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10 UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION

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

21
22 Plaintiffs,)

23 vs.)

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

28 Defendants.)

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

**[PROPOSED] ORDER GRANTING
CALTECH'S MOTION TO DISMISS
FIRST AMENDED COMPLAINT
FOR INJUNCTIVE AND
DECLARATORY RELIEF**

Complaint Filed: August 30, 2007

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[PROPOSED] ORDER

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Pursuant to the parties' Stipulation and Proposed Order to Amend Complaint and Set Proposed Briefing Schedule in Response to Amended Complaint, on October 22, 2007, Plaintiffs in this action filed their First Amended Complaint for Injunctive and Declaratory Relief seeking both declaratory relief and injunctive relief to enjoin the implementation of government promulgated security measures at Jet Propulsion Laboratory, a NASA-owned facility. These procedures were adopted pursuant to the NASA Interim Directive issued on May 24, 2007. Plaintiffs argue that such procedures violate their rights under the U.S. Constitution, including their Fourth and Fifth Amendment rights, the Administrative Procedure Act, and the California Constitution. Defendant Caltech filed a written Motion to Dismiss Plaintiff's First Amended Complaint on November 21, 2007. Having carefully considered the parties' arguments, allegations, and facts and documents subject to judicial notice, the Court **HEREBY ORDERS THAT** Plaintiffs' First Amended Complaint against Caltech is **DISMISSED WITH PREJUDICE**.

The Court makes the following findings in support of its dismissal of Plaintiffs' First Amended Complaint against Caltech.

1. As a matter of law, Plaintiffs cannot bring a claim against Caltech under the Administrative Procedure Act. The statute only applies to federal government agencies, and not private entities like Caltech. 5 U.S.C. §§ 701(b)(1), 702 (The APA defines "agency" as "each authority of the Government of the United States..." and the Act only allows judicial review for persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action..."); *see also W. State Univ. of S. Cal. v. Am. Bar Ass'n*, 301 F. Supp. 2d 1129,1133 (C.D. Cal. 2004) ("By its own language, the APA does not extend to an entity that is not a federal agency...."). Caltech is a private entity and is not subject to the Act.

1 2. Plaintiffs are unable to bring a claim under the U.S. Constitution against
2 Caltech because the alleged constitutional provisions do not apply to private entities
3 like Caltech. This Court finds that Caltech is not a government agency for purposes of
4 Homeland Presidential Security Directive No. 12 and the implementation of it through
5 the procedures mandated by the federal government pursuant to the NASA Interim
6 Directive. *See, e.g., Flagg Bros., v. Brooks*, 436 U.S. 149, 156 (1978) (constitutional
7 rights can only be infringed by governments or those acting under the color of law).
8 Caltech does not become a government actor when it follows federal law. *See Sutton*
9 *v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826,838 (9th Cir. 1999) (“[T]he mere
10 fact that the government compelled a result does not suggest that a government’s
11 action is ‘fairly attributable’ to the private defendant.”). The conduct at issue is
12 attributable only to the federal government and does not support a claim against
13 Caltech. *Id.* Documents that are properly the subject of judicial notice, including
14 NASA Procedural Requirement 1600.1 (“NPR 1600.1”), the NASA Interim Directive,
15 and Plaintiffs’ judicial admissions in briefs, contradict the conclusory allegations in
16 the amended complaint that purport to establish Caltech’s involvement. *Sprewell v.*
17 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (courts need not “accept as
18 true allegations that contradict matters properly subject to judicial notice or by
19 exhibit”). The only conduct that Caltech allegedly engages in is administrative or
20 ministerial tasks that do not rise to the level of constitutional violations.

21 3. Plaintiffs’ California Constitution claim against Caltech fails because it is
22 preempted by federal law. Federal law preempts state law when (1) the action
23 involves a uniquely federal interest; and (2) either (a) “significant conflict exists
24 between an identifiable federal policy or interest and the operation of state law,” or (b)
25 “the application of state law would frustrate specific objectives of federal legislation.”
26 *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988). The security of NASA
27 facilities is a uniquely federal interest. In this instance, the application of the
28 California Constitution to Caltech’s operation of a federal facility would interfere with

1 NASA's ability to maintain uniform security measures under NASA Interim Directive
2 1600.1 and would frustrate federal policy with respect to the security of federal
3 facilities. *See Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 189-90 (1956); *see also*
4 *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982) ("Federal
5 regulations have no less preemptive effect than federal statutes."). The preemption
6 doctrine applies to federal contractors' activities. *See Goodyear Atomic Corp. v.*
7 *Miller*, 486 U.S. 174, 181 (1988) (establishing that "a federally owned facility
8 performing a federal function is shielded from direct state regulation, even though the
9 federal function is carried out by a private contractor, unless Congress clearly
10 authorizes such regulation"). Caltech cannot simultaneously comply with both the
11 NASA directive and the California Constitution as interpreted by Plaintiffs. Because
12 federal law is supreme, Plaintiffs' California Constitutional claim is preempted and,
13 therefore, fails to state a claim upon which relief can be granted. Art. VI., cl. 2. (The
14 law of the United States "shall be the supreme Law of the Land;... any Thing in the
15 Constitution or Laws of any state to the Contrary notwithstanding.").

16 4. Plaintiffs' claim under the California Constitution also fails as a matter of
17 law because Plaintiffs' fail to allege Caltech is engaging in conduct that violates
18 Article I, Section 1 of the California Constitution. At best, Plaintiffs allege that
19 Caltech has engaged in non-actionable, ministerial conduct which does not rise to the
20 level of a "serious invasion of privacy." *Cf. Hill v. Nat'l Collegiate Athletic Assn.*, 7
21 Cal. 4th 1, 40-56, 58 (1994) (no violation of constitutional right of privacy even where
22 defendant actually implemented the nonconsensual drug testing program at issue,
23 including observation of urination, the medical testing of urine, and the exchange of
24 confidential medical information). Nor do Plaintiffs adequately allege that Caltech is
25 engaging in conduct that violates California Constitution Article I, Section 13,
26 governing unreasonable searches and seizures. Like the comparable protection under
27 the Fourth Amendment of the federal Constitution, this protection requires
28 government action and does not apply to a private actor like Caltech. *Jones v. Kmart*

1 *Corp.*, 17 Cal. 4th 329, 333 (Cal. 1998) (“[T]he right to be free from unreasonable
2 search and seizure provided in article I, section 13 of the California Constitution is
3 subject to a state action requirement.”). Further, in this context, the section does not
4 apply to background checks and questionnaires.

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6 **IT IS SO ORDERED.**

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8 DATED: _____

By: _____
The Honorable Otis D. Wright, II

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PROOF OF SERVICE

I, Allison L. Mayo Andrews, am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is Kirkland & Ellis LLP, 777 S. Figueroa Street, Los Angeles, CA 90017.

On November 21, 2007, I served the foregoing document(s) described as:

- 1. **[PROPOSED] ORDER GRANTING CALTECH'S MOTION TO DISMISS FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

on the interested parties in this action as follows:

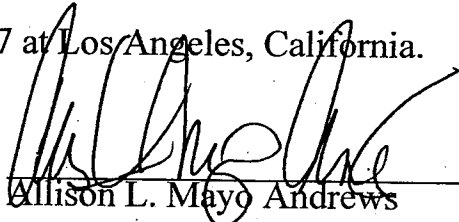
SEE ATTACHED SERVICE LIST

[E-mail] By transmitting via electronic mail the document(s) listed above to the person at the electronic addresses set forth in the above-entitled action.

[Federal Express] By placing the document(s) listed above in a sealed overnight courier envelope addressed as set forth below and routing the envelope for pick up within our offices by Federal Express. I am familiar with the firm's practice of collection for pick up and overnight delivery by Federal Express. It is routed for daily pick up in our offices by Federal Express on that same day with overnight courier charges thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the delivery date is more than one day after date of deposit with Federal Express in this affidavit.

(Federal) I declare under penalty of perjury that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on November 21, 2007 at Los Angeles, California.


Allison L. Mayo Andrews

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