No. 07-56424

In The United States Court of Appeals
For The Ninth Circuit

Robert M. Nelson, et al.

Plaintiffs - Appellants,

v.

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; California Institute of Technology; and Does 1-100,

Defendants - Appellees.

On Appeal From the Order Denying Motion for Preliminary Injunction of the United States District Court
For the Central District of California
Case No. CV-07-05669 ODW (VBKx)

EXHIBITS IN SUPPORT OF CALIFORNIA INSTITUTE OF TECHNOLOGY'S ("CALTECH") OPPOSITION TO EMERGENCY MOTION FOR STAY AND EXPEDITED APPEAL UNDER CIRCUIT RULE 27-3

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EXHIBIT 1

ORIGINAL

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

National Aeronautical and Space Agency, 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; California Institute of Technology; and Does 1-100.

Defendants.

ODW(VBKx)

Case No.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

[redacted]

I. INTRODUCTION AND SUMMARY OF THE ACTION

1. Plaintiffs are leading scientists and engineers employed by the California Institute of Technology (Caltech) as staff at the Jet Propulsion Laboratory. They bring this action on behalf of themselves and a class of similarly situated employees to challenge NASA's requirement, under pain of loss of their jobs, that JPL employees – including senior scientists and engineers, many of whom have been employed there for decades, and none of whom work on classified or national security materials or issues – submit to 1) an open-ended background investigation prying into their protected associational activities as well as myriad private and irrelevant personal information, and 2) a determination of their suitability for employment that includes such wrong-headed and/or dangerously vague criteria as sexual orientation, sexual history, medical and emotional history, financial history, "attitude," and "personality conflict." This action by NASA is putatively based upon Homeland Security Presidential Directive 12, an executive order concerned exclusively with the establishment of a common identification standard for federal employees and contractors, and which contemplates no additional background investigation or suitability determination beyond that already required by law. NASA's action violates, *inter alia*, plaintiffs' Constitutional rights to be free of unreasonable searches; to privacy; and violates the Administrative Procedure Act and the Privacy Act, as well as California's constitutional protections. Plaintiffs seek declaratory and injunctive relief, foreclosing further implementation of this background investigation program against JPL employees in non-sensitive positions.

II. JURISDICTION and VENUE

2. This Court has jurisdiction over plaintiffs' claims pursuant to 28 U.S.C. §1331 (federal question jurisdiction).

III. PARTIES

A. The Plaintiffs

3. Dr. Robert Nelson is currently employed by Caltech as a Senior Research Scientist at NASA's Jet Propulsion Lab and has been employed at JPL for twenty seven

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years. He holds the rank of a Principal Scientist, the highest research classification at JPL, and currently leads NASA's New Millennium Program which tests or validates all new technology that NASA will use in space. Dr. Nelson is also a member of the nine person Senior Research Scientist Council at JPL, which represents the interests of the research community at JPL to the JPL Chief Scientist and to the Director of JPL. Dr. Nelson is a resident of Los Angeles County. Dr. Nelson brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

4. Dr. William Bruce Banerdt is currently employed as a Principal Scientist at NASA's Jet Propulsion Laboratory, where he has worked since 1983. He serves as Project Scientist for the Mars Exploration Rovers Project, which involves both coordinating the scientists working on the mission, helping to develop and achieve the scientific goals for the mission, representing the needs of the mission scientists to project management and NASA and representing the project to the public. He has held various management positions at JPL, including Group Supervisor for Geophysics and Planetary Dynamics Group; Lead Scientist and Discipline Program Manager. Dr. Banerdt brings this suit on behalf of himself and all others similarly situated non-sensitive personnel employed by Caltech at JPL.

5. Dr. Julia Bell is currently employed by Caltech as a Senior Engineer in the Systems Engineering Section of the Systems and Software Division at NASA's Jet Propulsion Lab and has been employed there for the past 11 years. She has served as a member of the navigation team for the Mars Odyssey mission and the Mars Exploration Rover project, as well as a systems engineer on several other missions, including the Phoenix mission. Dr. Bell brings this suit on behalf of herself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

6. Dr. Josette Bellan is currently employed by Caltech as a Senior Research Scientist at JPL, where she has been employed since 1980. Dr. Bellan also holds a teaching position in Caltech in the Division of Engineering and Applied Sciences. For

the past three years she has served as a member of the nine person Senior Research Scientist Council at JPL, which represents the interests of the research community at JPL to the JPL Chief Scientist and to the Director of JPL. Dr. Bellan brings this suit on behalf of herself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

7. Dennis Byrnes is currently employed by Caltech as a Chief Engineer for Flight Dynamics at JPL, where he has worked for the past 30 years. This is the highest technical classification at JPL in the engineering field. He was one of the lead trajectory designers for numerous missions including the Galileo Project and the Apollo moon landings. Mr. Byrnes brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

8. George Carlisle is currently employed by Caltech as a Senior Member Technical Staff, Mission Design Section, at NASA's Jet Propulsion Laboratory, where he has worked since 1974. As a member of the Mission Design Section at JPL, he works with a team of scientists and engineers to determine what trajectory a spacecraft should travel to accomplish the goals set for it by mission scientists. Mr. Carlisle brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

9. Kent Crossin is currently employed as an Associate Engineer by Caltech at NASA's Jet Propulsion Laboratory, where he has worked since 2006. He performs hardware testing on the Multi-Mission System Architecture Platform, and provides support to the Mars Science Laboratory, a flagship mission scheduled to launch in 2009. Mr. Crossin brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

10. Dr. Larry D'Addario is currently employed by Caltech as a Principal Engineer at NASA's Jet Propulsion Laboratory. He is an engineer in the Tracking Systems and Applications System, where his work focuses on designing new technologies for the Deep Space Network. Dr. D'Addario brings this suit on behalf of himself and all other

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similarly situated non-sensitive personnel employed by Caltech at JPL.

11. Riley Duren is currently employed by Caltech at NASA's Jet Propulsion Laboratory as a Principal Systems Engineer, one of the highest rankings for engineers at JPL, where he has worked since 1996. He has served as Avionics Manager for the Champollion Comet Lander mission; and Chief Engineer for the Attitude and Orbit Determination Avionics subsystem on the Shuttle Radar Topography Mission, which generated a near-global map of the earth's surface to 10 meter vertical accuracy in a single 11 day flight. He has also served as the Project System Engineer for the Kepler space observatory, which will launch in 2009, where he leads a team of twenty senior engineers and scientists at JPL and other institutions. Mr. Duren brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

12. Peter Eisenhardt is currently employed by Caltech as a Principal Scientist at NASA's Jet Propulsion Laboratory, where he has worked since 1990. He is one of the principal scientists working on a mission known as Wide-Field Infrared Survey Explorer, which will carry out an infrared survey of the entire sky and is planned for launch in 2009. Dr. Eisenhardt brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

13. Susan D.J. Foster is currently employed by Caltech as a Senior Technical Writer Specialist at NASA's Jet Propulsion Laboratory, where she has worked since 1968. Since 1978, she has served as technical editor and technical writer in JPL's Technical Information Section. Ms. Foster brings this suit on behalf of herself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

14. Dr. Matthew Golombek is currently employed by Caltech as a Senior Research Scientist and Principal Scientist at NASA's Jet Propulsion Laboratory, where he has worked since 1983. Since 1983, he has been a continuously funded Principal Investigator in NASA's Planetary Geology and Geophysics and/or Mars Data Analysis programs; his work focuses on Mars geology and the prediction of surface characteristics

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from orbital remotely sensed data. Dr. Golombek is also a member of the nine person Senior Research Scientist Council at JPL, which represents the interests of the research community at JPL to the JPL Chief Scientist and to the Director of JPL. Dr. Golombek brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

15. Dr. Varoujan Gorjian is currently employed by Caltech as a research astronomer working primarily on the Spitzer Space Telescope at NASA's Jet Propulsion Laboratory, where he has worked since 2000. His research focuses on the study of black holes and the star formation history of the universe. Dr. Gorjian brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

16. Zareh Gorjian is currently employed by Caltech as a Senior Programmer at NASA's Jet Propulsion Laboratory, where he has worked since 1990. He works in JPL's Digital Image Animation Laboratory, creating graphics for teams who are writing mission proposals, preparing mission visualizations for the public and creating visualizations of actual movements and activities of spacecraft in flight or at their destination. Mr. Gorjian brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

17. Dr. Amy Snyder Hale is currently employed by Caltech as a Technical Staff member at NASA's Jet Propulsion Laboratory, where she has worked since 2000. She has worked as an engineer on the Mars Global Surveyor mission, among other Mars missions, and has focused her scientific research on Mars atmospheric studies and Mars polar studies. Dr. Hale brings this suit on behalf of herself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

18. Robert Haw is currently employed by Caltech as an engineer at NASA's Jet Propulsion Laboratory, where he has worked since 1987. While at JPL, he has participated in the navigation engineering team for the Magellan and Galileo Projects, as well as various new pre-launch mission design teams. Mr. Haw brings this suit on behalf

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of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

19. Dr. James Kulleck is currently employed by Caltech as a senior member of the technical staff at NASA's Jet Propulsion Laboratory, where he has worked for more than 15 years. Dr. Kulleck provides materials analysis support for all of JPL's flight projects. Dr. Kulleck brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

20. Dr. Sharon Laubach is currently employed by Caltech as a Project Manager at NASA's Jet Propulsion Laboratory, where she has been employed since 1999. Since 2005, she has been the Mars Exploration Rover (MER) Integrated Sequencing Team Chief (Project Manager I), leading a team of 40 engineers who design, validate and compile all the command sequences used to operate the Mars rovers. Dr. Laubach brings this suit on behalf of herself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

21. Dr. Christian Lindensmith is currently employed by Caltech as a Senior-A Member of the Technical Staff at NASA's Jet Propulsion Laboratory, where he has worked since 1996. His work at JPL focuses on the development of missions and instruments for the detection and characterization of Earth-like planets orbiting other stars, including leading the design of the Terrestrial Planet Finder mission. Dr. Lindensmith brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

22. Dr. Amanda Mainzer is currently employed by Caltech as a Research Scientist at NASA's Jet Propulsion Laboratory, where she has worked since 2003. She currently serves as the Deputy Project Scientist for the Wide Field Infrared Survey Explorer (WISE) mission, a NASA space telescope that will launch in 2009. Dr. Mainzer brings this suit on behalf of herself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

23. Scott Maxwell is currently employed by Caltech as a Senior Member of the

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Technical Staff at NASA's Jet Propulsion Laboratory, where he has worked for the past 13 years. For the past five years, he has worked on the Multi Mission Ground Data System, an extensive collection of software that provides data analysis and spacecraft commanding capabilities for most JPL projects. Mr. Maxwell brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

24. Timothy McElrath is currently employed by Caltech as Technical Group Supervisor and Principal Engineer at NASA's Jet Propulsion Laboratory, where he has been employed since 1988. His work at JPL has primarily consisted of orbit determination analysis on numerous spacecraft, including Galileo and the Mars Exploration Rovers. Mr. McElrath brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

25. Susan Paradise is currently employed by Caltech at NASA's Jet Propulsion Laboratory, where she has been employed for over 22 years. After many years as the lead software developer for the MISR (Multi-angle Imaging Spectro-Radiometer) Project, she was promoted to Project Element Manager in 2001 for the Tropospheric Emission Spectrometer Project, where she managed the design, development and testing of ground data system software for five years. In April 2006, she returned to the MISR to continue to manage the Level 2 Aerosol/Surface Team and in April 2007, joined the Aerosol Measurement Processing System as a scientific programmer and analyst. Ms. Paradise brings this suit on behalf of herself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

26. Dr. Konstantin Penanen is currently employed by Caltech as a scientist at NASA's Jet Propulsion Laboratory, where he has worked since 2004. He is the JPL Co-Principal Investigator on a project studying the fundamental properties of quantum fluids at low temperatures and is working to develop a light-weight, low power MRI with potential spin-off uses in mobile hospitals. Dr. Penanen brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at

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JPL.

27. Celeste Satter is currently employed by Caltech as a Senior Engineer in the Mission Systems Concepts Section at NASA's Jet Propulsion Laboratory, where she has worked since 1987. She currently is working on JPL's Single-Aperture Far-Infrared Observatory Concept Study, in a mission and program architecture role and on the Small Explorer mission proposal which is in the development stages. Ms. Satter brings this suit on behalf of herself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

28. Peter Shames is currently employed by Caltech as a Manager of the Data Systems Standards Program at NASA's Jet Propulsion Laboratory, where he has worked since 1991. At JPL he has held a variety of senior system architect and management positions, including group supervisor the Infrared Processing and Analysis Center (IPAC), system architect during the Multi-mission Image Processing Lab (MIPL) re-design, system architect for the Multi-mission Ground Systems Office (MGSO), and mission service technology program manager in the Telecommunications and Mission Operations Directorate (TMOD). In his current role of manager of the JPL Data Systems Standard Program he leads an international program of work to develop space communications and navigation standards for interoperability. Dr. Shames brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

29. John Walker is currently employed by Caltech as a Senior Engineer at NASA's Jet Propulsion Laboratory, where he has worked since 1990. During his tenure at JPL, Mr. Walker has served as Lead Control System Engineer on two major JPL spacecraft projects: the Cassini Mission to Saturn and the Space Interferometry Mission. Mr. Walker brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

30. Dr. Paul Weissman is currently employed by Caltech as a Senior Research Scientist at NASA's Jet Propulsion Laboratory, where he has worked for the past 33

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years specializing in the study of physics and dynamics of small bodies in the solar system, in particular comets and asteroids. He served as Deputy Project Scientist for the Comet Rendezvous and Asteroid Flyby mission, and assisted on the Galileo and other missions. Dr. Weissman brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

B. The Defendants

31. Defendant National Aeronautics and Space Administration ("NASA") is a federal agency which was created by the National Aeronautics and Space Act of 1958, as a purely civilian agency. Pub. L. 85-568, § 102, 72 Stat. 433.

32. Defendant Michael Griffin is the director of NASA and is sued in his official capacity only.

33. Defendant California Institute of Technology ("Caltech") is a non-profit educational institution and one of the premier research institutes in the world. Caltech is located in Los Angeles County. The Jet Propulsion Laboratory is an operating division of Caltech, staffed entirely by Caltech employees whose compensation and benefit policies are established by Caltech.

34. Defendant Department of Commerce is a department of the Federal Government.

35. Defendant Carlos M. Gutierrez is Secretary of Commerce and is sued in his official capacity only.

36. Plaintiffs are ignorant of the true names and capacities of defendants sued herein as DOES 1-100, inclusive, and therefore sue these defendants by such fictitious names and capacities. Plaintiffs will amend this complaint to allege their true names and capacities when ascertained. Plaintiffs are informed and believe and on that basis allege, that each fictitiously named defendant is responsible in some manner for the occurrence herein alleged and that the injuries to plaintiffs herein alleged were proximately caused by the conduct of such defendants.

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IV. FACTUAL ALLEGATIONS

37. Since 1959, Caltech has operated JPL pursuant to a written contract as a NASA Federally Funded Research and Development Center (FFRDC) "to meet certain Government research and development needs which could not be met effectively by existing Government resources or normal contractor relationships." The laboratories' actual physical facilities are owned by NASA.

38. Plaintiffs are long-term employees of Caltech, many of whom have worked at the JPL facilities in Pasadena on NASA-related scientific research and engineering projects for more than twenty years. None of them have security clearances nor do they work with classified material of any kind. Many of the plaintiffs, only agreed to work for NASA with the understanding that they would not have to work on classified materials or to undergo any type of security clearance. For all of the plaintiffs who conduct research, their research data (collected from NASA missions and instruments) is part of the public domain and their findings are freely shared with the scientific community and the public. Indeed, many of the plaintiffs have elected to work only on non-classified work expressly so their research can be subject to peer review, they can collaborate with the best scientists worldwide and publish their results. Because of this policy of non-classified work and public distribution of scientific data and findings, NASA attracts many of the world's top scientists who want to do research in a completely open environment.

39. On August 27, 2004, the President signed Homeland Security Presidential Directive 12 (HSPD-12), entitled "Policy for a Common Identification Standard for Federal Employees and Contractors," applicable to all Executive Branch departments and agencies. The express purpose of HSPD-12 is to ensure that "secure and reliable forms of identification" are used by government employees and contractors. HSPD-12 directed that the Secretary of Commerce promulgate a Federal standard for "secure and reliable forms of identification" within six months of the directive. HSPD-12 defined "secure and reliable forms of identification" to mean identification that is (a) "issued

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based on sound criteria for verifying an individual employee's identity;" (b) "strongly resistant to identity fraud, tampering, counterfeiting and terrorist exploitation;"(c) "can be rapidly authenticated electronically;" and (d) "is issued only by providers whose reliability has been established by an official accreditation process."

40. Nowhere does HSPD-12 authorize or require implementation of a background investigation process for current or new federal employees or contractors, nor does it authorize or contemplate any requirement that applicants for the new federal identification standard waive any of their privacy rights. Indeed, HSPD-12 expressly states that it "shall be implemented in a manner consistent with the Constitution and applicable laws, including the Privacy Act (5 U.S.C. 552a) and other statutes protecting the rights of Americans."

41. In response to HSPD-12, in March 2006, the U.S. Department of Commerce published the Federal Information Processing Standard Publication (FIPS PUB 201-1), entitled "Personal Identify Verification (PIV) of Federal Employees and Contractors" hereafter ("PIV Standard"). The PIV Standard explained that it was issued in response to HSPD-12 and that its sole authority was based on that presidential directive. While stating that the Standard sought to meet the four criteria set forth in HSPD -12, the Commerce Department proceeded to impose a background investigation requirement on all employees or contractors seeking to obtain the new form of identification. Despite the absence of any such directive in HSPD-12, the PIV Standard mandates that "only an individual with a background investigation on record is issued a credential." The PIV Standard further specifies that the background investigation required will be a "National Agency Check *with Inquiries*," or its equivalent, for which each applicant will be required to complete Standard Form (SF) 85, "OPM Questionnaire for Non-Sensitive Positions," or its equivalent.

42. Working separately to respond to HSPD-12, in 2006 NASA had instituted an identification badge system which required JPL (and other NASA employees) to obtain new badges, which could be used throughout NASA facilities. To obtain one of these

new identification badges, JPL employees were required to complete four forms, requiring that they provide basic information such as current address, date and place of birth, social security number, height and weight and former names, submit two forms of approved identification (one of which had to be a state or federal issued identification) and submit to fingerprinting. None of the forms required that JPL employees provide detailed information about their work, residential or personal history, provide names of references for interviews about their suitability, or waive their privacy rights in anyway. As a group, Plaintiffs had no objection to this rebadging process, which fully met the objectives of HSPD-12 and posed no significant invasion of their privacy rights.

43. Despite its implementation of the OneNASA badge, on or about May 24, 2007, NASA issued NASA Interim Directive (NPR 1600.1), establishing a new "Agency-wide policy for the creation and issuance of federal credentials at NASA." The Directive stated that it was being implemented in compliance with HSPD-12 and the Federal Information Processing Standards Publication Number 201-1 (FIPS 201). The directive required that all individuals who require physical access to NASA resources for a period of greater than 179 days obtain a new identification badge, known as the PIV or PIV II. All JPL personnel were informed that to receive the newly required PIV badge they would have to submit to a background investigation, the extent of which would be determined by their position's risk level.

44. As part of the implementation of the new PIV system, NASA and JPL jointly established the risk level for each position at JPL based on "the position's impact on NASA operations." Each position was designated as "high, moderate or low risk," based on the "overall responsibility of the position" and "any possible adverse impact the position could have in terms of integrity and efficiency of NASA assets/operations." All employees determined to be low risk level were required to complete Standard Form SF 85 and submit to a background check known as a "National Agency Check with Inquiries" ("NACI"). Low risk positions are those positions which "have little affect on the efficiency of the agency's programs and operations" and would include all "non-

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sensitive positions and all other positions involving IT systems whose misuse has limited potential for adverse impact." Moderate and high risk employees were required to complete Standard Form SF 85 P and submit to a more extensive background investigation.

45. All of the plaintiffs in this case have been notified that they have been deemed "non-sensitive personnel" by NASA and JPL and therefore required to complete Form SF 85.

46. Approximately 97% of JPL personnel have been designated as "non-sensitive personnel" by JPL and NASA.

47. Standard Form SF 85 requires that plaintiffs provide various types of background information to which there is no objection, e.g. name, date of birth, place of birth, social security number, etc. The form also requires that they provide information about their employment and residential history for the last five years, as well as their education starting with highschool; provide the names of three individuals with whom they associate who know them well; and state whether they have used illegal drugs in the past year, none of which information is mentioned or contemplated by HSPD-12. (A true and correct copy of Form 85 is attached hereto as Exhibit 1.)

48. As an essential part of Form 85, employees are required to sign an "Authorization for Release of Information," which authorizes "any investigator, special agent or other duly accredited representative of the authorized Federal agency conducting my background investigation to obtain *any information relating to my activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information.* This information may include, but is not limited to, my academic, residential, achievement, performance, attendance, disciplinary, employment history and criminal record information.. . . I authorize custodians of records and sources of information pertaining to me to release such information upon request of the investigator, special agent, or other duly accredited representative. . . regardless of any previous agreement to the contrary."

[redacted]

49. All JPL employees have been informed that they must sign the authorization "without any modification or alteration."

50. The background investigation required of JPL personnel in non-sensitive positions is known as an NACI, or National Agency Check with Inquiries. None of the plaintiffs have previously undergone a NACI background investigation, nor have they ever been informed that in order to work at JPL that they would have to waive any of their privacy rights or be subjected to a background investigation. Many of the plaintiffs had been required to submit to the more basic National Agency Check ("NAC"), which merely required that they provide their name, social security number and current address, but did not require any inquiries to be made of former employers, neighbors, or references, nor did it include any privacy waiver.

51. As part of the newly instituted background investigation, JPL employees are required to provide the names of three references, as well as their past employers and landlords for the past 5 years. Those individuals are then sent an Investigative Request for Personal Information (Form No. 42), which asks that they report any adverse information they have on the plaintiff with respect to "abuse of alcohol or drugs," "financial integrity," "mental or emotional stability," "general behavior or conduct," and "other matters." (A true and correct copy of Form No. 42 is attached hereto as Exhibit 2.)

52. NASA's Interim Directive regarding the implementation of the background investigation states that if the Badge issuance process yields any "derogatory or unfavorable information," it will be forwarded to the Human Relations Officer for JPL who will determine "employment suitability." In public meetings regarding the implementation process, JPL employees have been informed that the adjudication of their suitability, based on the background check, will instead be performed by a "federal employee," not shared with JPL and a negative outcome "would prevent [the] individual from access to a federal facility."

53. JPL has posted on its internal website a chart, setting forth all of the grounds for which an employee could be determined to be unsuitable for access to the JPL

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facilities. That chart includes ""infrequent, irregular but deliberate delinquency in meeting financial obligations," "pattern of irresponsibility as reflected in . . . credit history," "sexual misconduct with impact on job," "sodomy," "attitude," "personality conflict," "absenteeism or attendance problem," "homosexuality," "judgment, reliability and dependability issues," "physical health issues," "mental, emotional, psychological or psychiatric issues," "issues . . . that relate to an associate of the person under investigation," and "issues . . . that relate to a relative of the person under investigation." (A true and correct copy of the Suitability Chart is attached hereto as Exhibit 3.)

54. JPL employees have been informed by JPL senior management that no employee will be admitted to JPL facilities without a new PIV badge after October 27, 2007. Further, they have been informed that if they do not complete all of the paperwork (Form 85 and waiver) by September 28, 2007, JPL will be unable to process their requests by October 27, 2007 and they will be barred from the premises on that date.

55. All of the plaintiffs have been informed at public meetings that if they do not have their PIV badge by October 27, 2007, that they will not only be barred from the premises but will be deemed to have terminated their employment with JPL.

56. All of the plaintiffs will suffer irreparable harm if they are denied access to JPL and deemed to have voluntarily resigned from employment with Caltech as they will lose their livelihood and medical benefits. For several of the plaintiffs, who are over 60, it may be difficult to find replacement jobs. For all of the plaintiffs, loss of their position at JPL will deprive them of a unique and irreplaceable job, which will imperil their ability to continue their research and to remain active in space exploration. Indeed, for all of the plaintiffs there is no comparable job in the world, as JPL is the premier institution for exploration of space.

57. Of equal if not greater significance, JPL, NASA and Caltech will suffer irreparable harm if they lose these key employees, many of whom play indispensable roles on current space exploration missions and are irreplaceable because of their knowledge, experience, and intimate involvement with these missions over the past

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years, including key personnel on the Mars Exploration Rover mission and other critical programs.

58. In addition, NASA will be deprived of talented scientists and engineers who will be deterred from applying to work at JPL because of the newly-required background investigation and waiver of privacy rights, both of which are antithetical to the type of autonomy and academic freedom needed to maintain JPL's status as the preeminent research institution for space exploration. Some employees have already announced their resignation or retirement over this issue; others are already seeking work outside of JPL. JPL is already experiencing a shortage of experience in Mars science and has experienced difficulties recruiting senior talented scientists in this area, which will be compounded by the departure of these key scientists and engineers.

V. CLASS ACTION ALLEGATIONS

59. Plaintiffs incorporate by reference paragraphs 1 - 57 of this Complaint as if set forth herein.

60. Plaintiffs bring this action individually and on behalf of a class of JPL employees in non-sensitive positions. There are approximately 5000 employees of Caltech at JPL, approximately 97% of which have been designated by NASA as non-sensitive personnel.

61. The class members identified are so numerous that joinder of all members is impracticable. Plaintiffs believe that there are thousands of members in the class.

62. There are questions of law and facts common to the class. Such common questions include but are not limited to, the following:

a. Whether and to what extent Plaintiffs' constitutionally protected privacy rights are being violated by the requirement that they complete Form 85, sign the waiver that is part of that form, and submit to a NACI background investigation.

b. Whether and to what extent Plaintiffs' constitutionally protected rights to be free from unlawful searches and seizures are violated by the requirement that