the information may be provided to “the  
3 news media or the general public, [where] the disclosure of which would be in the public  
4 interest and . . . would not constitute an unwarranted invasion of personal privacy;” to “a  
5 Member of Congress or to a Congressional staff member in responses to an inquiry of  
6 the Congressional office ;” to “the National Archives and Records Administration for  
7 records management inspections;” to any “federal, foreign, state, local tribal or other  
8 public authority,” “when a record on its face, or in conjunction with other records,  
9 indicates a violation or potential violation of law, whether civil, criminal or regulatory in  
10 nature;” and to a “court or adjudicative body in a proceeding when (a) the agency or any  
11 component thereof; or (b) any employee of the agency in his or her official capacity; or  
12 (c) any employee of the agency in his or her individual capacity where the Department of  
13 Justice has agreed to represent the employee; or (d) the United States Government is a  
14 party to litigation or has interest in such litigation.” (FAC, Exh. 1.) While these uses are  
15 not unlimited, invocation of any of them lies entirely in the government’s hands and  
16 would place personal information before the public. While defendants may promise this  
17 court that they will never use the information other than to conduct a background  
18 investigation, their own documents announce that the government retains full authority  
19 to use the information for a host of purposes, over which plaintiffs will have no control.

20 Turning to the specific allegations here, it cannot be denied that the information  
21 sought intrudes upon plaintiffs’ fundamental privacy interests. Specifically, Question  
22 No. 14 requires that plaintiffs state whether they have used illegal drugs in the past year  
23 and/or sought treatment for drug use. Private drug use and treatment for drug abuse are  
24 aspects of an individual’s private medical history which are traditionally subject to strict  
25 privacy protections. *Doe v. Attorney General*, 941 F.2d at 796.

26 The broad written release required of plaintiffs also necessarily implicates  
27 plaintiffs’ privacy rights as the waiver gives the government free rein to seek a vast  
28 amount of information about the plaintiffs’ credit history, school activities, employment

1 history, school attendance, as well as anything from any “other source of information”  
2 found germane to the government’s investigation. *Crawford*, 194 F.3d at 959; *Doe v.*  
3 *Attorney General*, 941 F.2d at 796. Defendants admit that the release is “facially broad,”  
4 and explain that this breadth is necessary to allow the government “flexibility to follow  
5 up on relevant leads.” (Federal Defendants’ Opp. To Plaintiffs’ Mtn for Preliminary  
6 Injunction, Exh. 3 to Plaintiffs’ Request for Judicial Notice, p. 23.) It cannot seriously be  
7 doubted that requiring citizens to provide the government with this type of blanket  
8 waiver so that it may, by its own admission, follow up on “any relevant leads” invades  
9 protected privacy interests, and that the injury to the individual is an actual one.

10 Turning to the requirement that plaintiffs disclose the names of close associates so  
11 they may be questioned about the plaintiffs’ medical and financial history, this  
12 requirement necessarily impinges on core privacy rights. Not only must the plaintiffs  
13 disclose names of associates, but plaintiffs must consent to those individuals being  
14 questioned about what they may have learned through that association about the  
15 plaintiffs’ private lives. Two of those questions relate directly to potential medical  
16 issues. (FAC, Exh. 2.) The associate is asked to divulge whether the plaintiff has ever  
17 abused alcohol or drugs and whether he has any mental or emotional problems. Both of  
18 these questions require disclosure of information about the mental health of the plaintiff,  
19 medical problems, or alcohol dependency (all protected conditions under the Americans  
20 with Disabilities Act, 42 U.S.C. §12101-117). Since it certainly would invade the  
21 plaintiffs’ privacy to ask them directly about such issues, the government cannot compel  
22 the plaintiffs to facilitate the questioning of their friends and family about these matters.

23 Finally, the suitability determination itself, like the standardless polygraph  
24 examination at issue in *Thorne*, conditions the right to work in a government facility on  
25 the government’s unfettered right to gather and determine suitability based on private  
26 non-work related information. By defendants’ own admission such determination can be  
27 based on such things as medical conditions or mental health. (Exh. 2 to Plaintiffs’ Req.  
28 for Judicial Notice, at 30-41. The written suitability matrix lists numerous other criteria

1 which impinge upon fundamental privacy interests, including sexual orientation, sexual  
2 conduct, and financial behavior.

3 While such suitability determinations for government employment have not  
4 traditionally been examined on privacy grounds, they have been found to impinge upon  
5 fundamental associational and due process rights, which in turn are sources of the  
6 informational privacy rights recognized by this Circuit. For example, in *Parker*, this  
7 Circuit struck down a background suitability test for merchant seamen, finding the entire  
8 process offended notions of due process. Particularly offensive to the court was the  
9 collection of “secret” information about the seamen, the reliance on secret informers, and  
10 the failure to provide the seamen with a meaningful opportunity to defend themselves  
11 from vague charges of unsuitable associations, beliefs and conduct. *Id.*, at 719-720.

12 Likewise, in *Keyishian, supra*, the Supreme Court struck down a New York  
13 program that required candidates for employment to be questioned about their possible  
14 association with “subversive organizations,” finding the program placed intolerable  
15 burdens on freedom of association and First Amendment rights. 385 U.S. at 604.  
16 *Keyishian* followed *Elfbrandt v. Russell*, 384 U.S. 11, 18-19 (1966), in which the  
17 Supreme Court struck down an Arizona law providing for termination of any public  
18 employee who was a member in any organization having as one of its purposes the  
19 overthrow of the government. *Elfbrandt* had found that the Arizona statute was not  
20 narrowly enough drawn. The concern noted by the Supreme Court in *Elfbrandt* applies  
21 with equal force here: “public employees of character and integrity may well forgo their  
22 calling rather than risk prosecution for perjury or compromise their commitment to  
23 intellectual and political freedom. . . . A statute touching these protected rights must be  
24 ‘narrowly drawn to define and punish specific conduct as constituting a clear and present  
25 danger to a substantial interest of the State.’ [Citation omitted.] Legitimate legislative  
26 goals ‘cannot be pursued by means that broadly stifle fundamental personal liberties  
27 when the end can be more narrowly achieved.’” *Id.*, at 18-19.

1 **D. Defendants Cannot Meet their Burden of Justifying the Background**  
2 **Investigation/Suitability Determination**

3 Defendants have not met their burden of establishing that the governmental  
4 interests they seek to advance through the background investigation process outweigh  
5 the substantial privacy interests outlined above, either under the constitutional right to  
6 informational privacy or under the Fourth Amendment balancing test applicable to  
7 warrantless searches. *O'Connor v. Ortega*, 480 U.S. 709, 719 (1987) (government must  
8 establish “compelling need” to infringe on constitutional rights); *National Treasury*  
9 *Employees Union v. Von Raab*, 489 U.S. 656, 667-68 (1989). The government can show  
10 that it has a compelling interest in searching its employees “only when a clear, direct  
11 nexus exists between the nature of the employee’s duty and the nature of the feared  
12 violation.” *AFGE, Local 1533 v. Cheney*, 754 F. Supp. 1409, 1419 (N.D.Cal. 1990).

13 Defendants simply have not justified subjecting plaintiffs to intense scrutiny of  
14 their extra-professional lives under any legitimate government interest. First, defendants  
15 cannot justify their policy based on the need to verify their employees’ identities.  
16 Although defendants have a legitimate interest in secure and reliable forms of  
17 identification, which plaintiffs already possess, this goal does not justify the open-ended  
18 background investigation and waiver of privacy rights because there is absolutely no  
19 causal nexus whatever between the end and the putative means.<sup>2</sup> None of the irrelevant  
20 personal information is pertinent to verification of an employee's identity, and thus this  
21 justification cannot be used to support current HSPD-12 policy.

22 Second, the defendants do not have a compelling interest in protecting the material  
23 on which plaintiffs work because none of the plaintiffs works on classified matters.  
24 Almost all of their work is within the public domain. Therefore, there can be no nexus  
25 between this interest and the proposed means to achieve it, as required under the clear

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26  
27 <sup>2</sup> All of the plaintiffs have photo identifications which they use to gain access to  
28 JPL, and many of them have the OneNASA badge, which was created only recently by NASA in response to HSPD-12. That badge required fingerprinting and the presentation of at least two official forms of identification. (FAC, ¶ 42.)

1 rule set out above. *See Von Raab*, 489 U.S. at 709 (while “Government has a compelling  
2 interest in protecting truly sensitive information,” Navy’s drug testing program was over-  
3 broad to the extent it applied to employees who had no access to classified information).

4 Third, the government’s interest in enhancing public safety is not furthered by this  
5 program. To establish this interest for Fourth Amendment purposes, the government  
6 must not only demonstrate a great risk to public safety, but it must also show that the  
7 significant safety risk arises from the potential of a “momentary lapse” on the part of an  
8 employee. *Gonzalez v. MTA*, 73 Fed. Appx. 986 (9th Cir. 2003); *AFGE, Local 1533*,  
9 754 F. Supp. at 1422; *Skinner*, 489 U.S. at 628. By designating the plaintiff class as  
10 “low risk” personnel, NASA has admitted that none of these individuals pose any risk to  
11 public safety. Indeed, the plaintiffs and the class they seek to represent have all been  
12 designated *as non-sensitive personnel* by NASA, meaning that their positions “have little  
13 affect on the efficiency of the agency’s programs and operations.” (FAC, ¶ 44.)

14 Because defendants cannot articulate a compelling interest that has a nexus with  
15 any of the employees’ job duties, and because plaintiffs do not have a diminished  
16 expectation of privacy, defendants’ acts violate plaintiffs’ rights to informational privacy  
17 and to be free from unreasonable searches under the Fourth Amendment.

18 **E. NASA’s Suitability Investigation/Determination Policy Violates the**  
19 **Administrative Procedure Act.**

20 NASA’s suitability investigation and determination policy violates the  
21 Administrative Procedure Act because it has no basis in any executive order or statute  
22 and runs counter to Supreme Court precedent forbidding such treatment of individuals in  
23 non-security positions. *Cole v. Young*, 351 U.S. 536 (1956). Contrary to defendants’  
24 position, Plaintiffs have standing to bring an APA challenge because they fall within the  
25 “zone of interests” protected by the Space Act and FISMA, which the courts have held  
26 must be broadly interpreted. *See Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399 (1987).  
27 A plaintiff falls outside of the zone of interest only if the plaintiff is neither “the subject  
28 of the contested regulatory action,” or the “plaintiff’s interests are so marginally related  
to or inconsistent with the purposes implicit in the statute that it cannot reasonably be

1 assumed that Congress intended to permit the suit." *Id.* See also *Ashley Creek Phosphate*  
2 *Co. v. Norton*, 420 F.3d 934, 940 (9th Cir. 2005).

3 Plaintiffs clearly fall within the zone of interest to challenge security measures  
4 instituted against them under the Space Act and FISMA. The Space Act permits the  
5 director of NASA to establish security requirements "in the interest of national security"  
6 and to refer to the FBI for further investigation anyone of questionable loyalty. 42 U.S.C.  
7 2455(a)(1958). Employees who are subjected to these new security requirements and  
8 who could potentially be referred to the FBI clearly fall within the zone of interest  
9 created by the Space Act, under *Clarke*. Plaintiffs also fall within the zone of interest  
10 created by the FISMA, which permits the creation of security measures for computerized  
11 information systems. Although it is a tenuous argument that the FISMA could authorize  
12 anything akin to the background investigation at issue here, to the extent the government  
13 relies on FISMA as legal authority for a broad investigation of all of its employees, those  
14 employees fall within the zone of interest in that they are directly impacted – denied  
15 access to the facility where they make their livelihood – as a result of these new  
16 measures. Moreover, the plaintiffs allege they will suffer economic injury as a result of  
17 NASA's implementation of these statutes; the courts have found economic injury  
18 sufficient to bring the plaintiff within the zone of interest to challenge agency action  
19 under the APA. See, e.g. *Assoc. of Data Processing v. Camp*, 397 U.S. 150, 153 (1970).

20 The APA requires courts to "hold unlawful and set aside agency action found to be  
21 . . . not in accordance with law." 5 U.S.C. § 706(2)(c). Agencies are not lawmakers and  
22 are not free to simply create legal mandates from whole cloth. See, e.g., *Kurzner v.*  
23 *United States*, 413 F.2d 97 (5th Cir. 1969) (agency authorized only to implement  
24 statutes, not to effectively legislate by promulgating regulations). As a result, judicial  
25 review of an agency's observance of law is far more exacting than review under the  
26 "arbitrary and capricious" standard employed for review of agency fact-finding under the  
27 APA. See *National Ass'n of Metal Finishers v. EPA*, 719 F.2d 624 (3d Cir. 1983), *rev'd*  
28 *on other grounds*, 470 U.S. 116 (1983); see also *ACEMLA v. Copyright Royalty*

1 *Tribunal*, 763 F.2d 101 (2d Cir. 1985). An agency not only must conform to the law as it  
2 exists but must desist from widening the mandate of existing law to create new rights or  
3 obligations. *See, Brungart v. BellSouth Telecomms., Inc.*, 231 F.3d 791, 796 (11th Cir.  
4 2000) (DOL rule amounted to bureaucratic legislation by widening the scope of the rule  
5 contained in the statute).

6 In requiring the investigation and suitability determination here, NASA originally  
7 cited HSPD-12 as the basis for its actions. The sole function of HSPD-12, however, is to  
8 create a uniform identification system. It makes no mention of requiring that agencies  
9 determine the suitability for employment of contractors or conduct any background  
10 investigation. HSPD-12 is concerned purely with the establishment of a “Federal  
11 standard for secure and reliable forms of identification.” HSPD-12(2).

12 Apparently realizing that HSPD-12 did not provide sufficient basis for mandating  
13 a full-scale background check and suitability determination, NASA in its opposition to  
14 the motion for preliminary injunction relied for the first time upon two alternative  
15 sources as authority: Executive Order 10450 (April 1953) and the Space Act. Neither of  
16 these statutes, however, authorize background investigations and suitability  
17 determinations for government contractors in non-sensitive positions.

18 Executive Order 10450 was signed on April 27, 1953, in order to establish security  
19 requirements for government *employees*. By its terms, the Order only applies to civilian  
20 officers and employees of departments and agencies of the government. See E.O. 10450  
21 Sec. 3(a). It does not apply to non-civil service government contractor positions.

22 E.O. 10450 was issued by President Eisenhower pursuant to section 3 of the Act of  
23 August 26, 1950 (“the Act”), 64 Stat. 476, 477. The Act itself was enacted to “protect  
24 the national security of the United States by permitting the summary suspension of  
25 employment of civilian *officers and employees* of various departments and agencies of  
26 the Government.” (Emphasis added.)<sup>3</sup> In a seminal decision about the limits of the  
27

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28 <sup>3</sup> The Act provides that the heads of various enumerated agencies, “may, in his  
absolute discretion and when deemed necessary in the interests of national

1 government's ability to invoke "national security" in order to restrict government  
2 employment, the Supreme Court in *Cole v. Young*, held that the Act did not apply to any  
3 employees whose work did not involve national security. The court's analysis of the  
4 term "national security" as used in the Act is critical to this court's analysis of NASA's  
5 assertion that the "national security" language within the Space Act gives it free rein to  
6 conduct the background investigation/suitability determination at issue here, as the  
7 Space Act was passed only two years after the *Cole* decision.

8 *Cole* reviewed an agency's ability to summarily suspend a food and drug inspector  
9 known to have close associations with Communists and a "subversive organization."  
10 351 U.S. at 539. Because the Act gave this power to the agencies' heads when  
11 "necessary or advisable in the interest of the national security," the Supreme Court had to  
12 determine the meaning of "national security" as used in the Act. The court concluded  
13 that Congress had intended national security to be narrowly defined and that the  
14 summary suspension process could only apply to employees in sensitive positions whose  
15 activities could pose an "immediate threat of harm to the national security." *Id.*, at 546.

16 The Court reasoned:

17 it is difficult to justify summary suspensions and unreviewable dismissals on  
18 loyalty grounds of employees who are not in 'sensitive' positions and who are thus  
19 not situated where they could bring about any discernible adverse effects on the  
20 Nation's security. In the absence of an immediate threat of harm to the 'national  
21 security,' the normal dismissal procedures seem fully adequate and the  
22 justification for summary powers disappears. Indeed, in view of the stigma  
attached to persons dismissed on loyalty grounds, the need for procedural  
safeguards seems even greater than in other cases, and we will not lightly assume  
that Congress intended to take away those safeguards in the absence of some  
overriding necessity, such as exists in the case of employees handling defense  
secrets.

23 *Id.*, at 546-47 (emphases added). The Court relied explicitly upon the designation of  
24 "sensitive positions" as the demarcation for where and when national security may be  
25 used as a justification for the expansion of the Executive's powers *qua* employer.

26 The passage of the Space Act only two years after *Cole*, and Congress' use of the

27 \_\_\_\_\_  
28 security, suspend without pay, any civilian officer or employee of [those  
agencies.]” Public Laws, 64 Stat. 476 (1950).

1 exact same language as that used in the Act of 1950, indicates Congress' intent that  
2 "national security" be given the same strict interpretation as in the Act. It is a basic  
3 canon of statutory construction that "Congress knows the settled legal definition of the  
4 words it uses, and uses them in the settled sense." *Harris v. Garner*, 216 F.3d 970, 974  
5 (11<sup>th</sup> Cir. 2000); *Commissioner v. Keystone Consol. Industries, Inc.*, 508 U.S. 152, 159.  
6 Thus, in enacting the Space Act two years after *Cole* held that use of the term "national  
7 security" limited certain employment decisions for public employees to sensitive  
8 personnel, Congress is presumed to have intended the same limitation for NASA.

9 Those courts to consider the legacy of *Cole* have concluded that it precludes in-  
10 depth background investigations of non-sensitive personnel. In *Flake v. Bennett*, 611  
11 F.Supp. 70 (D.D.C. 1985), two GS-13 trial attorneys in the Office of Civil Rights for the  
12 Department of Education challenged their department's requirement that they submit to a  
13 background investigation under the first amendment, right to privacy and equal  
14 protection clauses. *Id.*, at 76. The question before the court was whether "or not the  
15 Department of Education may lawfully impose a security investigation requirement on  
16 applicants for a position that does not implicate national security concerns." *Id.*, at 75.  
17 Concluding that the personnel security program being applied to plaintiffs had originated  
18 in the Act of 1950, the court held that in light of *Cole* the Department was *precluded*  
19 from requiring full security investigations for positions that do not affect the national  
20 security of the United States.<sup>4</sup> The court explained: "*Cole* teaches that it is unlawful for  
21 the defendants to designate such a position as "critical sensitive:" and thus to impose  
22 upon applications for or occupants of that position the burden of undergoing a full field  
23 investigation. Just as the Act's summary discharge procedure could not be used against  
24 the plaintiff in *Cole*, whose job did not involve the national security, here the full  
25 investigation requirement cannot lawfully be imposed on a position the duties of which  
26

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27 <sup>4</sup>While the plaintiffs in *Flake* apparently were complaining about a "full field  
28 investigation," there is no meaningful distinction between such an investigation  
and the type of investigation being undertaken against JPL employees, the  
National Agency Check with Inquiries.

1 do not implicate the concerns identified in the Act and the Executive Order.” *Id.*, at 77.

2 With respect to FISMA, that statute on its face does not contemplate any type of  
3 investigation of employees and certainly not the far-reaching investigation implemented  
4 here. The FISMA does not mention any standards with respect to hiring or employment,  
5 nor does it make mention of background investigations or suitability determinations. At  
6 most, it authorizes a physical security system for the technical maintenance of data.

7 Thus, there is no statute or executive order to justify the mandate that Caltech  
8 employees submit to the invasive background check and inappropriate suitability  
9 determination required by NASA. Because NASA has overstepped its statutory mandate  
10 and has legislated a wholly new legal mandate –that federal contractors in non-national  
11 security positions must be subjected to a background investigation and suitability check–  
12 its actions violate the APA and should be struck down by this Court.

13 **F. Plaintiffs Have Alleged a Fifth Amendment Claim**

14 Question No. 14 on SF 85 requires plaintiffs to state whether they have used  
15 illegal drugs in the past year. While the question purports to give some immunity to  
16 individuals whose answer indicates drug use, the government does not inform the  
17 applicant of their right not to answer the question, as required by the 5<sup>th</sup> Amendment.  
18 (See *National Treasury Employee Union*, 838 F. Supp. at 637-38.)<sup>5</sup>

19  
20 DATED: December 5, 2007

Respectfully Submitted,  
HADSELL & STORMER, INC.

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22  
23 By Virginia Keeny (sp)  
24 Virginia Keeny, Esq.  
25 Attorneys for All Plaintiffs  
26  
27

28 <sup>5</sup> Plaintiffs do not dispute dismissal of their state constitutional claims for the reasons set forth in the federal defendants’ motion to dismiss.

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 FEDERAL DEFENDANTS' MOTION TO  
DISMISS** on all interested parties in this action by a true copy thereof enclosed in a  
7 sealed box addressed as follows:


8 Vesper Mei, Esq. 9 Wendy Ertmer, Esq. 10 Mark Stern, 11 Trial Attorney 12 Federal Programs Branch 13 U.S. Department of Justice, Civil Division 14 20 Massachusetts Avenue, N.W. 15 Washington, DC 20530 16 Telephone: (202) 514-4686 Facsimile: (202) 616-8470	7 <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>
12 Mark Holscher, Esq. 13 Alexander Pilmer, Esq. 14 Mark T. Cramer, Esq. 15 KIRKLAND & ELLIS, LLP 16 777 S. Figueroa, #3700 Los Angeles, California 90071 Telephone: (213) 680-8400 Facsimile: (213) 680-8500	12 <b>Attorneys for Defendant CALIFORNIA INSTITUTE OF TECHNOLOGY</b>

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

20 **XX BY OVERNIGHT DELIVERY:**  
21 XX I am readily familiar with the firm's practice of collection and processing  
22 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.

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

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

26  
27   
28 Yuritzzy Anaya  
Declarant