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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE OTIS D. WRIGHT, II, JUDGE PRESIDING

ROBERT M. NELSON et al,)	
)	
)	
)	
Plaintiffs,)	
)	No. CV 07-05669
VS)	
)	
NATIONAL AERONAUTICAL and SPACE AGENCY)	
et al,)	
)	
)	
Defendants.)	
_____)	

Reporter's Transcript of Proceedings
MOTION HEARING
Los Angeles, California
Monday, October 1, 2007

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1 Monday, October 1, 2007 4:00 P.M.

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P R O C E E D I N G S

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5 **COURT CLERK:** Calling Item No. 8. Civil case
6 07-5669. Robert Nelson et al versus National Aeronautics And
7 Space Administration et al.

8 Will counsel please state your appearances
9 for the record.

10 **MR. STORMER:** Good afternoon, Your Honor. Dan
11 Stormer, Virginia Keeny, Sanjukta Paul for plaintiffs.

12 **THE COURT:** Mr. Stormer, good afternoon.

13 **MR. STORMER:** Good afternoon.

14 **MS. MEI:** Good afternoon, Your Honor. Vesper Mei,
15 Wendy Ertmer, and Jane Ristrop for the federal defendants.

16 **THE COURT:** Ms. Mei, good afternoon.

17 **MR. HOLSCHER:** Good afternoon, Your Honor. Mark
18 Holscher and Alex Pilmer for Caltech. With us is Victoria
19 Stratman who's deputy general counsel of Caltech.

20 **THE COURT:** Mr. Holscher, good afternoon.

21 All right, we're here on Caltech's request
22 for a preliminary injunction.

23 Question -- and this is for Caltech -- were
24 it not for the internal web site, would we be here now?

25 **MR. HOLSCHER:** Your Honor, we represent one of the

1 defendants; so, I'm not sure if you meant to address that
2 question to us or to Mr. Stormer. I'm happy to address it if
3 you'd like.

4 It's Mr. Stormer who's seeking the --

5 **THE COURT:** Tell me this, how long has that
6 particular web site or the information on that web site
7 regarding the factors which might deem an employee to be
8 unsuitable, how long has that been up?

9 **MR. HOLSCHER:** It's been up for a few months, Your
10 Honor.

11 **THE COURT:** Just a few months.

12 **MR. HOLSCHER:** Give or take. It was a web site
13 set up to just kind of inform the Caltech JPL employees of
14 the status of the program that NASA was rolling out.

15 **THE COURT:** All right. So, it is tied to this
16 identification program.

17 **MR. HOLSCHER:** It is tied in the sense that -- let
18 me back up, Your Honor. I'm here on behalf of Caltech which
19 has its employees who work for Jet Propulsion Laboratory. As
20 the plaintiffs set out in their separate Reply brief that was
21 addressed just to Caltech, the identification and background
22 check program -- let me get my notes, Your Honor.

23 **THE COURT:** Or, actually, maybe the questions is
24 more appropriately addressed to JPL.

25 **MR. HOLSCHER:** Caltech operates JPL. It's a

1 federally funded facility, and JPL is actually a federal land
2 that we operate in.

3 With respect to the question of Caltech's
4 involvement, Your Honor, the plaintiffs set forth in their
5 separate Reply brief that was filed against Caltech at
6 page 1, line 15 through 17, and I quote: The motion for a
7 preliminary injunction is primarily to address the federal
8 government which is mandating and implementing the background
9 investigation process.

10 Under the Ninth Circuit law, Your Honor, the
11 Sutton case in 1999, that involved the hospital that was
12 required to get Social Security numbers from patients is part
13 of a mandated federal program.

14 Under Sutton, I don't think there is any
15 dispute, that once the plaintiffs conceded in their Reply
16 brief that the background check is, quote -- that the federal
17 government is, quote: Mandating and implementing a
18 background check, in their Reply brief, Your Honor, the
19 plaintiffs have essentially conceded as a matter of law is
20 impossible for Caltech to be deemed a state actor.

21 As the Court is well aware, the plaintiffs
22 set out what they described as a Fourteenth Amendment claim,
23 which only applies to the state. Whether you describe it as
24 a Fifth Amendment privacy act -- and if Your Honor allows
25 them to essentially constructively replead it for this

1 preliminary injunction hearing, the only way that Caltech
2 could conceivably be held responsible is under the narrow
3 exception that a private entity can only be held responsible
4 for a government program if they are actively involved in the
5 implementation and the operation, or there is a limited
6 federal government involvement.

7 So, Your Honor, I respectfully believe that
8 the core dispute here is between the plaintiffs and NASA, and
9 that we'll be coming back to Your Honor in a few weeks
10 seeking dismissal of the Privacy Act claim as it relates to
11 Caltech, because we believe as a matter of law under the
12 Sutton case -- and I would ask Your Honor to just look at the
13 Sutton case at 192 F.2d, 826, but specifically at pages 836
14 and 837; and at 837 Sutton explicitly holds, Your Honor: A
15 private actor cannot be found to have violated the
16 Constitution for conduct compelled by the government.

17 I don't mean to punt on your questions, Your
18 Honor, but I believe the gravamen of the dispute here is the
19 plaintiffs versus NASA; and not only are the plaintiffs not
20 entitled to a preliminary injunction against Caltech, I think
21 you're going to find in three or four weeks we're going to
22 have a very meritorious motion to dismiss.

23 And I'd ask, Your Honor -- it was a bit
24 unusual, Your Honor, the plaintiffs filed a Joint Reply brief
25 that was 30 pages, and there was about a three and a half

1 page separate Reply brief against Caltech. And I don't even
2 know if Your Honor saw that from the clerk's office because
3 it was kind of a separate filing.

4 I submit, Your Honor, if you review that and
5 look at the Sutton case, there is no other possible outcome
6 other than a denial of any preliminary injunction against
7 Caltech.

8 The government has already conceded that the
9 Privacy Act and Administrative Procedures Act, the government
10 and the plaintiffs I think now finally agree that can't apply
11 to Caltech; it only applies to governmental entity.

12 So, at the end of the day, Your Honor, I
13 believe what you have before you is a dispute between the
14 plaintiffs and NASA regarding the background checks.

15 **THE COURT:** All right. You're probably right. I
16 have the feeling that time was of the essence, and this
17 Complaint was hastily drawn, and that's why it includes
18 Fourth Amendment claims, Fourteenth Amendment claims, which
19 apply to the states, the California Constitution. These
20 things have nothing to do with NASA.

21 And so, I would imagine you would probably
22 see an amendment later on, but we're here now on the issue of
23 a preliminary injunction, and I really did want to, sort of,
24 get to the chase here, because the Standard Form 85
25 questionnaire really does seek what appears to me to be

1 nonsensitive information. And I guess, Mr. Stormer, I'll
2 hear from you.

3 And this is why my question, that surely
4 there would not be this tempest but for the web site,
5 internal web site which lists a number of characteristics
6 which would be found to be, found to make an employee
7 unsuitable. So it appears that that is the real concern, not
8 so much the questionnaire which seeks, you know, date of
9 birth, place of birth, Social Security number, educational
10 history and three references.

11 So, Mr. Stormer, is that the real problem?

12 **MR. STORMER:** Ms. Keeny will address this, Your
13 Honor.

14 **THE COURT:** All right.

15 **MS. KEENY:** Thank you, Your Honor.

16 Let me first address the question that you
17 were posing to Caltech about where the suitability
18 determination comes from. I think Caltech responded as to
19 the fact that the suitability matrix was posted on their
20 internal web site for several months.

21 The requirement that NASA conducted
22 suitability determination of all of these long-term employees
23 is found in the NASA interim directive, MPR 1600.1, which is
24 Exhibit 5 to our request for judicial notice in support of
25 the original motion for a preliminary injunction; and at

1 page 17 it discusses the suitability analysis that will be
2 applied to all of these long-term government employees.

3 But with respect to your more general
4 question, which is: Would the plaintiffs be here if it was
5 only the Form 85 question at issue, the answer would be yes,
6 because the Form 85 does have some questions in it to which
7 the plaintiffs have no concerns about providing; for example,
8 the names of past employers, places where they resided, their
9 schools. In fact, some of that information has probably been
10 previously provided as part of their original applications to
11 JPL.

12 But within Form 85 are also requests that
13 they disclose drug use and treatment. There are also the
14 waivers which is at -- it's at the heart of this
15 conspiracy -- it's a very broad waiver that NASA requires the
16 employees sign which gives NASA investigators the ability to
17 request without any limit their personnel files, their
18 student records and, in fact, information from any source to
19 determine whether or not they may be suitable employees.

20 So, those two issues alone, the waiver that
21 they're required to sign, the drug tests, the drug
22 information that they're required to provide both clearly
23 exceed the government's ability to, you know, create a simple
24 process by which to confirm their identity and issue them a
25 badge.

1 And the case law that has considered Form 85
2 and its sister form, Form 85-P, has made quite clear that
3 these types of questionnaires and background investigations,
4 waivers and requirements of disclosure of drug use are only
5 appropriate where the employees hold what's called a public
6 trust position; and in this case we are willing, at least at
7 this point, to go with NASA's own determination, that our
8 clients and the class they seek to represent are nonsensitive
9 personnel and that they are a low-risk personnel.

10 And if I could point the Court to Exhibit N
11 to our original moving papers, that is a NASA presentation
12 that made to all JPL employees that describe what was meant
13 by low-risk, moderate-risk and high-risk.

14 And low-risk, which is the category in which
15 our clients fall, are those positions that have little effect
16 on the efficiency of the agency's programs and operations and
17 includes all nonsensitive positions and all other positions
18 involving IT systems whose misuse have limited potential for
19 adverse impact. That's a direct quote from NASA's own
20 presentation regarding this new badging system at page 266.

21 By contrast, those who are just mid risk
22 employees are those who are responsible for planning,
23 directing, designing, operating and maintaining IT systems or
24 who have access to data or systems whose misuse can cause
25 serious impact or result in personal gain, and high-risk has

1 even more attributes that place those employees in this
2 high-risk category.

3 So, the three cases that has considered these
4 Form 85-Ps, each one of them has found that they do pose
5 significant questions. Form 85-P is virtually identical to
6 Form 85, except where it goes back -- it covers a more
7 extended period of time and asks them additional questions.

8 But the Fifth Circuit's decision in National
9 Treasury Employees Union did uphold the use of Form 85-P but
10 only because in that situation the employees were all public
11 trust employees.

12 And a DC Circuit's decision in AFGE versus
13 Department of HUD, again, they did uphold the use of Form
14 85-P; but, again, it was only after the court analyzed the
15 positions that the -- in that case the -- sorry, the
16 commerce -- well, no -- the employees in that situation and
17 found that those individuals actually had access to a
18 financial data systems at which they could actually alter the
19 data and redirect the funds to themselves; and because of
20 their ability to reek that kind of havoc on this significant
21 government benefits program, the court determined they were
22 public trust employees and that they would be required to
23 answer the Form 85-P questions.

24 The other court, the final court to decide
25 and to rule against the Form was the National Treasury

1 Employees Union versus US Department of Treasury, and a lot
2 of these cases have nearly identical names. This is the case
3 decided by Judge Green out of the DC District Courts.

4 And there the Court analyzed employees who
5 are much more akin to those here. These were employees that
6 the Court found were not involved in law involvement or
7 public safety, did not have access to national security
8 information and did not carry weapons. And because they were
9 all low-risk employees, the Court held that they could not be
10 required to answer the questions on drug testing, answer the
11 other information requested by Form 85-P or to waive their --
12 sign a broad waiver as was requested with that form as well.

13 **THE COURT:** Well, one of the things about that
14 case, and the question I have here, is whether or not there
15 is going to be any limitation with respect to the use of that
16 information particularly as it pertains to drug use.

17 And I know that question probably should not
18 be directed to you, but it is a question that I have.

19 **MS. KEENY:** And I understand why, because some of
20 the courts have considered whether this is a violation of the
21 Fifth Amendment or whether it's compelled or whether they're
22 being given immunity. And I think that the drug testing
23 cases that we've cited, they -- the general message that one
24 can draw from them is, that you cannot require -- regardless
25 of what use you may ultimately do with the information, you

1 cannot require employees in non-safety positions to provide
2 any information, whether by a drug test or by a question and
3 answer scenario regarding their drug use.

4 The Fourth Amendment protections as well as
5 those that flow from Fifth Amendment prohibit the government
6 from requiring employees to disclose anything about their
7 drug use unless they are public trust or public safety
8 employees.

9 And the case law in this circuit and that of
10 the Supreme Court is very clear on that. So, I think
11 certainly the question has to be, if you cannot require a
12 drug test of these employees, which you can't, how can you
13 require that they disclose even more incriminating
14 information to the government?

15 And I don't know what use the government may
16 put this information to. That's one of our concerns, that
17 they're collecting information that they may share with other
18 agencies or that they may use to determine that our employees
19 are unsuitable for employment.

20 I mean, that's the very thing that's
21 prohibited by Skinner and VonRab and by the host of Ninth
22 Circuit cases that has prevented the government from finding
23 out about personal off-the-job drug use.

24 **THE COURT:** Another question I have, this PIV
25 standard mandates that only an individual with a background

1 investigation on record is issued a credential.

2 Don't all of the employees already have a
3 background investigation on record?

4 **MS. KEENY:** No. All of the employees have photo
5 IDs that they have obtained by going through various
6 procedures.

7 What some of the employees have is this thing
8 called a One NASA Badge, which is a badge that was
9 implemented by NASA in response to the HSPD 12, the executive
10 order, that require that employees -- some of our plaintiffs
11 went through this process -- be fingerprinted, that they show
12 forms of accepted identification and that they then be issued
13 a secured photo badge.

14 All of the employees either have that badge
15 or some other type of, you know, photo identification that
16 they've been using for years at JPL. I think many of those
17 IDs have, you know, bar codes and other systems, go into them
18 to make sure that they are scanned or scannable, and that
19 they are checked every time the employee enters the
20 facilities.

21 With respect to whether they did a background
22 investigation, let me be specific. Every one of our clients,
23 every one of the plaintiffs went through something called the
24 National Agency Check, and we are not objecting to the
25 National Agency Check. What is at issue here is something

1 called the National Agency Check With Inquiries.

2 The National Agency Check to which they've
3 all been subjected was a process by which the government
4 would access different databases doing like, for example,
5 criminal records check, and there are other databases that
6 are accessed as part of that perhaps the government could
7 complain more accurately than I can.

8 But, yes, to get hired in the first instance,
9 they all have their criminal records verified. They've all
10 have their education history verified, and they've all gone
11 through some sort of process to have a badge issued to them
12 so that their face -- you know, so that guards at the
13 facility know who's coming and leaving the property.

14 **THE COURT:** Okay. I've got a question now that
15 you probably are not in a position to answer, and that is:
16 While the plaintiffs here may be classified by NASA as
17 low-risk employees, are they physically segregated from other
18 medium and high-risk employees?

19 **MS. KEENY:** Ninety-seven to ninety-eight percent
20 of the employees at JPL have been designated as low-risk
21 and --

22 **THE COURT:** Say that again?

23 **MS. KEENY:** Ninety-seven to ninety-eight percent
24 of the employees at JPL have been designated by NASA as
25 low-risk. So most of our clients' interaction is with other

1 low-risk employees.

2 They have minimal interaction with employees
3 who have security clearances who would, I think, by
4 definition be higher risk employees. They don't work on
5 classified projects.

6 All of our clients made an expressed decision
7 that they didn't want to work on classified work and wanted
8 to instead work in an open research environment as is
9 provided by JPL. So, though there is some minimal amount of
10 classified work being done at JPL, our clients have no access
11 to it and don't work on those projects.

12 And we would -- I mean, certainly all of the
13 cases that look at drug testing, all of the cases that have
14 tried to decide who in a government facility should be tested
15 have never come to the conclusion that just because someone
16 might work near a high-risk employee, they should be
17 subjected to random drug testing.

18 In fact, the line is drawn between -- the
19 courts consistently draw a line between low-risk and
20 high-risk employees and have never accepted an argument that
21 just because everyone may be in the same federal facility one
22 way or another, that they should all have the same drug
23 testing or they should all give up their Constitutional
24 Rights to the same degree.

25 **THE COURT:** All right, I'd like to hear from the

1 government.

2 Let's hear from NASA as to justification for
3 infringing upon the plaintiffs' information on privacy
4 interest.

5 Yes, Ms. Mei.

6 **MS. MEI:** Well, I think the first -- first of all,
7 the government is not infringing on the plaintiff's
8 informational privacy interest.

9 The Form, itself, as Your Honor has pointed
10 out is not that intrusive on its face; it's limited.

11 With respect to the drug use question, it
12 goes back only one year, and there is -- it asks for illegal
13 conduct, which certainly would go to the question of the
14 fitness or reliability of an employee to be an employee in a
15 federal or in any other facility.

16 **THE COURT:** Also goes to Fifth Amendment.

17 **MS. MEI:** But on its face, though, Your Honor,
18 Question 14 says that: Neither your truthful response nor
19 information derived from your response will be used as
20 evidence against you in any subsequent criminal proceeding.
21 So there in itself takes away the Fifth Amendment problem.

22 **THE COURT:** Good, thank you.

23 Now let's get to the other concern of the
24 plaintiffs that they must sign an authorization for release
25 of information.

1 **MS. MEI:** Yes, the authorization for release of
2 information is much more limited than what plaintiffs would
3 say.

4 **THE COURT:** All right.

5 **MS. MEI:** If you look at the second paragraph, for
6 example, it says: I understand that for some sources of
7 information a separate specific release will be needed, and I
8 may be contacted for such release at a later date.

9 That, right there, shows that even for this
10 investigation, this one release form isn't enough. You still
11 may have to sign another release for additional information.

12 **THE COURT:** For example, what, medical --

13 **MS. MEI:** Medical -- yeah. And then also the 4th
14 paragraph of the authorization says: I understand that the
15 information released by records custodians and sources of
16 information is for official use by the federal government
17 only for the purposes provided in the Standard Form 85 and
18 may be redisclosed by the government only as authorized by
19 law.

20 If you look also at the Standard Form 85, it
21 has a list of Privacy Act protections and some Privacy Act
22 routine uses. So, disclosure of any information on this form
23 and -- so, the use of the form and the release is limited to
24 the Privacy Act, which provides that you can only maintain
25 information that's relevant and necessary for those specific

1 purposes, which would by extension also extend to the
2 collection of information, because why would you collect it
3 if you can't maintain it.

4 **THE COURT:** Now, how much of this information is
5 really necessary in order to assure the individual employee's
6 identity?

7 **MS. MEI:** I think it's a broader inquiry than just
8 plain identity, Your Honor.

9 **THE COURT:** Yes, it is.

10 **MS. MAI:** Well, inherent in the question of
11 identity, first of all, I think many of the questions do go
12 to verifying the person, that the person is who they say they
13 are.

14 But the HSPD-12 is for the security of
15 federal facilities, and that encompasses two different
16 aspects: First, the physical security, which is who can be
17 in the facility, itself; and second, the logical access,
18 which is, who has access to the computer systems.

19 So, it's a broader -- it's just a broader --
20 you need -- inherently, within that, you need to be able to
21 assess the reliability of the people who come into your
22 facilities, and that's where the additional questions come
23 in.

24 Although, it is -- although with the form,
25 itself, many of the questions, the employment history, the

1 educational history, where you've lived and the references go
2 to establish that the person -- they do have an identity
3 portions, which is, they establish that the person has a
4 history within the community and that they are who they say
5 they are, with the additional perjury issue, that they're
6 subject to perjury charges if they falsify information on the
7 form; and I think the Department of Commerce decided that
8 that was a way to verify the person's identity as well as
9 partly their reliability.

10 **THE COURT:** To be frank, I was only troubled
11 slightly by the waiver. I was more troubled by the internal
12 web site, and I could see where there may be individuals who
13 are concerned about some of the characteristics that would
14 render a person unsuitable: Rape, murder, those things, you
15 know, call them D or A, whichever it was. That wasn't much
16 of a concern; but sexual orientation, that was a concern.

17 **MS. MEI:** Well, Your Honor, there is an executive
18 order in place, which is Executive Order 13087, which was
19 from May 28, 1998; and in that Executive Order President
20 Clinton amended Executive Order 11478, which was Equal
21 Employment Opportunity in the federal government to prohibit
22 discrimination on the basis of sexual orientation.

23 So, that is not something that should be
24 taken into account for these contractors.

25 **THE COURT:** So, why does it appear on the web site

1 as an unsuitable characteristic for employee at the JPL
2 facility?

3 **MS. MEI:** Your Honor, at this time I think
4 anything that has to do with that chart is premature and
5 speculative, and it's not ripe for review by this Court.

6 **THE COURT:** That's another issue, you know,
7 ripeness; but, again, I was surprised to hear that that only
8 went up a few months ago apparently in response to this
9 program, which is troublesome, that some of those
10 questionable factors are listed there, like you say, long
11 after President Clinton left office.

12 So, I'm somewhat concerned about that, as I'm
13 sure some of the employees; and, you know, that there are
14 attorneys protestations to the contrary notwithstanding, I
15 strongly suspect that it is that web site that has prompted
16 the majority of this, not that innocuous questionnaire, which
17 is similar to the one that you'd have to fill out if you
18 wanted to lease an apartment for a year. I'm sure that's not
19 the problem, okay?

20 But, yes, ripeness is a question, and it
21 appears that right now the concern is, what might be
22 uncovered through the utilization of the authorization for a
23 release of information, and what NASA will do in response to
24 that or the JPL human resources officer, what they may do
25 with respect to that.

1 But apparently right now no adverse
2 employment action has been taken against anyone.

3 **MS. MEI:** That's correct, Your Honor. And I think
4 there are two different parts of the answer to that question.

5 The plaintiffs -- if something adverse were
6 to happen, for example, and they were denied badge access to
7 the facility, the national -- the NASA interim directive,
8 which is NID 1600.1 which the plaintiffs attached to their
9 papers, I think it's Exhibit R, it provides for appeal rights
10 for those individuals who were denied access, including
11 contractors.

12 So, the first step is that the individual can
13 look at the derogatory information that's come back and
14 respond to it, that individual has the opportunity to
15 respond. The second step, if the individual does not like
16 that determination, the first one, is that they can then
17 appeal to a three-person panel.

18 And also if an individual suspects that
19 something improper has happened, they can file a Privacy Act
20 request to get the information from their investigative file;
21 and if something has happened that they believe is improper,
22 they can file a Privacy Act suit.

23 So, all of these remedies would occur at the
24 appropriate time, when the issue is ripe, when something
25 adverse has happened to the individual who may have suffered

1 an injury.

2 **THE COURT:** All right. Thank you.

3 Would the plaintiffs like to address the
4 ripeness issue?

5 **MR. STORMER:** Dan Stormer on behalf of the
6 plaintiffs, Your Honor.

7 The courts have uniformly held that one
8 cannot condition a waiver of Constitutional Rights as a
9 precondition to maintaining your employment. And JPL has
10 said, unequivocally in the Heart Declaration at Paragraph 10,
11 they have said that if you do not fill out this form so that
12 we begin processing by October 5th, you will be considered to
13 have voluntarily resigned.

14 **THE COURT:** All right, what Constitutional Rights
15 are they waiving?

16 **MR. STORMER:** Their privacy rights, Your Honor.
17 In this case it's informational privacy.

18 There is a whole host of cases. One of the
19 best cases from our perspective in viewing this is the
20 Thorn V El Segundo, where the Court said quite clearly, this
21 was just for a potential employee, not even for somebody who
22 was already employed. A potential employee of the state may
23 not be required to forego his or her constitutionally
24 protected rights simply to gain the benefits of employment --
25 of state employment.

1 And that's what we have here, and we have the
2 whole host of cases that have followed exactly that line of
3 reasoning.

4 **THE COURT:** All right, let's say I agree with you,
5 that there is a constitutional protection against being
6 forced to provide confidential information. Do we have a
7 case or a controversy here now that's sufficient to invoke
8 the jurisdiction of the federal courts?

9 **MR. STORMER:** Oh, absolutely, Your Honor.
10 Virtually all of the cases which have dealt with it have
11 dealt with the issue of standing, ripeness and
12 constitutionality essentially simultaneously. That is, they
13 have said that if you are required in that process to waive
14 your constitutional right, that in and of itself creates
15 immediate standing.

16 The cases that say ripeness, I believe, that
17 defendants have only cited, the treasury cases, and that just
18 said that -- the hotel and restaurant employees -- and in
19 that case, which is the only case they really have for this
20 position, there was no claim for informational privacy, and
21 they just said that a portion of the First Amendment claim
22 was not ripe.

23 In this case, once again, it's sort of the
24 flip side of the National Treasury case which counsel
25 referred to earlier, the Fifth Circuit National Treasury,

1 where we're dealing with -- there it was public trust,
2 here it's nonpublic trust; there it was a limited disclosure,
3 here it's a substantial disclosure; there it was government
4 employees, here it's nongovernment employees.

5 There really is no support in any of the
6 cases for the government's position that somehow this -- that
7 there is no standing or this matter is not ripe, because
8 if -- the minute they have to -- the minute they fail to
9 waive their informational privacy rights, they are
10 voluntarily terminated. So they have -- and Thorn speaks
11 directly to that, and it's unequivocal that that cannot be a
12 requirement for governmental employment.

13 **THE COURT:** You don't feel that in this particular
14 case there is a legitimate governmental interest in seeking
15 this information?

16 **MR. STORMER:** I do not. I mean, I'm speaking of
17 somebody who once had a secret clearance when I was in the
18 military at very, very low level.

19 But there really is no need for this. In
20 fact, these are employees who have worked there for 40 years,
21 who have performed admirably, for whom in some of the
22 declaration you see there are tremendous cross-checks as to
23 how things are carried out.

24 There is no governmental interest that arises
25 to the level of putting them akin to sensitive or secured

1 positions. There really --

2 I'm trying to say this in the best of ways,
3 but the specter, the post 911 specter that gets raised in
4 this setting is really unfair, and it's really an attempt to
5 prejudice the Court through a specter when people in -- among
6 our plaintiffs have worked there for years and years and
7 years and years, and there has been no need for it because
8 the vast majority, 97 to 98 percent, is not classified.

9 So, is there a legitimate governmental
10 interest? I would argue on a constitutional scale there is
11 not, not for the information that is being requested.

12 And some of the information, Your Honor --
13 it's an interesting approach, but in the last year -- they
14 say they collect the information and they store it.

15 In the last year in my household alone, we
16 have learned of disclosures that affect both my wife and
17 myself where the government mishandled materials. Some of it
18 flowed from the UCLA release of security -- Social Security
19 information, some involved the release of the Veterans
20 Administration information about --

21 I mean, this is not something where you can
22 just invoke as a claim, a specter, that constitutionally has
23 never been allowed.

24 **THE COURT:** You know, if this were pre 2001, and
25 if this were ACME Janitorial Service, I guess this would be

1 pretty easy, wouldn't it? But I suppose it's difficult, me
2 being outside the scientific community to readily accept the
3 notion that JPL is not really a sensitive arm of NASA and the
4 government, and to talk about the low-risk personnel at JPL,
5 I don't know, I'm having trouble with that.

6 **MR. STORMER:** Your Honor, I would just -- we, in
7 putting together this case, which easily got put together
8 pretty quickly, we chose consciously to use their definition
9 of what low-risk is. We have defined this by their
10 definition as to low-risk. And that definition should, by
11 their own creation, guide this Court because they can't
12 suddenly say it's post 911, so low-risk is not low-risk any
13 longer. There has to be some consistency.

14 **THE COURT:** There is. I agree with you.

15 The difficulty here is, one, seeking the
16 relief that you are seeking, I have yet to hear about an
17 irreparable harm. In fact, I'm hearing about internal appeal
18 processes, and I'm also concerned whether or not the
19 plaintiffs are likely to succeed on their merits, that their
20 informational privacy interest outweighed the government's
21 interest in a secure facility. And this is what I'm
22 grappling with now.

23 **MR. STORMER:** On the irreparable harm, there are a
24 host of cases, Your Honor, that have addressed this directly,
25 which you've said, that the loss of the Constitutional Right

1 is in and of itself an irreparable harm. And the Elrod V
2 Burns case, Leduke V Nelson, Connection Distributing Company
3 V Reno, Covino V Patrissi, McDonald V Hunter, and the list
4 goes on, Amalgamated Transit, each of these has addressed a
5 component of and address the irreparable harm that flows from
6 the loss of the Constitutional Right.

7 The Amalgamated Transit Union case, the
8 government employees were entitled to a preliminary
9 injunction against employer instituting a preemployment test
10 which potentially violated the Fourth Amendment. It's what
11 we have here. It's virtually directly on point. The Thorn
12 case is very similar.

13 Each of the cases that have had the
14 opportunity to address this issue have determined that the
15 irreparable harm lies in the loss of the Constitutional
16 Right. And it's not really correctable, because once you
17 have lost that right, you can't -- once you've given up the
18 information, it's gone.

19 And in this case they have made it absolutely
20 clear that if our clients don't sign by this Friday, they
21 don't have a job; and in order to sign, they've got to give
22 up their privacy rights.

23 **THE COURT:** They could get their jobs back.

24 **MR. STORMER:** Well, they could get their jobs back
25 if they signed the document.

1 One of the interesting things that Ms. Mei
2 stated was, well, for some things like medical records, we
3 might want a second release; but the same thing applies to
4 the second release. If you don't sign that second release,
5 which now is more specific in the seeking of medical records
6 or consumer records, something which is really traditionally
7 a very, very private area, you lose your job.

8 So it isn't like, well, maybe we can, we'll
9 deal with this at some later date; it's, if you don't sign
10 that second one, you still lose your job.

11 And Ms. Keeny can address the issue of the
12 appeal.

13 **THE COURT:** I'd like to hear from NASA again about
14 how release of medical information might even remotely be
15 relevant to these employees.

16 **MS. MEI:** I think it goes to the reliability
17 determination, Your Honor. You certainly want to make sure
18 that your employees are reliable to work in these facilities
19 and on the computer systems.

20 **THE COURT:** But these employees have been working
21 there for years and years.

22 **MS. MEI:** That's true, but I don't think --

23 **THE COURT:** Tell me this -- well, let me tell you
24 this: Don't think you've got to win every single point,
25 okay? Because I can't imagine -- I know, obviously, the

1 government has thought about this, and they've learned from
2 some of the past decisions, and I'm sure there is probably a
3 reason. I just don't know with that reason is, and, frankly,
4 I wish I knew what I was going to do with this.

5 I don't want these employees hurt. I don't
6 want their rights unnecessarily infringed upon, but I want
7 the security of this nation preserved, and I want the
8 security and integrity of all NASA programs preserved, and I
9 don't want any sleepers infiltrating NASA or JPL, and there
10 has got to be a reasonable way to accommodate privacy
11 interests as well as the legitimate governmental interest in
12 this nation's security; and before this case is over, we're
13 going to reach some sort of an accommodation.

14 But, go ahead, tell me about medical records.

15 **MS. MEI:** I think it's what I said before, to the
16 extent that you have somebody whose mental health may be
17 unstable, you'd want to know that with respect to a person
18 working in the facility.

19 **THE COURT:** Well, if you don't know by now, you're
20 never going to know. I don't mean that flippantly; but I
21 mean, my understanding is, that these people have been with
22 the program for some time.

23 **MS. MAI:** Well, but that doesn't preclude
24 something happening --

25 **THE COURT:** Okay, that's fine.

1 **MS. MEI:** -- even with their mental health.

2 **THE COURT:** Okay. All right, does anyone else
3 have something that they're just dying to get off their
4 chest?

5 **MS. MEI:** Your Honor, if I could just address --

6 **THE COURT:** Certainly.

7 **MS. MEI:** -- the standing point briefly.

8 **THE COURT:** Please.

9 **MS. MEI:** I just wanted to say that with the
10 informational privacy cases that the plaintiffs have cited,
11 it's not true that in cases like this the courts have
12 standing. They're not cases like this.

13 Those cases, the cases that the plaintiffs
14 cite were either facial challenges, which they've said that
15 this is not. For example, the National Federation of Federal
16 Employees versus Greenberg, the Tucson Women's Clinic,
17 Planned Parenthood versus Lewall, Asti Local 1533 versus
18 Cheney and AFL-CIO versus HUD.

19 So, either they're facial challenges or there
20 was some injury that conferred standing: For example, in the
21 Crawford case, it was an appeal from the imposition of a fine
22 for not putting the Social Security number on the form.

23 In the Doe versus AG case, it was a challenge
24 to a refusal to continue to send business to a doctor who had
25 AIDS.

1 In the Thorn case the plaintiff had actually
2 not gotten hired after the consideration of that entries of
3 polygraph.

4 In U.S. V Westinghouse, it was an action to
5 enforce a subpoena. In the Norman-Bloodsaw case, the blood
6 in urine samples had actually been taken and additional tests
7 had been performed. So in all of those, there was an injury
8 that conferred standing.

9 **THE COURT:** That is troublesome here. We are
10 anticipating an injury on the 27th.

11 All right, does anyone else have anything
12 they wish to add?

13 **MR. HOLSCHER:** Yes, Your Honor. Very briefly.
14 Mark Holscher for Caltech.

15 First, our understanding of behalf of our
16 employees is, that this current waiver is not a waiver. It
17 is a release. It's been described by the plaintiffs as a
18 waiver; that, in fact, if you look at the plaintiff's Reply
19 Brief, at page 4, this is Joint Reply Brief, at page 4, line
20 20, the SP-85 -- sorry, the SF-85-P, the more intrusive
21 questionnaire, they conceded, quote: No waiver of privacy
22 rights was at issue. That's the exact same authorization for
23 records here, although it's more intrusive questions because
24 it's a public trust position.

25 No Caltech employee, in our view, is waiving

1 any privacy rights or constitutional claims by signing this
2 authorization. Similarly, it is our understanding of the
3 law, Your Honor, that the government must comply not only
4 with the Privacy Act but with HIPAA if they're ever to seek
5 medical records, and it is our position at Caltech that our
6 employees by signing an authorization that is specifically
7 limited to verifying the information on the form and doing a
8 background check, that that authorization is not a waiver of
9 their Constitutional Privacy Act claim or their substantive
10 Privacy Act claim.

11 I expect, Your Honor, we may be here at some
12 point as an amicus on behalf of our employees if this case
13 ever becomes ripe.

14 As we sit here today, 4100 of our fine staff
15 have begun this process, filled out the form. As we sit here
16 today, we're not aware of a single medical record that was
17 attempted to be taken from any of their files. We're not
18 aware of any improper question from the chart. And, Your
19 Honor, we share your concern and the plaintiffs' concern
20 about the chart.

21 To be clear, we were pleased to hear the
22 government say that they recognize what President Clinton
23 enacted into law several years ago; and I believe what we
24 heard was an implicit concession or recognition that to ask
25 our employees personal questions about personal sexual

1 activity for our staff that are viewed as low-risk, I think
2 they understand that there is constitutional implication
3 there.

4 But today we have a form, we're not aware of
5 any reference of being asked an improper question, and I was
6 not being sarcastic in the brief when I said each of the
7 plaintiffs could have chosen each other as their references
8 to self-select in terms of attesting for their good
9 character.

10 So, where we are today, Your Honor, and your
11 question of ripeness was exactly on point, is that our
12 employees have been asked to fill out this form.

13 Like the Fifth Circuit National Treasury
14 case, where the plaintiffs, themselves, concede there has
15 been no waiver of privacy issues, it is Caltech's view of the
16 law, for what it's worth to Your Honor, that this
17 authorization that NASA is seeking is not a waiver either.
18 It's the exact same form that the plaintiffs analyzed in
19 their brief.

20 **THE COURT:** I have to admit, I'm not following
21 that. You've said it a couple of times. I'm just not
22 following it. As it stands right now, no one has got access
23 to any of our medical records, right?

24 **MR. HOLSCHER:** Correct.

25 **THE COURT:** Absent us signing a written

1 authorization --

2 **MR. HOLSCHER:** Correct.

3 **THE COURT:** -- giving up our privacy interests in
4 our medical records.

5 **MR. HOLSCHER:** Correct.

6 **THE COURT:** Well, isn't that a waiver of our right
7 of privacy and confidentiality in our medical records?

8 **MR. HOLSCHER:** This release does not permit anyone
9 to get medical records.

10 **THE COURT:** Well, all right. So, then there may
11 be additional release that is required.

12 **MR. HOLSCHER:** Your Honor, if an additional
13 release were required of an individual who works at JPL, then
14 Mr. Stormer may have a right claim to come before Your Honor
15 and say they're asking for this medical record that's
16 unrelated to my background or security. At that point, you
17 have a right claim to that person, Your Honor, for you to
18 evaluate the legitimate interest the government has put
19 forward versus the privacy.

20 But that's not where we are today. Today we
21 have 4100 people processed, and there is not a single shred
22 of evidence before Your Honor that any improper question that
23 was on this issued chart -- and, again, we share more of the
24 plaintiff's concerns and the Court's concern than I think our
25 staff recognizes to date, and as we stand here today, there

1 is not a ripe claim.

2 Let me talk about the Thorn case briefly,
3 which they've relied on for standing. I urge you to read the
4 Thorn case before you decide.

5 **THE COURT:** Thorn versus El Segundo?

6 **MR. HOLSCHER:** Yes.

7 **THE COURT:** Cite?

8 **MR. HOLSCHER:** The cite, Your Honor, is 726 F.2nd,
9 459.

10 **THE COURT:** All right, thank you.

11 **MR. HOLSCHER:** And what you see in that case, Your
12 Honor, was a woman who was applying to be a police officer in
13 El Segunda, and a police officer put her through a horrible,
14 quote, polygraph, with two hours of very offensive
15 questioning about her personal sexual conduct, about a
16 miscarriage, about a personal relationship she had before she
17 was thinking of joining the department, and passed that
18 information to the chief of police and others, and it was
19 awful. That was a ripe claim.

20 Questions that directly went to core privacy
21 interest as the Ninth Circuit has recognized were asked of
22 this women. She came before Judge Real, asked for relief.
23 Judge Real denied it, and the Ninth Circuit found that those
24 questions were improper, that there was a -- she had a
25 legitimate privacy interest in not having those questions to

1 be asked.

2 And if you look at the facts in Thorn versus
3 where we are, it's the equivalent of someone coming before
4 Your Honor and saying: I am applying for a job. I'm afraid
5 that someone may ask this question; but 4100 people have
6 submitted this before me, and not one of them has had the
7 improper question asked so far.

8 Your Honor, I know that you wanted us to wrap
9 up, but --

10 **THE COURT:** No, don't worry about that. I've been
11 waiting on this for weeks, and we want to get it right. And
12 the input of all you, able counsel, is appreciated.

13 I am quite interested in all the plaintiffs
14 here as I am in the security of this country. I don't want
15 any more intrusiveness than is necessary.

16 **MR. HOLSCHER:** Your Honor, on behalf of Caltech,
17 you know, we agree with what I hear Your Honor expressing,
18 that some of the suitability factors, particularly those in
19 Paragraph 11, the first two bullet points regarding personal
20 sexual behavior, and in our view, it's hard for us to imagine
21 the government coming up with any basis for those being
22 rationally related to a legitimate interest.

23 And the Thorn case which I urge you to read
24 for the ripeness, which I think requires denial of the
25 preliminary injunction against NASA -- as for us, we're not a

1 state actor.

2 In some ways, Your Honor, the Caltech
3 decision is an easy decision, I submit. I think when you
4 look at the plaintiffs' separate Reply, you'll see, once you
5 see the Sutton holding, we're not a state actor; we really
6 are -- and I was not being facetious -- there is a
7 possibility we could reemerge after being dismissed on behalf
8 of our scientists saying: We don't want questions in No. 11
9 asked of our staff, and we need to see a justification for
10 the medical records.

11 But as we sit here today, Your Honor, I think
12 Thorn both proves that this case is not ripe, but also, Your
13 Honor, holds, I believe, looking down the road, not a basis
14 for a preliminary injunction but that NASA should be quite
15 careful because Thorn has clear language that private,
16 personal conduct unrelated to work is almost never going to
17 be related to a legitimate interest.

18 Thank you, Your Honor.

19 **THE COURT:** All right. And thank you, counsel. I
20 appreciate it.

21 I didn't ask you, Mr. Stormer -- I know you
22 had to put this together quickly, and I know you cast your
23 net broadly, and I'm not sure you want to keep all the
24 defendants you've named, and I would imagine you would
25 probably be abandoning your Fourth Amendment claim and

1 certainly your Fourteenth Amendment claim and the claim under
2 the California Constitution, you may end up amending it to
3 your complaint at least to add a First Amendment claim.

4 But I'm still troubled by the issue of
5 whether or not this case is ripe at this time; however, I
6 would love to hear from you.

7 **MR. STORMER:** I'll be brief, Your Honor.

8 **THE COURT:** No, just be effective.

9 **MR. STORMER:** Your Honor had said earlier, there
10 is an injury which will take place on October 27th.

11 **THE COURT:** Maybe.

12 **MR. STORMER:** And, in fact, under the pleading
13 standard that has developed, the pleading standard for
14 purposes of a preliminary injunction is whether or not you
15 have pled an injury in fact, and what the cases said, no more
16 is required than the allegation that the challenged official
17 action has caused the plaintiff injury in fact, economic or
18 otherwise.

19 And the injury that we are pleading is the
20 loss of the Constitutional Right. And for purposes of a
21 preliminary injunction, once we have pled that, we just have
22 to show that the injury is imminent, and we really don't have
23 to go further than pleading that there is an injury, and the
24 injury is imminent and that the Court can intercede, assuming
25 we meet all of the other standards and prevent that loss.

1 It is to preserve the status quo ante. That
2 is what we have right here, right now, which are our clients
3 not waiving their rights and them not losing their jobs.

4 One of the -- the U.S. V Westinghouse case
5 which we cite addresses this quite clearly. It's a third
6 circuit case. So, I really think that in assessing this, one
7 needs to look at the U.S. V Westinghouse case and the whole
8 concept of injury in fact, and for purposes of a preliminary
9 injunction looking at the prevention of an imminent harm.
10 That, really, is on the issue of ripeness.

11 Ms. Keeny has another area that, with Your
12 Honor's permission, would like to address.

13 **THE COURT:** Certainly.

14 **MS. KEENY:** A specific comment, first, with
15 respect to the issue of an appeal, this goes to the ripeness
16 question, under NASA's rules as it appears as Exhibit 3 to
17 the request for judicial notice filed by plaintiffs, is the
18 Interim Directive 1600.1 at page 20, it makes clear that for
19 contractors, while there is some sort of brief appeal, has to
20 happen very quickly, it's an appeal to federal employees
21 only, and the decision of the panel is final. Further review
22 of the access appeal panel's decision is not provided for nor
23 allowed.

24 So, it's not a true appeal right if there is
25 no outside arbiter to turn to other than basically the people

1 who are doing the security investigation and making this
2 suitability determination.

3 **THE COURT:** Are you saying now that for the
4 purposes of at least NASA's Interim Directive 1600.1 that the
5 Caltech employees, Caltech-JPL employees, would not be
6 considered federal employees?

7 **MS. KEENY:** That's right, Your Honor. And, in
8 fact, it divides, it's a NASA directive, distinguishes
9 between the process that is granted to those who are federal
10 civil service employees and those who are contractors.

11 The federal employees have a civil service
12 review with the attendant due process; the contractors have
13 something that is far less.

14 **THE COURT:** And what is that far less?

15 **MS. KEENY:** Well, it's -- sorry, just lost the
16 page.

17 It is an appeal to three people: An attorney
18 from the Office of General Council, someone from the Center
19 Management, and an employee from the Center Office of
20 Security. Those are your -- and I'm not exactly sure who
21 those individuals are. Perhaps it's explained elsewhere in
22 here, but they are certainly not anyone outside of the agency
23 that's actually making the determination.

24 And it doesn't even permit Caltech, even if
25 it wanted to protect some of these employee, they're not part

1 of the appeal process dispute their protestations that they
2 share mutual interest in many ways. So, I did want to bring
3 the Court's attention to that provision.

4 With respect to counsel's -- Caltech
5 counsel's comments that the release is a narrow one, if it
6 was a narrow one, perhaps we would have no complaints about
7 it. If all they were really trying to do was determine
8 whether or not someone had actually worked at the jobs, lived
9 at the residences or gone to the schools they went to, the
10 waiver could be narrowly defined to just seek those records,
11 basically confirm employment, confirm education.

12 Rather, the way it's written, it would permit
13 NASA to send out the release and get all of their school
14 records from anyplace they attended or to get their personnel
15 files. And we all know that both of those types of files
16 usually contain huge amounts of personal information, often
17 even going beyond the individual employee or student, to
18 their family, et cetera.

19 So, it is a broad release, and it is a
20 release that they're being required to sign by October 5th,
21 and that release gives the government the right to get, to
22 obtain from any source huge amounts of information. And the
23 government in its Opposition brief admitted, that the Relief
24 form must allow the investigators some flexibility to follow
25 up on leave.

1 So they have indicated that they do intend to
2 use it to gather information. It's not just a release
3 they're obtaining and putting in a file; it's a release, a
4 very broad release that they fully intend to use. And the
5 fact that they have stated they were going to use it is
6 further irreparable harm that will occur on the 5th.

7 And I would also draw the Court's attention
8 to everyone that's being required to disclose whether or not
9 they've used drugs and whether or not they've had any
10 treatment for drugs in the past years. And I think it's
11 unquestioned that that information, in and of itself, being
12 required to answer that question requires the employee to
13 give up the Constitutional Right, whether you want to
14 describe it as a privacy or a Fifth Amendment right, they
15 have to answer that question by the 5th, which is no
16 different than requiring that they submit to drug testing by
17 the 5th, or lose their jobs.

18 And we understand and appreciate Your Honor's
19 concern about maintaining the security of important
20 facilities. I think every one of our clients shares those
21 concerns, but the government clearly has to come back with a
22 more sufficient and compelling showing than is done in this
23 case.

24 In this case the government, all it did was,
25 it said: These are federal facilities, and it's possible

1 that one of these people could come close enough to one of
2 these federal buildings that it could cause a risk.

3 And we submitted the declaration of Mr. Duren
4 who is a senior engineer at JPL, who describes that these are
5 federal facilities, yes; but they operate more like an open
6 university campus in a federal facility.

7 There are no metal detectors. They're open
8 to the public with incredible liberality. They're, you know,
9 there is a weekend where 50,000 -- I don't know, tens of
10 thousands of people walk through the facilities with
11 literally no security checks being performed. So that the
12 security at JPL may be less than at this courthouse.

13 And the fact that they have now come in and
14 just say the words national security and think that that's
15 sufficient to justify invading Constitutional Rights, the
16 courts hold otherwise.

17 And we would ask Your Honor to consider and
18 read the case of Kole V Young, which we cited only in the
19 Reply brief, and it's an old case from the '50s, and it
20 considered, however, a similar time when the country was
21 facing, you know, the fear of, the spread of Communism, and
22 the court had to consider whether employees who were in
23 non high-risk positions could be summarily terminated if they
24 associate with Communists.

25 **THE COURT:** Did anybody else out there take

1 offense to the '50s being characterized as old?

2 (Laughter.)

3 **THE COURT:** What's the citation?

4 **MS. KEENY:** I'll get it for you. I didn't bring
5 it up.

6 **THE COURT:** It's okay.

7 **MS. KEENY:** But it's an interesting and important
8 case --

9 **THE COURT:** One other question -- I'd hate to
10 interrupt you, but there is some things that I'm interested
11 in, and I know there's things that you're interested in
12 saying, but what is the question number on the application of
13 the SF-85 as to whether the applicant has used illegal drugs
14 in the past year? The question number, if you know.

15 **MS. KEENY:** While I'm looking for that, I'll give
16 you the cite of Kole V Young. It's 351 US 536.

17 **THE COURT:** All right, thank you.

18 **MS. KEENY:** And the question is, Question 14.

19 **THE COURT:** All right.

20 **MS. KEENY:** And it appears in numerous places, but
21 the whole form is attached to our Complaint and Summons as an
22 exhibit.

23 So, just to quickly -- Your Honor can draw
24 your own conclusions; but the court there, you know, though
25 considering, I would submit, more serious national security

1 concerns then than now, or certainly equal serious concerns,
2 held that the federal government could not simply say because
3 of national security we can subvert the rights or change the
4 rights that are accorded our employees.

5 And the court said, well -- and the court
6 basically held, you have to scrutinize very carefully
7 whether, in fact, this employee is in a position to hurt
8 national security; and in that case it was a Food and Drug
9 inspector, I believe; and the court said they simply do not
10 impact national security.

11 And so even though that employee, there was
12 good evidence that he was associating with Communists,
13 whatever the evidence was, the court said they cannot
14 summarily dismiss him. He is entitled to full rights.

15 And we would submit that in the current, you
16 know, post 911 environment, this Court has to scrutinize just
17 as carefully the justifications put forth by the government
18 about national security, and that in this case, the
19 defendants just haven't met that burden.

20 If the Court has additional questions, I
21 would happily answer them; otherwise I think I --

22 **THE COURT:** No, these good people are on pins and
23 needles wondering -- I'm sure they've already filled out the
24 questionnaire but wondering whether or not they're going to
25 have to submit it by the end of the week.

1 I'll tell you what I'm inclined to do. It is
2 not what I was inclined to do when this hearing started, and
3 this is subject to change after I go and take a look at some
4 of the cases that counsel have cited.

5 I'm inclined to grant the preliminary
6 injunction in part, and that is only with respect to
7 Question 14, and deny it in all other respects, and set a
8 hearing for October 19th, 3:30 as to whether or not a
9 permanent injunction should issue.

10 We will get something out in writing as
11 quickly as possible, certainly before the 5th. All right?

12 Thank you, all.

13 **COURT CLERK:** This court is in recess.

14 - - -

15 (Proceedings concluded at 5:09 p.m.)

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C E R T I F I C A T E

I hereby certify that the foregoing is a true and correct transcript of the stenographically recorded proceedings in the above matter.

Fees charged for this transcript, less any circuit fee reduction and/or deposit, are in conformance with the regulations of the judicial conference of the united states.

10/06/2007

Anne Kielwasser, CSR, RPR
Official Court Reporter

Date