

1 Mark Holscher (S.B.N. 139582)  
R. Alexander Pilmer (S.B.N. 166196)  
2 Mark T. Cramer (S.B.N. 198952)  
KIRKLAND & ELLIS LLP  
3 777 South Figueroa Street  
Los Angeles, California 90017  
4 Telephone: (213) 680-8400  
Facsimile: (213) 680-8500  
5 E-mail: mholscher@kirkland.com  
E-mail: apilmer@kirkland.com  
6 E-mail: mcramer@kirkland.com

7 Attorneys for Defendant  
California Institute of Technology  
8

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

13 Robert M. Nelson, William Bruce ) Case No. CV-07-05669 ODW (VBKx)  
Banerdt, Julia Bell, Josette Bellan, )  
14 Dennis V. Byrnes, George Carlisle, Kent )  
Robert Crossin, Larry R. D'Addario, ) **CALTECH'S MOTION TO DISMISS**  
15 Riley M. Duren, Peter R. Eisenhardt, ) **FIRST AMENDED COMPLAINT**  
Susan D.J. Foster, Matthew P. ) **FOR INJUNCTIVE AND**  
16 Golombek, Varoujan Gorjian, Zareh ) **DECLARATORY RELIEF**  
Gorjian, Robert J. Haw, James Kulleck, ) **PURSUANT TO RULE 12(B)(6)**  
17 Sharon L. Laubach, Christian A. )  
Lindensmith, Amanda Mainzer, Scott )  
18 Maxwell, Timothy P. McElrath, Susan )  
Paradise, Konstantin Penanen, Celeste M. )  
19 Satter, Peter M.B. Shames, Amy Snyder )  
Hale, William John Walker and Paul R. )  
20 Weissman, )  
21 Plaintiffs, )  
22 vs. )  
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 Defendants. )  
28

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Judge Otis D. Wright, II

TABLE OF CONTENTS

Page

1 INTRODUCTION.....1

2

3

4 FACTUAL BACKGROUND .....2

5 ARGUMENT .....4

6 I. PLAINTIFFS’ ADMINISTRATIVE PROCEDURE ACT CLAIM

7 SHOULD BE DISMISSED BECAUSE CALTECH IS NOT A

8 FEDERAL AGENCY.....5

9 II. PLAINTIFFS’ FEDERAL CONSTITUTION CLAIMS SHOULD BE

10 DISMISSED AGAINST CALTECH BECAUSE CALTECH IS NOT A

11 STATE ACTOR.....5

12 A. A Private Entity Like Caltech Is Not A Government Actor When It

13 Follows Federal Law. ....6

14 B. Plaintiffs’ Allegations Establish That Caltech Is *Not* A Willful

15 Participant In A Joint Activity With The Government. ....9

16 C. Caltech Does Not Determine Employee Suitability.....12

17 III. PLAINTIFFS’ CALIFORNIA CONSTITUTION CLAIM SHOULD BE

18 DISMISSED BECAUSE THE CLAIM IS PREEMPTED BY FEDERAL

19 LAW AND CALTECH IS NOT ENGAGING IN THE CHALLENGED

20 CONDUCT, IN ANY EVENT.....13

21 A. Federal Law Preempts State Law Where, As Here, There Is A

22 Uniquely Federal Interest And The State Law Either Conflicts Or

23 Interferes With That Federal Interest. ....13

24 1. NASA And The Federal Government Have A Unique

25 Interest In The Security Of NASA Facilities. ....14

26 2. As Alleged In the First Amended Complaint, California Law

27 Would Conflict With NASA’s Directives And Frustrate The

28 Federal Interest In Uniform Security Measures In NASA

Facilities. ....15

B. The California Constitution Does Not Apply To Caltech Because

The Challenged Conduct Is The Federal Government’s Conduct. ....17

CONCLUSION .....19

**TABLE OF AUTHORITIES**

Page(s)

**CASES**

*Am. Title Ins. v. Lacelaw Corp.*,  
861 F.2d 224 (9th Cir. 1988) ..... 8

*Boggs v. Boggs*,  
520 U.S. 833 (1997)..... 15

*Boyle v. United Techs. Corp.*,  
487 U.S. 500 (1988)..... 14, 15

*Branch v. Tunnell*,  
14 F.3d 449 (9th Cir. 1994) ..... 2

*English v. Gen. Elec. Co.*,  
496 U.S. 72 (1990)..... 14

*Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*,  
458 U.S. 141 (1982)..... 14

*Flagg Bros., Inc., v. Brooks*,  
436 U.S. 149 (1978)..... 5

*Gartrell Constr. Inc. v. Aubry*,  
940 F.2d 437 (9th Cir. 1991) ..... 16

*George v. Pacific-CSC Work Furlough*,  
91 F. 3d 1227 (9th Cir. 1996) ..... 7, 8, 9

*Goodyear Atomic Corp. v. Miller*,  
486 U.S. 174 (1988)..... 14, 17

*Gospel Missions of Am. v. Los Angeles*,  
328 F.3d 548 (9th Cir. 2003) ..... 8

*Hancock v. Train*,  
426 U.S. 167 (1976)..... 17

*Hill v. Nat'l Collegiate Athletic Ass'n*,  
7 Cal. 4th 1 (1994) ..... 18

*Hines v. Davidowitz*,  
312 U.S. 52 (1941)..... 15

*In re Calpine Corp. Secs. Litig.*,  
288 F. Supp. 2d 1054 (N.D. Cal. 2003)..... 5

*In re VeriFone Secs. Litig.*,  
11 F.3d 865 (9th Cir. 1993) ..... 4

**TABLE OF AUTHORITIES (CONT'D)**

		Page(s)
1		
2	<i>Jones v. Kmart Corp.</i> ,	
3	17 Cal. 4th 329 (Cal. 1998).....	18
4	<i>Leslie Miller, Inc. v. Arkansas</i> ,	
5	352 U.S. 187 (1956).....	16
6	<i>Lugar v. Edmondson Oil Co.</i> ,	
7	457 U.S. 922 (1982).....	5, 6, 7, 8
8	<i>McCauley v. Computer Aid Inc.</i> ,	
9	447 F. Supp. 2d 469 (E.D. Penn. 2006).....	7
10	<i>Mishler v. Clift</i> ,	
11	191 F.3d 998 (9th Cir. 1999) .....	2
12	<i>Plevy v. Haggerty</i> ,	
13	38 F. Supp. 2d 816 (C.D. Cal.1998) .....	2
14	<i>Sprewell v. Golden State Warriors</i> ,	
15	266 F.3d 979 (9th Cir. 2001) .....	4, 11
16	<i>Sutton v. Providence St. Joseph Med. Ctr.</i> ,	
17	192 F.3d 826 (9th Cir. 1999) .....	6, 7, 8, 9
18	<i>U.S. Postal Serv. v. Greenwich, Conn.</i> ,	
19	901 F. Supp. 500 (D. Conn. 1995) .....	16
20	<i>United States v. Virginia</i> ,	
21	972 F. Supp. 1008 (E.D. Va. 1997) .....	17
22	<i>W. State Univ. v. Am. Bar Ass'n</i> ,	
23	301 F. Supp. 2d 1129 (C.D. Cal. 2004) .....	5
24	<b>STATUTES</b>	
25	42 U.S.C. § 2455(a).....	14
26	5 U.S.C. § 701(b)(1).....	5
27	5 U.S.C. § 702 .....	5
28	Fed. R. Evid. 201(b).....	4

1 **INTRODUCTION**

2 Plaintiffs' suit against the California Institute of Technology ("Caltech") is  
3 directed to the wrong party—and Plaintiffs seem to know it. In just the first paragraph  
4 of their amended complaint, Plaintiffs allege that "they bring this action . . . to  
5 challenge *NASA's* requirement;" that the background investigation is "action by  
6 *NASA*;" and that "*NASA's* action violates" Plaintiffs' alleged constitutional rights.  
7 *See* FAC ¶ 1.<sup>1</sup> There are no comparable allegations against Caltech. Moreover, as  
8 Plaintiffs previously acknowledged to this Court, "an order enjoining *NASA* . . .  
9 would sufficiently . . . protect the plaintiffs' rights." *See* Request for Judicial Notice  
10 ("Judicial Not.") Ex. 4 at 1 (Plaintiffs' Reply to [Caltech's] Opposition to Motion for  
11 Preliminary Injunction).

12 Caltech's motion to dismiss should be granted for the following reasons:

13 ***First***, Plaintiffs' Administrative Procedure Act claim against Caltech fails  
14 because Caltech is not a federal agency subject to the requirements of that act.

15 ***Second***, Plaintiffs' federal Constitution claims against Caltech fail because  
16 Plaintiffs do not adequately allege that Caltech is engaging in government action.  
17 Moreover, Plaintiffs have made a number of judicial statements which preclude any  
18 finding that Caltech is a government actor. Caltech is a private entity and cannot be  
19 liable for the alleged constitutional violations, even if Plaintiffs could state a claim  
20 against the federal government defendants.

21 ***Third***, Plaintiffs' California state constitution claim against Caltech fails  
22 because it is preempted by federal law. Caltech cannot be subject to state laws that  
23 conflict with the federal regulations Caltech is obligated to follow in connection with  
24 its operation of a NASA facility.

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26  
27 

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<sup>1</sup> All emphasis in this brief is supplied by Caltech unless otherwise noted.  
28

1 **FACTUAL BACKGROUND**

2 For purposes of this motion, Caltech assumes—as it must—the truth of the facts  
3 alleged in Plaintiffs’ First Amended Complaint (“FAC”) as well as those facts  
4 incorporated by reference into the FAC or subject to judicial notice.

5 Caltech is a non-profit educational institution. It operates the Jet Propulsion  
6 Laboratory (“JPL”) pursuant to a written contract as a NASA Federally Funded  
7 Research and Development Center. FAC ¶¶ 33, 37. JPL’s physical facilities are  
8 owned by NASA, which is a federal agency. *Id.* ¶ 31, 33, 37.

9 Plaintiffs admit that “the crux of this litigation is a dispute between [Plaintiffs],  
10 and the government....” *See* Judicial Not. Ex. 5 at 1 (Appellants’ Opening Brief).  
11 Indeed, Plaintiffs’ request for injunctive relief “is primarily addressed to the federal  
12 government, which is mandating and implementing the background investigation  
13 process.” Judicial Not. Ex. 4 at 1 (Reply Brief). Plaintiffs acknowledge that “an order  
14 enjoining *NASA* from continuing to require SF 85 and the investigation until a full  
15 hearing may be had, would sufficiently maintain the status quo and protect the  
16 plaintiffs’ rights.” *Id.*

17 NASA, not Caltech, requires that JPL employees obtain new access badges.  
18 *See* FAC ¶ 1. This requirement comes from a May 24, 2007 NASA Interim Directive  
19 (“NASA Interim Directive”) establishing a new “Agency-wide policy for the creation  
20 and issuance of federal credentials at NASA.” *Id.* ¶ 43.<sup>2</sup> The NASA directive

21  
22 <sup>2</sup> Plaintiffs refer to NASA Interim Directive in their complaint. *See* FAC ¶ 43.  
23 The Court is thus entitled to consider the entirety of this directive on a motion to  
24 dismiss under the incorporation by reference doctrine. *See Branch v. Tunnell*, 14  
25 F.3d 449, 453 (9th Cir. 1994); *Mishler v. Clift*, 191 F.3d 998, 1008 n.7 (9th Cir.  
26 1999) (“When a complaint alleges the contents of a document, but the document is  
27 not attached to the pleading, the court may consider the document in ruling on a  
28 Rule 12(b)(6) motion.”). The NASA Interim Directive references NASA  
Procedural Report 1600.1 (“NPR 1600.1”), a federal regulation, which may also be  
properly considered by the Court. *See Plevy v. Haggerty*, 38 F. Supp. 2d 816, 820-  
21 (C.D. Cal.1998) (observing that a “judicially noticed fact must be one not  
subject to reasonable dispute in that it is . . . capable of accurate and ready  
determination by resort to sources whose accuracy cannot reasonably be  
questioned”).

1 requires all employees classified as low risk, such as Plaintiffs here, to complete  
2 Standard Form (SF) 85, "OPM Questionnaire for Non-Sensitive Positions" and submit  
3 to a NACI background check. FAC ¶¶ 41, 43. Indeed, NASA's Procedural  
4 Requirements 1600.1 ("NPR 1600.1") state: "No one shall be issued a permanent  
5 NASA employee photo-ID, granted access to NASA Centers or facilities, granted  
6 access to NASA IT systems . . . without, at a minimum, immediate completion of a  
7 NAC and subsequent completion of a NACI within 6 months." *See* Judicial Not. Ex.  
8 3 (NPR 1600.1 § 3.1.4). Like all contractors subject to the government-imposed  
9 requirement, Caltech cannot permit employees to enter the NASA-owned JPL facility  
10 without a badge. *See* Judicial Not. Ex. 2 (NASA Interim Directive at § 6) ("All  
11 NASA employees and contractor employees will be required to comply with this  
12 Directive, and the implementing Directive of their respective Centers consistent with  
13 [HSPD-12] and with the Privacy Act, 5 U.S. Code section 552a."); *id.* § 9 (physical  
14 and logical access to NASA facilities only permitted after "proper issuance of a  
15 Badge.").

16 The government-mandated background check was instituted as a security  
17 measure for federal facilities. *See* FAC ¶ 1. Completion of the background check is a  
18 prerequisite for issuance of the badge that will permit federal employees and  
19 contractors to access designated federal facilities. *See* FAC ¶ 41 (alleging that the  
20 Department of Commerce "mandates that 'only an individual with a background  
21 investigation on record is issued a credential'"); *see also* Judicial Not. Ex. 1 (FIPS  
22 Pub 201-1 "Personal Identity Verification (PIV) of Federal Employees and  
23 Contractors" at § 2.1, p.5).

24 Plaintiffs also acknowledge that the federal government is "mandating and  
25 implementing the background investigation process." *See* Judicial Not. Ex. 4 at 1. In  
26 fact, it was the Department of Commerce that "impose[d] a background investigation  
27 requirement on all employees or contractors seeking to obtain the new form of  
28 identification." FAC ¶ 41. And "NASA is responsible for ensuring appropriate

1 investigations are conducted and access suitability determined for all contractor  
2 personnel.” See Judicial Not. Ex. 2 (NPR 1600.1 § 4.7.1). “At a minimum, NASA  
3 shall conduct the appropriate investigation required by position risk designation, but  
4 no less than a National Agency Check with Inquiries (NACI) and shall make an  
5 employment suitability determination of all NASA employees.” *Id.* § 3.1.4. Caltech  
6 plays no independent role in deciding who will be issued a badge or in selecting the  
7 standards utilized in the process; the government performs these functions.

8 As alleged by Plaintiffs, and confirmed by the documents Plaintiffs incorporate  
9 into their amended complaint, Caltech had nothing to do with the creation of the  
10 government’s background investigation that Plaintiffs are challenging as  
11 unconstitutional.

#### 12 ARGUMENT

13 A motion to dismiss tests the legal sufficiency of the claims asserted in the  
14 complaint. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).<sup>3</sup>  
15 “Conclusory allegations of law and unwarranted inferences are insufficient to defeat a  
16 motion to dismiss for failure to state a claim.” *In re VeriFone Secs. Litig.*, 11 F.3d  
17 865, 868 (9th Cir. 1993).

18 The Court also does not need to “accept as true allegations that contradict  
19 matters properly subject to judicial notice or by exhibit.” *Sprewell*, 266 F.3d at 988.  
20 Judicial notice may be taken of facts that are “not subject to reasonable dispute in that  
21 [they are] either (1) generally known within the territorial jurisdiction of the trial court  
22 or (2) capable of accurate and ready determination by resort to sources whose  
23 accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Documents  
24 appropriate for judicial notice include documents “on which allegations in the  
25 [complaint] necessarily rely, even if not expressly referenced in the [complaint],  
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27 <sup>3</sup> All internal citations and quotations are omitted in all citations throughout this  
28 brief unless otherwise noted.



1 provided the authenticity of those documents are not in dispute.” *In re Calpine Corp.*  
2 *Secs. Litig.*, 288 F. Supp. 2d 1054, 1076 (N.D. Cal. 2003).

3 **I. PLAINTIFFS’ ADMINISTRATIVE PROCEDURE ACT CLAIM**  
4 **SHOULD BE DISMISSED BECAUSE CALTECH IS NOT A FEDERAL**  
5 **AGENCY.**

6 The Administrative Procedure Act (“APA”) applies only to government  
7 agencies—not private universities like Caltech. *See* 5 U.S.C. §§ 701(b)(1), 702 (the  
8 APA defines “agency” as “each authority of the Government of the United States”);  
9 *see also W. State Univ. v. Am. Bar Ass’n*, 301 F. Supp. 2d 1129, 1133 (C.D. Cal.  
10 2004) (“By its own language, the APA does not extend to an entity that is not a  
11 federal agency. . . .”). Plaintiffs do not allege that Caltech is a government agency,  
12 but rather acknowledge Caltech’s status as a “non-profit educational institution and  
13 one of the premier research institutes in the world.” FAC ¶ 33. Because the APA  
14 does not apply to Caltech, this claim must be dismissed.<sup>4</sup>

15 **II. PLAINTIFFS’ FEDERAL CONSTITUTION CLAIMS SHOULD BE**  
16 **DISMISSED AGAINST CALTECH BECAUSE CALTECH IS NOT A**  
17 **STATE ACTOR.**

18 Plaintiffs have sued Caltech for alleged violations of the Fourth and Fifth  
19 Amendments of the United States Constitution, as well as alleged violations of their  
20 “informational privacy” rights.<sup>5</sup> *See* FAC (First, Second and Third Claims for Relief).  
21 But the Constitution applies to the government, not private entities. *See, e.g., Flagg*  
22 *Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978) (most constitutional rights can only be  
23 infringed by governments or their agents).

24 In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), the Supreme Court  
25 directed that there should be “careful adherence” to the state action requirement in

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26 <sup>4</sup> Plaintiffs did not name Caltech as a defendant to the APA claim in their original  
27 complaint. Amending their complaint to include Caltech on this claim is frivolous.

28 <sup>5</sup> Plaintiffs fail to identify a constitutional amendment under which their  
“informational privacy” claim arises. For purposes of this motion, Caltech  
assumes that Plaintiffs intended to bring the claim under the substantive due  
process clause of the Fifth Amendment, which only applies to federal government  
conduct.

1 order to maintain “an area of individual freedom by limiting the reach of federal law  
2 and federal judicial power.” *Id.* at 936. A key component of this requirement is that  
3 “the party charged with the deprivation must be a person who may fairly be said to be  
4 a state actor. . . . Without a limit such as this, private parties could face constitutional  
5 litigation whenever they seek to rely on some state rule governing their interactions  
6 with the community surrounding them.” *Id.* at 937.

7 Because Caltech is a private actor and not engaging in any challenged conduct,  
8 all three claims against Caltech under the federal Constitution should be dismissed.

9 **A. A Private Entity Like Caltech Is Not A Government Actor When It**  
10 **Follows Federal Law.**

11 In the Ninth Circuit, private entities like Caltech cannot be liable for  
12 constitutional violations when they are following federal law or federal mandates.  
13 The Ninth Circuit’s decision in *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d  
14 826 (9th Cir. 1999) is controlling. In *Sutton*, a private hospital did not hire plaintiff  
15 because he refused to follow a federal law requiring that he provide a social security  
16 number. Plaintiff sued, and the hospital moved to dismiss on the grounds that it was  
17 not a state actor. *Id.* at 829-30. The district court granted the hospital’s motion, and  
18 the Ninth Circuit affirmed. *Id.* at 843.

19 The *Sutton* court began its analysis “with the presumption that private conduct  
20 does not constitute governmental action.” *Id.* at 835. Relying on the framework  
21 created by the Supreme Court’s decision in *Lugar*, the Ninth Circuit stated that:

22 Ninth Circuit precedent does not suggest that governmental compulsion,  
23 without more, is sufficient to deem a truly private entity a governmental  
24 actor in the circumstances of this case. The plaintiff must establish some  
25 other nexus sufficient to make it fair to attribute liability to the private  
entity as a governmental actor. Typically, the nexus consists of some  
***willful participation*** in a ***joint activity*** by the private entity and the  
government.

26 *Id.* at 843.

27 Further, *Sutton* also held that “the mere fact that the government compelled a  
28 result does not suggest that a government’s action is ‘fairly attributable’ to the private

1 defendant.” *Id.* at 838. Rather, “only the state actor, and not the private party, should  
2 be held liable for the constitutional violation that resulted from the state compulsion.”  
3 *Id.* at 838.

4 The *Sutton* court then observed that finding the hospital liable would have the  
5 undesirable result of converting “every employer—whether it has one employee or  
6 1,000 employees—into a governmental actor every time it complies with a  
7 presumptively valid, generally applicable law, such as an environmental standard or a  
8 tax-withholding scheme.” *Id.* This would “emasculate the government action  
9 concept” and force private employers to defend laws and pay damages even where  
10 “they bear no real responsibility for the violation of rights arising from the enactment  
11 of the laws.” *Id.* at 838-39.<sup>6</sup>

12 The Ninth Circuit’s decision in *George v. Pacific-CSC Work Furlough*, 91 F. 3d  
13 1227 (9th Cir. 1996) also calls for the dismissal of Plaintiffs’ claims against Caltech.  
14 In *George*, the plaintiff sued his former employer, a private entity operating a  
15 correctional facility, for wrongful termination. The plaintiff claimed his termination  
16 was the result of his exercise of certain federal and state constitutional rights. *George*,  
17 91 F.3d at 1229. The district court granted defendant’s motion to dismiss on the basis  
18 that the private entity running the county prison was not a state actor, and the Ninth  
19 Circuit affirmed. *Id.*

20 The Ninth Circuit rejected the plaintiff’s state action theory under each of the  
21 four approaches suggested by the Supreme Court in *Lugar*. *Id.* at 1230. While the  
22 private defendant operated a prison, which was traditionally a governmental function,  
23

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24 <sup>6</sup> A Pennsylvania district court decision illustrates the same principle. There, the  
25 plaintiffs argued that the defendants acted under the color of federal law because  
26 the federal law at issue compelled the defendants to fire the plaintiff. *McCauley v.*  
27 *Computer Aid Inc.*, 447 F. Supp. 2d 469, 474 (E.D. Penn. 2006). The court  
28 rejected this analysis, citing *Sutton* with approval, and held that without alleging a  
further nexus between the federal government and the private defendant, “the fact  
that compliance with federal law motivated Defendants to terminate the Plaintiff is  
insufficient to establish them as federal actors.” *Id.*

1 there was “no indication [defendant] ha[d] ‘become the government,’ for employment  
2 purposes.” *Id.* In addition, because the plaintiff alleged only generally that the  
3 defendants acted “as part of a conspiracy and scheme,” the court found he failed to  
4 allege “facts to support a claim of concerted action” between the government entity  
5 and private actor, despite the existence of a contract between them regulating  
6 operation of the prison. *Id.* at 1231. Likewise, the court found no “joint action”  
7 because the private defendant was not performing any constitutional obligation in  
8 connection with plaintiff’s employment. *Id.* at 1231.

9 Like the hospital in *Sutton*, Caltech is bound to follow a federal government  
10 requirement. Whereas the employee in *Sutton* was required to provide a social  
11 security number, Caltech’s employees here must obtain badges from the government  
12 to have physical and logical access to JPL, a government-owned facility. In each  
13 case, the requirements were imposed by the federal government. Indeed, Plaintiffs  
14 acknowledge that the federal government “is mandating and implementing the  
15 background investigation process” at issue here. Judicial Not. Ex. (Reply at 1).<sup>7</sup>  
16 Further, the challenged conduct here applies to NASA facilities generally, not just  
17 Caltech. Caltech is one of many private contractors whose employees will be  
18 affected by these regulations. As the *Sutton* court held, “governmental compulsion in  
19 the form of a generally applicable statute, without more,” is not sufficient “to deem a  
20 private entity a governmental actor.” *Sutton*, 192 F.3d at 841.

21 The case for finding no state action is even stronger here than it was in *George*.  
22 In *George*, the plaintiff had been terminated from his employment for exercising his  
23 constitutional rights. Here, none of the Plaintiffs has been terminated. Plaintiffs make

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24  
25 <sup>7</sup> This statement is a judicial admission and the Court not only can but should take  
26 judicial notice of it. *See Am. Title Ins. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th  
27 Cir. 1988) (“Factual assertions in pleadings and pretrial orders, unless amended,  
28 are considered judicial admissions conclusively binding on the party who made  
them.”). Courts also have “discretion to consider a statement made in briefs to be a  
judicial admission.” *Gospel Missions of Am. v. Los Angeles*, 328 F.3d 548, 557  
(9th Cir. 2003).

1 no allegations linking Caltech's conduct to the creation or implementation of the  
2 background investigation they allege to be unconstitutional. This Court should follow  
3 both district courts and the Ninth Circuit in *Sutton* and *George* and dismiss Plaintiffs'  
4 constitutional claims against Caltech.

5 **B. Plaintiffs' Allegations Establish That Caltech Is *Not* A Willful**  
6 **Participant In A Joint Activity With The Government.**

7 Instead of alleging willful participation in a joint government program,  
8 Plaintiffs, at most, allege non-actionable, ministerial conduct by Caltech related to the  
9 administration of the background check process. For instance, Plaintiffs allege that  
10 Caltech assists NASA in assessing the appropriate risk level of the various employees  
11 subject to the badge requirements. FAC ¶ 44. Plaintiffs also allege that Caltech  
12 gathers and processes the SF 85 forms from the employees and verifies the employees  
13 have answered all the questions. FAC ¶ 56. None of this alleged administrative  
14 conduct implicates a constitutional violation, nor does it suggest Caltech's willful  
15 participation in a joint activity with the government.

16 The gravamen of the challenged conduct in the First Amended Complaint—the  
17 creation, implementation, investigation, approval, and adjudication of the background  
18 check—is only government conduct. *See Blum v. Yaretsky*, 457 U.S. 991, 1003  
19 (1982) (“Faithful adherence to the ‘state action’ requirement...requires careful  
20 attention to the gravamen of the plaintiff's complaint.”).

- 21 • Government Conduct: The President signed Homeland Security Presidential  
22 Directive 12 (HSPD-12) entitled “Policy for a Common Identification  
23 Standards for Federal Employees and Contractors,” applicable to all  
24 Executive Branch departments and agencies. FAC ¶ 39.
- 25 • Government Conduct: In March 2006, the U.S. Department of Commerce  
26 published the Federal Information Processing Standard Publication (FIPS  
27 PUB 201-1), establishing the PIV Standard. The Commerce Department  
28 imposed a background investigation requirement on all employees or

1 contractors seeking to obtain the new form of identification. The PIV  
2 Standard further specifies that the background investigation will require a  
3 “National Agency Check *with Inquiries*” (“NACI”) or its equivalent, which  
4 requires applicants to complete Standard Form (SF) 85, “OPM  
5 Questionnaire for Non-Sensitive Positions,” or its equivalent. FAC ¶ 41.

- 6 • Government Conduct: On or about May 24, 2007, NASA issued NASA  
7 Interim Directive (NPR 1600.1) establishing a new “Agency-wide policy for  
8 the creation and issuance of federal credentials at NASA.” The directive  
9 required that all individuals who require physical access to NASA resources  
10 for a period of greater than 179 days obtain a new identification badge,  
11 known as the PIV or PIV II. FAC ¶ 43.

12 Plaintiffs’ allegation that Caltech is an “indispensable party” does not rescue  
13 their claims. FAC ¶ 56. First, Plaintiffs have already conceded, when they sought  
14 injunctive relief from this Court, that Caltech is not an indispensable party:

15 *[T]he motion for preliminary injunction is primarily addressed to the*  
16 *federal government*, which is mandating and implementing the  
17 background investigation process. . . . *[A]n order enjoining NASA* from  
18 continuing to require SF 85 and the investigation until a full hearing may  
19 be had, *would sufficiently maintain the status quo and protect the*  
20 *plaintiffs’ rights.*

21 Judicial Not. Ex. 4 at 1.

22 Second, Plaintiffs cannot end run the state actor requirement on the grounds  
23 that, while a private entity is not engaging in any impermissible conduct, it can still be  
24 enjoined based on its affiliation with a government entity. If that were the case, then  
25 the state action doctrine would be rendered meaningless.

26 Third, an injunction against the government would have the precise outcome  
27 Plaintiffs’ seek here, namely, an end to the implementation of the background check.  
28

1 Plaintiffs do not allege that Caltech would require or perform the challenged  
2 background check on its own if the government is enjoined.<sup>8</sup>

3 Plaintiffs' remaining conclusory allegations about Caltech's involvement are  
4 also insufficient to state a claim against Caltech. For example, Plaintiffs allege that  
5 "Caltech plays an integral part in implementing and enforcing the background  
6 investigation at issue here." FAC ¶ 54. Plaintiffs also allege that Caltech is the  
7 government's "agent" in the "implementation and enforcement" of the background  
8 investigation. FAC ¶ 33. The Court, though, is not obligated to accept such  
9 conclusory allegations. *See Sprewell*, 266 F.3d at 988 (court not required to accept as  
10 true "allegations that are merely conclusory, unwarranted deductions of fact, or  
11 unreasonable inferences").

12 Not only are these conclusory allegations legally insufficient, but they are  
13 contradicted by other materials within Plaintiffs' amended complaint. For instance,  
14 Plaintiffs' conclusory allegation that Caltech is enforcing the badge requirement is  
15 contradicted by NPR 1600.1, the NASA directive referenced in the amended  
16 complaint. FAC ¶ 43. NPR 1600.1 states: "No NASA contractor employee shall be  
17 issued a permanent NASA photo-ID, granted access to NASA Centers or facilities,  
18 granted access to NASA IT systems, or sensitive information without, at a minimum,  
19 immediate completion of a NAC and...submission of required investigative  
20 paperwork required to complete the 'Inquiries' portion of the NACI...." *See* Judicial  
21 Not. Ex. 3 (NPR 1600.1 § 4.1.5). Moreover, for contractor background investigations,  
22 "NASA is responsible for ensuring appropriate investigations are conducted and  
23 access suitability determined for all contractor personnel. *Id.* § 4.7.1. The decision to  
24 implement the challenged measures, including the SF 85 form and background check

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25  
26 <sup>8</sup> The allegation that an injunction is necessary to make Caltech "conform its  
27 employment practices to accommodate and respond to any injunctive relief order"  
28 is circular. If the Court enjoins the government, Caltech, as a government  
contractor subject to the government's regulations, will necessarily have to  
conform its employment practices. No separate injunction is needed.

1 for personnel having access to NASA facilities, is a federal government decision—  
2 contractors like Caltech are subject to this security requirement, but are not  
3 responsible for it.

4 **C. Caltech Does Not Determine Employee Suitability.**

5 Plaintiffs also allege that “NASA’s Interim Directive regarding the  
6 implementation of the background investigation states that if the Badge issuance  
7 yields any ‘derogatory or unfavorable information,’ it will be forwarded to the Human  
8 Relations Officer for JPL who will determine ‘employment suitability.’” FAC ¶ 52.  
9 This allegation is a misstatement and is contradicted by the NASA directives  
10 referenced in the amended complaint. In fact, the NASA directives provide *the exact*  
11 *opposite* of what Plaintiffs say. NPR 1600.1 confirms that a government actor makes  
12 this determination:

- 13 • “Per FIPS 201, *NASA* is responsible for ensuring appropriate investigations  
14 are conducted and access suitability determined for all contractor  
15 personnel.” Judicial Not. Ex. 3 (§ 4.7.1).
- 16 • “*NASA* shall follow established OPM suitability adjudicative guidelines in  
17 order to determine a contractor’s suitability status. The process shall  
18 examine the facts in the investigation and result in a determination that an  
19 individual is or is not eligible for access, or continued access to facilities,  
20 information, or IT systems.” *Id.* (§ 4.9.2).
- 21 • “These expanded inquiries may be conducted by a *NASA* security official. . .  
22 *NASA* contracted investigators, by the original investigative agency, or by  
23 an agency of the Federal Government at *NASA*’s request.” *Id.* (§ 4.11.1.1).

24 Nor does the NASA Interim Directive indicate that Caltech personnel would be  
25 involved in any suitability determination. Rather, it specifies that a “PIV Authorizer,”  
26 a position designated for a NASA federal employee in the Center Security Office who  
27 “must be a government employee,” is the person to manage the applicant’s  
28 background investigation submission process and review the results of the NACI. *See*



1 Judicial Not. Ex. 2 (NASA Interim Directive § 6.2.5 at 4-5). “[T]he PIV Authorizer  
2 makes a determination if the applicant is eligible to receive a Badge.” *Id.* § 11 at 11.  
3 While the sponsor (in this case, Caltech) is notified if an applicant is denied access,  
4 “the employer need not be informed of the basis for the determination.” *Id.* § 13.1.2 at  
5 17. The contractor is advised “only that the employee is being denied physical and/or  
6 logical access to NASA-controlled facilities and/or information systems.” *Id.*

7 \* \* \*

8 Plaintiffs have not, and cannot, allege facts to bring their case outside the  
9 general rule that private entities are not liable for constitutional violations.  
10 Accordingly, their first three claims against Caltech should be dismissed.

11 **III. PLAINTIFFS’ CALIFORNIA CONSTITUTION CLAIM SHOULD BE**  
12 **DISMISSED BECAUSE THE CLAIM IS PREEMPTED BY FEDERAL**  
13 **LAW AND CALTECH IS NOT ENGAGING IN THE CHALLENGED**  
14 **CONDUCT, IN ANY EVENT.**

15 **A. Federal Law Preempts State Law Where, As Here, There Is A**  
16 **Uniquely Federal Interest And The State Law Either Conflicts Or**  
17 **Interferes With That Federal Interest.**

18 Plaintiffs allege that the federal government and Caltech (a federal contractor)  
19 “have violated, or threatened to violate” the U.S. Constitution by requiring employees  
20 to undergo federally-mandated background checks and to obtain federally-required  
21 access badges before they can enter the JPL facility on federal land. *See* FAC ¶¶ 68,  
22 71, 74. Although Plaintiffs acknowledge that federal law applies and allege several  
23 federal constitutional violations, Plaintiffs simultaneously allege that the federal  
24 government and Caltech “have violated provisions of the California Constitution.” *Id.*  
25 ¶ 80. But Plaintiffs’ state constitutional claim should be dismissed with prejudice  
26 because it is preempted by federal law.

27 Article VI of the Constitution provides that the laws of the United States “shall  
28 be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any  
state to the Contrary notwithstanding.” Art. VI, cl. 2. Federal law preempts state law  
when (1) the action involves a uniquely federal interest; and (2) either (a) “a

