

1 Diane Curran
2 dcurran@harmoncurran.com
3 HARMON, CURRAN, SPIELBERG & EISENBERG, L.L.P.
4 1726 M Street N.W., Suite 600
5 Washington, D.C. 20036
6 Telephone: 202-328-3500
7 Fax: 202-328-6918

8 Attorney for Amicus Curiae
9 Union of Concerned Scientists [appearing *pro hac vice*]

10 Robert D. Newman [S.B. # 086534]
11 rnewman@wclp.org
12 LAW OFFICE OF ROBERT D. NEWMAN
13 370 Wilshire Boulevard, Suite 208
14 Los Angeles, CA 90010
15 Telephone: 213-487-4727
16 Fax: 213-487-0242

17 Local Counsel for Amicus Curiae
18 Union of Concerned Scientists

19 **UNITED STATES DISTRICT COURT**
20 **CENTRAL DISTRICT OF CALIFORNIA**

21	_____)	
22	Robert M. Nelson, William Bruce)	Case N. CV-07-05669 ODW (VBKx)
23	Banerdt, Julia Bell, Josette Bellan,)	
24	Dennis V. Byrnes, George Carlisle,)	[Assigned to the Honorable Otis D.
25	Kent Robert Crossin, Larry R.)	Wright II – Courtroom II]
26	D’Addario, Riley M. Duren, Peter R.)	
27	Eisenhardt, Susan D.J. Foster,)	BRIEF OF AMICUS CURIAE
28	Matthew P. Golmbek, Varoujan)	UNION OF CONCERNED
29	Gorjian, Zareh Gorjian, Robert J.)	SCIENTISTS IN SUPPORT OF
30	Haw, James Kulleck, Sharon L.)	PLAINTIFFS’ MOTION FOR A
31	Laubach, Christian A. Lindensmith,)	PRELIMINARY INJUNCTION
32	Amanda Mainzer, Scott Maxwell,)	
33	Timothy P. McElrath, Susan Paradise,))	Date: October 1, 2007
34	Konstantin Penanen, Celeste M.)	Time 1:30 p.m.
35	Satter, Peter M.B. Shames, Amy)	Courtroom: 11
36	Snyder Hale, William John Walker,)	

1 and Paul R. Weissman,)
2)
3 Plaintiffs,)
4)
5 v.)
6)
7 National Aeronautics and Space)
8 Administration, an Agency of the)
9 United States; Michael Griffin,)
10 Director of NASA, in his official)
11 capacity only; Department of)
12 Commerce; Carlos M. Gutierrez,)
13 Secretary of Commerce, in his official)
14 capacity only; California Institute of)
15 Technology; and Does 1-100,)
16 Defendants.)
17)
18)
19)
20)
21)
22)
23)
24)
25)
26)
27)
28)

I. INTRODUCTION

Amicus Union of Concerned Scientists (“UCS”) submits this brief in support of the Plaintiffs’ Motion for a Preliminary Injunction. Plaintiffs are twenty-eight scientists and engineers employed as researchers by the California Institute of Technology (“Caltech”) at Caltech’s Jet Propulsion Laboratory (“JPL”), which performs scientific research for the National Aeronautics and Space Administration (“NASA”). Plaintiffs conduct research on scientific issues deemed “non-sensitive” by NASA, *i.e.*, having no security-related sensitivity. They seek protection from unlawful and intrusive federal “background” investigations by NASA into their personal lives. While the alleged purpose of these investigations is to firmly establish the identities of JPL employees, their wide-ranging scope includes sensitive personal information that has no apparent bearing on an employee’s identity. NASA has failed to show that its proposed inquiries into constitutionally protected private information are justified and that they are tailored to the agency’s

1 precise informational needs. Therefore UCS supports Plaintiffs' motion to enjoin
2 their enforcement.

3 UCS submits this amicus brief out of concern that if NASA's intrusive
4 investigations are allowed to stand, they will discourage Plaintiffs and many other
5 scientists from working at the JPL and other federal research institutions, and could
6 chill the atmosphere of open debate. As a result, they threaten to adversely affect
7 the quality of scientific work performed on behalf of the federal government and
8 diminish the effectiveness of federally sponsored research in solving the pressing
9 scientific problems of our day.

10
11 **II. INTERESTS OF THE AMICUS CURIAE UNION OF CONCERNED**
12 **SCIENTISTS IN THIS PROCEEDING**

13 As the leading U.S. non-profit organization dedicated to the use of science to
14 foster a healthy environment and a safer world, UCS has a strong interest in
15 preserving and protecting an intellectual environment of scientific independence
16 and vigorous debate in the United States. UCS is an alliance of more than 200,000
17 citizens and scientists that combines independent scientific research and citizen
18 action to develop innovative, practical solutions and to secure responsible changes
19 in government policy, corporate practices, and consumer choices. UCS has worked
20 to forge bi-partisan solutions for a range of issues, from global warming and the
21 dangers of nuclear weapons to vehicle pollution and the safety of the nation's food
22 supply.

23 UCS believes that a crucial ingredient in achieving a healthy environment
24 and a safer world is the maintenance of research institutions that attract talented
25 scientists and engineers by fostering an environment of independent and rigorous
26 scientific inquiry. Among the most important of these research institutions are
27 federal scientific agencies and their research arms because they establish our first
28 line of defense in protecting the public health and safety, providing needed

1 scientific assessments on everything from drug safety to air pollution to global
2 warming, and producing basic scientific knowledge indispensable to national
3 security.

4 The health of the federal scientific workforce has long been a topic of
5 concern for UCS. Thus UCS has advocated for the right of government scientists
6 to do their jobs free from political interference, for their right to freely
7 communicate their findings with the wider scientific community (unless these
8 findings are classified), and for greater transparency and openness in federal
9 science and regulatory agencies. See the description of UCS' *Scientific Integrity*
10 program at www.ucsusa.org/scientific_integrity/. UCS is concerned that the
11 background investigations proposed by NASA are wide-ranging, highly personal,
12 and unwarranted in light of the unclassified and non-sensitive nature of the
13 Plaintiffs' work. While the investigations purportedly are intended to verify the
14 Plaintiffs' identities (see FIPS PUB 201-1, *Personal Identity Verification (PIV) of*
15 *Federal Employees and Contractors*, attached as Exhibit 2 to Plaintiffs' Request for
16 Judicial Notice), in fact the subjects covered by the investigations include a host of
17 irrelevant and personal issues, including credit history, "personality conflict,"
18 physical and mental health, and sexual orientation. See Penan, ¶ 20.

19 UCS is concerned that wide-ranging and intrusive background investigations
20 such as those proposed by NASA could have a three-fold adverse effect on the
21 quality of scientific inquiry in U.S. research institutions:

- 22 • Highly qualified and experienced scientists may leave research institutions
23 rather than be subjected to intrusive and unnecessary background
24 investigations. In this case, for example, many of the Plaintiffs are senior
25 level scientists with job responsibilities that include management of major
26 NASA initiatives and several have indicated a willingness to leave the JPL
27 rather than submit to the background check. The potential loss of this brain-
28

1 trust of technical expertise and institutional memory has serious implications
2 for the research and engineering capacity of NASA and the JPL, both of
3 which are critical to this country's space exploration enterprise.

- 4 • Similarly, the unwillingness of these scientists to submit to background
5 checks indicates that there may be a large class of scientists who would not
6 consider taking a job at a government laboratory where that is a requirement
7 for work. Therefore, adopting this policy may reduce the pool of scientists
8 interested in work at the JPL and may have a chilling effect on recruitment of
9 the best and the brightest scientists in similar settings elsewhere.
- 10 • For those scientists who remain at the JPL, the prospect of regular identity
11 checks by the federal government that probe into every aspect of an
12 employee's life, including vague employment-related issues such as
13 "attitude" and "personality conflict," could create an atmosphere of
14 intimidation. In effect, background checks could become secret and arbitrary
15 employment reviews, where dissenters are eliminated by termination on the
16 ground that they did not satisfy a background check. Such an intimidating
17 environment could stifle the atmosphere of open debate that is so important
18 to rigorous scientific inquiry.

19 UCS recognizes that background checks are an established part of
20 government employment. Nevertheless, it is possible, appropriate and necessary
21 for the government to balance its own need for information against the privacy
22 interests of employees and contractors, to tailor its investigations to the
23 circumstances of the employment, and to limit its inquiries to essential information
24 rather than straying into irrelevant and intrusive personal issues. For instance, for
25 employees or contractors with access to classified information, it may be necessary
26 to make inquiries into private matters in order to rule out individuals who are
27 vulnerable to blackmail or bribery. Similarly, for employees or contractors with
28

1 jobs that require the handling of dangerous equipment, it may be appropriate to
2 investigate drug use. Here, however, where the Plaintiffs' work on scientific
3 research is deemed by the government to be non-sensitive, the intrusiveness of
4 NASA's proposed inquiries is not only unwarranted but potentially destructive to
5 the atmosphere of open scientific debate that is crucial to the production of high-
6 quality scientific work in federal research institutions.

7 **III. ARGUMENT: NASA'S PROPOSED BACKGROUND**
8 **INVESTIGATIONS ARE UNCONSTITUTIONAL.**

9 The Ninth Circuit recognizes a constitutional right to privacy that includes
10 both an individual's interest in avoiding disclosure of personal matters and the
11 individual's interest in independence "in making certain kinds of important
12 decisions." *Thorne v. City of El Segundo*, 726 F.2d 459, 468 (9th Cir. 1983) cert.
13 denied, 469 U.S. 979 (1984), quoting *Whalen v. Roe*, 429 U.S. 589, 599 (1977).
14 For these Plaintiffs, both types of interests are implicated. First, NASA proposes to
15 invade their privacy by forcing them to agree to be investigated on highly personal
16 matters as a condition of their employment; and second, NASA's potential refusal
17 to retain the Plaintiffs based on the same personal considerations interferes with
18 Plaintiffs' privacy interests. *Thorne*, 726 F.2d at 468.

19 In seeking private information, the government bears the burden of showing
20 that "its use of the information would advance a legitimate state interest and that its
21 actions are narrowly tailored to meet the legitimate interests." *In re Crawford*, 194
22 F.3d 954, 959 (9th Cir. 1999). Here, the government's professed interest is in
23 establishing the identity of JPL employees. *See* FIPS PUB 201-1. It is not apparent
24 how personal information about an individual's finances, sexual orientation,
25 personal life, or personality would aid the establishment of his or her identity.
26 Rather than being tailored to meet the interest of establishing identity, the inquiry
27 appears designed to give NASA unlimited grounds on which to terminate an
28

1 employee, even including grounds of questionable legality such as sexual
2 preference and physical health.

3 **IV. CONCLUSION**

4 NASA has failed to justify its proposed investigations into constitutionally
5 protected information about the personal lives of the Plaintiffs, or to tailor those
6 investigations to fit the agency's purpose of establishing Plaintiffs' identities.
7 Instead, NASA proposes a wide-ranging inquiry into a host of irrelevant and
8 potentially sensitive personal issues. Accordingly, the Court should enjoin NASA
9 from conducting the proposed background investigations.

10
11 Respectfully submitted,

12 

13 Diane Curran

14 HARMON, CURRAN, SPIELBERG & EISENBERG, L.L.P.

15 

16 Robert D. Newman

17 LAW OFFICE OF ROBERT D. NEWMAN

18 Attorneys for Amicus Curiae
19 Union of Concerned Scientists

20 September 26, 2007
21
22
23
24
25
26
27
28