
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

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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA

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

27 Plaintiffs,

28 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.

07-000000 ODW(VBK)

Case No.

COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF

I. VIOLATION OF FOURTH
AMENDMENT RIGHTS

II. VIOLATION OF FOURTEENTH
AMENDMENT RIGHTS

III. VIOLATION OF THE
ADMINISTRATIVE PROCEDURE
ACT, 5 U.S.C. § 706(2)(c)

IV. VIOLATION OF THE
PRIVACY ACT, 5 U.S.C. § 522a

V. VIOLATION OF RIGHTS
UNDER THE CALIFORNIA
CONSTITUTION

VI. INJUNCTIVE AND
DECLARATORY RELIEF

1 **I. INTRODUCTION AND SUMMARY OF THE ACTION**

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

22 **II. JURISDICTION and VENUE**

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

25 **III. PARTIES**

26 **A. The Plaintiffs**

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

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

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

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

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

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

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

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

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

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

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

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

13 12. Peter Eisenhardt is currently employed by Caltech as a Principal Scientist at
14 NASA's Jet Propulsion Laboratory, where he has worked since 1990. He is one of the
15 principal scientists working on a mission known as Wide-Field Infrared Survey Explorer,
16 which will carry out an infrared survey of the entire sky and is planned for launch in
17 2009. Dr. Eisenhardt brings this suit on behalf of himself and all other similarly situated
18 non-sensitive personnel employed by Caltech at JPL.

19 13. Susan D.J. Foster is currently employed by Caltech as a Senior Technical
20 Writer Specialist at NASA's Jet Propulsion Laboratory, where she has worked since
21 1968. Since 1978, she has served as technical editor and technical writer in JPL's
22 Technical Information Section. Ms. Foster brings this suit on behalf of herself and all
23 other similarly situated non-sensitive personnel employed by Caltech at JPL.

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

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

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

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

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

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

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

3 19. Dr. James Kulleck is currently employed by Caltech as a senior member of the
4 technical staff at NASA's Jet Propulsion Laboratory, where he has worked for more than
5 15 years. Dr. Kulleck provides materials analysis support for all of JPL's flight projects.
6 Dr. Kulleck brings this suit on behalf of himself and all other similarly situated non-
7 sensitive personnel employed by Caltech at JPL.

8 20. Dr. Sharon Laubach is currently employed by Caltech as a Project Manager at
9 NASA's Jet Propulsion Laboratory, where she has been employed since 1999. Since
10 2005, she has been the Mars Exploration Rover (MER) Integrated Sequencing Team
11 Chief (Project Manager I), leading a team of 40 engineers who design, validate and
12 compile all the command sequences used to operate the Mars rovers. Dr. Laubach brings
13 this suit on behalf of herself and all other similarly situated non-sensitive personnel
14 employed by Caltech at JPL.

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

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

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

1 Technical Staff at NASA's Jet Propulsion Laboratory, where he has worked for the past
2 13 years. For the past five years, he has worked on the Multi Mission Ground Data
3 System, an extensive collection of software that provides data analysis and spacecraft
4 commanding capabilities for most JPL projects. Mr. Maxwell brings this suit on behalf
5 of himself and all other similarly situated non-sensitive personnel employed by Caltech
6 at JPL.

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

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

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

1 JPL.

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

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

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

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

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

6 **B. The Defendants**

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

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

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

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

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

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

28 ///

1 **IV. FACTUAL ALLEGATIONS**

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

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

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

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

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

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

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

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

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

20 44. As part of the implementation of the new PIV system, NASA and JPL jointly
21 established the risk level for each position at JPL based on "the position's impact on
22 NASA operations." Each position was designated as "high, moderate or low risk," based
23 on the "overall responsibility of the position" and "any possible adverse impact the
24 position could have in terms of integrity and efficiency of NASA assets/operations." All
25 employees determined to be low risk level were required to complete Standard Form SF
26 85 and submit to a background check known as a "National Agency Check with
27 Inquiries" ("NACI"). Low risk positions are those positions which "have little affect on
28 the efficiency of the agency's programs and operations" and would include all "non-

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

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

8 46. Approximately 97% of JPL personnel have been designated as “non-sensitive
9 personnel” by JPL and NASA.

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

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

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

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

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

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

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

1 facilities. That chart includes “infrequent, irregular but deliberate delinquency in
2 meeting financial obligations,” “pattern of irresponsibility as reflected in . . . credit
3 history,” “sexual misconduct with impact on job,” “sodomy,” “attitude,” “personality
4 conflict,” “absenteeism or attendance problem,” “homosexuality,” “judgment, reliability
5 and dependability issues,” “physical health issues,” “mental, emotional, psychological or
6 psychiatric issues,” “issues . . . that relate to an associate of the person under
7 investigation,” and “issues . . . that relate to a relative of the person under investigation.”

8 (A true and correct copy of the Suitability Chart is attached hereto as Exhibit 3.)

9 54. JPL employees have been informed by JPL senior management that no
10 employee will be admitted to JPL facilities without a new PIV badge after October 27,
11 2007. Further, they have been informed that if they do not complete all of the paperwork
12 (Form 85 and waiver) by September 28, 2007, JPL will be unable to process their
13 requests by October 27, 2007 and they will be barred from the premises on that date.

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

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

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

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

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

12 **V. CLASS ACTION ALLEGATIONS**

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

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

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

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

- 23 a. Whether and to what extent Plaintiffs' constitutionally protected privacy
24 rights are being violated by the requirement that they complete Form 85, sign
25 the waiver that is part of that form, and submit to a NACI background
26 investigation.
- 27 b. Whether and to what extent Plaintiffs' constitutionally protected rights to be
28 free from unlawful searches and seizures are violated by the requirement that

1 they complete Form 85, sign the waiver that is part of that form, and submit
2 to a NACI background investigation.

3 c. Whether the Secretary of Commerce and Commerce Department violated the
4 Administrative Procedure Act, 5 U.S.C. § 706(2)(c), by imposing a
5 background investigation on employees of government contractors which
6 has no basis in HSPD-12, or in any other executive order or statute.

7 d. Whether Defendants' policy directly violates several sections of the Privacy
8 Act of 1974, codified at 5 U.S.C. §§ 552a(a)-(q), which requires departments
9 and agencies of the executive branch to observe certain rules in the
10 computerization, collection, management, use, and disclosure of personal
11 information about individuals.

12 63. Plaintiffs' claims are typical of the claims of the class. Plaintiffs seek redress
13 for the same conduct that has affected all Proposed Class Members and press legal claims
14 which are the same for all Proposed Class Members.

15 64. Plaintiffs are all members of the class they seek to represent and will fairly and
16 adequately represent the class. Plaintiffs do not have conflicts of interest with members
17 of the class and have retained counsel who are experienced in complex litigation,
18 including class actions and constitutional litigation, who will vigorously prosecute this
19 action.

20 65. A class action is the superior method for adjudication of this controversy. In
21 the absence of a class action, courts will be unnecessarily burdened with multiple,
22 duplicative individual actions. Moreover, this action is properly maintainable as a class
23 action because Defendants have acted and/or refused to act on grounds generally
24 applicable to the Proposed Class, thereby making equitable relief appropriate to the
25 Proposed Class as a whole. Questions of law and fact common to the class also
26 predominate over any questions affecting only individual members.

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