No. 07-56424

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

vs.

National Aeronautics and Space Administration,
an Agency of the United States, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
For the Central District of California

OPPOSITION TO PETITION FOR PANEL REHEARING EN BANC

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INTRODUCTION AND SUMMARY

The federal defendants utterly fail to justify their request for rehearing *en banc*. The decision of the Ninth Circuit panel in this case (Thompson, Wardlaw and Reed) in no way undermines the government's ability to conduct *all* reference checks, as defendants sweepingly assert, but instead focuses narrowly on certain aspects of the challenged background investigation process which are excessively intrusive and unjustified for workers in non-sensitive or low risk positions. Relying on well-established precedent from this Circuit and the Supreme Court, the panel found constitutionally protected privacy interests threatened by several steps in the investigation process: the requirement that the worker disclose drug use and treatment; the broad release that the worker must sign, giving the government unrestricted access to information from any source; and the requirement that all references, landlords and prior employers provide highly personal information about the individual's "financial integrity," "mental or emotional stability," "general behavior or conduct, " or any other adverse information. The fundamental rights at stake and the lack of legal or factual justification for encroaching upon them under the circumstances presented here fully support the panel's conclusion that plaintiffs were likely to prevail on their claims under the United States Constitution. Moreover, contrary to defendants' assertion, the panel's decision does not create any conflict with decisions in the D.C. and Fifth Circuit, as no circuit has examined the background investigation and forms at issue here.

The panel was also fully justified in concluding that the background investigation process violates the Administrative Procedures Act. The panel considered each of the statutory bases offered by defendants to justify imposing a broad background investigation and suitability determination on low risk workers. None of the statutes or executive orders advanced by the defendants came close to authorizing such a process for these workers. While the government may believe that it is entitled to take any step to investigate its citizens or those who work for it on any program, such investigation must be grounded in a legal mandate. Without legal authority, an agency such as NASA in implementing an intrusive background investigation acts outside of the law and its conduct properly may be enjoined.

FACTUAL STATEMENT

Defendant National Aeronautics and Space Administration ("NASA") was created by Congress in 1958 as a purely civilian agency, dedicated to the exploration of space for "peaceful purposes for the benefit of all mankind." Pub. L. 85-568, § 102, 72 Stat. 433. California Institute of Technology ("Caltech") is a non-profit educational institution and one of the premier research institutes in the world. JPL is an operating division of Caltech, staffed entirely by Caltech employees. Excerpt of Record ("ER") 1210-1213. JPL's physical facilities are owned by NASA. (*Id.*)

The plaintiffs in this action are scientists, engineers and administrative support personnel employed by Caltech to work at the JPL facility on NASA programs, all of

whom have been designated by NASA as "low risk" or "non sensitive" employees. ER 1248, 1444, Exh. 10; Exh. 11, at 266. None of them have security clearances nor do they work with classified material of any kind. (*See, e.g.* ER 1371.) Many of the plaintiffs only agreed to work for NASA with the understanding that they would not have to work on classified materials or obtain security clearances. (*See, e.g.* ER 1221.) All research data collected from NASA missions and instruments are in the public domain, and plaintiffs' scientific findings are freely shared with the scientific community and the public. (*See, e.g.* ER 1424.) Indeed, many of the plaintiffs have elected to do only non-classified work so that their research is subject to peer review, and so that they can "collaborate with the best scientists worldwide and publish [their] results. Because of this deliberate policy, NASA attracts many of the world's top scientists who want to do research in a completely open environment." ER 1406.

The JPL facility does not operate in any way like a secure government facility but rather prides itself on the openness of its campus and the streams of visitors it hosts every day. ER 0145-0149. "As an extension of Caltech," one engineer notes:

> JPL is a unique combination of academia and government. JPL has always operated more as a university campus type environment than as a high security government facility and continues to do so to this day.. . . JPL has instituted [only] limited physical security precautions. For example, there are no metal detectors, no inspection of handbags, and vehicle inspectors are cursory and for cars, only conducted randomly. . . . Many [] personnel including students and others who work part-time or only on lab several months per year, are only required to submit to a NAC check before being granted unescorted access to the lab including

computer access. This includes foreign nationals." ER 0145-0147.[1]

On August 27, 2004, President Bush signed Homeland Security Presidential Directive 12 (HSPD-12), entitled "Policy for a Common Identification Standard for Federal Employees and Contractors," applicable to all Executive Branch departments and agencies. HSPD-12's stated purpose is to ensure that "secure and reliable forms of identification" are used by government employees and contractors. HSPD-12 directed the Department of Commerce to promulgate a Federal standard for "secure and reliable forms of identification." Nowhere does HSPD-12 require or authorize implementation of a background investigation process for employees of contractors or even current or new federal employees.

In response to HSPD-12, in March 2006, the Department of Commerce promulgated a standard entitled "Personal Identify Verification (PIV) of Federal Employees and Contractors," codified at FIPS PUB 201-1. The PIV standard explained that its sole authority was based on HSPD-12. While stating that it sought to meet the criteria for forms of identification set forth in HSPD-12, the PIV standard proceeded, without explanation, to impose a background investigation requirement on all employees. The standard further specifies that the background investigation required will be a "National Agency Check with Inquiries," or its equivalent, for which each applicant will be required to complete Standard Form (SF) 85, "OPM

[1] All low risk contractors at JPL, including plaintiffs, have submitted to a NAC check, which is minimally intrusive and not challenged here.

Questionnaire for Non-Sensitive Positions," or its equivalent. ER 0856, 0903.

Working separately to respond to HSPD-12, in 2006 NASA had instituted an identification badge system (the OneNASA badge), which could be used at all NASA facilities. ER 0969-0970, 0974-0977, 1004-1014. To obtain this badge, JPL employees were required to provide basic personal information, submit two forms of approved identification, and submit to fingerprinting. *Id*. None of the forms required that JPL employees waive their privacy rights in any way. *Id.* Plaintiffs had no objection to this process, which fully met the objectives of HSPD-12.

Nonetheless, NASA ultimately rejected the OneNASA badge and imposed the NACI background investigation on all low risk personnel. The first form at issue here, SF 85, requires various background information to which plaintiffs do not object, e.g., name, date of birth, place of birth, social security number, etc. The form also requests information regarding the applicant's drug use history, as well as "treatment and counseling" for the same. A 25. Applicants are also required to sign, as part of SF 85, an extremely broad "Authorization for Release of Information," which authorizes the agency to collect "any information relating to my activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information." *Id.*, p. 6.

Each of the applicant's references, employers and landlords are then sent an "Investigative Request for Personal Information," Form 42, which asks whether the recipient has "any reason to question [the applicant's] honesty or trustworthiness" or

has "any adverse information about [the applicant's] employment, residence, or activities" concerning "violations of the law," "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," "general behavior or conduct," and "other matters." ER 0966-0973, 1024-1025.

This information is then analyzed as part of a suitability adjudication to determine the individual's eligibility for access to the facility (and thus for employment). ER 0518-0519. The evaluative criteria include, *inter alia*: "delinquency in meeting financial obligations," "sexual misconduct with impact on job," "carnal knowledge," "sodomy," "attitude," "homosexuality," "judgment, reliability and dependability issues," "physical health issues," and "mental, emotional, psychological or psychiatric issues," ER 1332-1342.

LEGAL ARGUMENT

I. The Panel Properly Found Plaintiffs Likely to Prevail on their Constitutional Challenge to The Background Investigation

The district court below, the emergency motion panel which issued an injunction pending an appeal, and the regular panel which ordered a preliminary injunction all found that serious privacy concerns were raised by the breadth of the background investigation imposed by NASA. A13; A 22. Defendants basically raise four arguments in seeking *en banc* review, each of which was properly rejected by the panels below: 1) that the information sought here is not of a fundamental nature akin to marriage, procreation and contraception and so is not entitled to protection

from government inquiry; 2) that privacy protections only come into play when information is disclosed *by* the government, as distinct from situations where individuals are compelled to disclose information *to* the government; 3) that the panel's decision conflicts "starkly" with decisions of the D.C. and Fifth Circuits rejecting privacy-based challenges to similar background checks; and 4) that NASA has justified this intrusion into these workers' privacy rights.

Defendants' argument that the Constitution does not protect any information which does not fall within the narrow confines of material related to an individual's health, family or procreative activities ignores well established law. As the panel below found, the requirement that applicants disclose drug use, treatment or counseling invades reasonable expectations of privacy in medical history, citing *Skinner v. R.R. Labor Executives Ass'n*, 489 U .S. 602, 6127 (1989). The panel further found that the information sought by Form 42 – which solicits any adverse information concerning "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability" and "other matters" – implicates the right to informational privacy, citing *In re Crawford*, 194 F.3d 959 (9th Cir. 1999). This decision is supported by many cases expanding the right to privacy beyond the realms of sexual and health matters. *See, e.g. Crawford*, 194 F.3d 954, 959 (9th Cir. 1999) (right to privacy extends to social security numbers; *Barry v. City of New York*, 712 F.2d 1554, 1562-63 (2d Cir. 1983) (financial reports); *Plante v. Gonzalez,* 575 F.2d 1119 (5th Cir. 1978) (officials' privacy interest in their financial affairs).

Defendants' reliance on *Washington v. Glucksberg,* 521 U.S. 702, 720, 722 (1996), which considered Washington's assisted-suicide law, is misplaced. The court there considered the expansion of legal concepts of substantive due process, not the right to privacy. Further, with respect to assisted-suicide, there was a long common law tradition condemning and penalizing such conduct. There is no common law equivalent requiring disclosure of private facts to the government.

Defendants' assertion that information about an individual's drug use, counseling and treatment is unprotected and must be divulged to the government upon request is unsupportable. The concept that an individual's zone of privacy covers even such matters as drug use has long been recognized and forms the foundation of the many cases overturning government drug-testing programs. Indeed, the courts are adamant that requiring drug testing of public employees is only justified for a relatively small subset of employees who are in "safety sensitive" positions. *See, e.g. Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989) (upholding drug testing of employees in positions directly involving the interdiction of illegal drugs, or positions that require the incumbent to carry a firearm but questioning reasonableness of such testing for employees in non-sensitive positions.)[2] *See also Skinner,* 489 U.S. at 617 (individual's reasonable expectations

[2]*See also Harmon v. Thornburgh*, 878 F.2d 484 (D.C.Cir. 1989) (preventing DOJ from drug testing all federal prosecutors and employees with access to grand jury proceedings while allowing testing only for those with security clearances); *Am. Fed. of Gov't Employees v. Derwinski*, 777 F. Supp. 1493 (N.D.Cal. 1991) (enjoining random testing of employees who are not in safety-sensitive positions).

of privacy in their medical history includes information about drug use). If defendants cannot constitutionally subject these non-sensitive personnel to drug testing, they also cannot require such personnel to disclose information about drug use or treatment on pain of losing their jobs.

That medical information is covered by the fundamental right to privacy cannot be seriously disputed, further undermining defendants' claim that the panel's decision unnecessarily expands constitutional protections. The background investigation clearly requires that plaintiffs disclose medical information. Not only does SF 85 require that plaintiffs disclose whether they have received any treatment for drug use, Form 42 expressly seeks medical information, requiring individuals to disclose any information relating to the applicant's "mental or emotional stability." (ER 0966-0973, 1024-1025, 1536.) In their brief on appeal, the federal defendants reiterated that they intended to seek information about an individual's mental health and to use such information to bar individuals from JPL. (Defs. Brief, at 39.) The panel's conclusion that such information was entitled to constitutional protections falls well within the ambit established by prior case law. *See, e.g. Skinner,* at 617*;* U.S. *v. Westinghouse Elec. Corp*., 638 F.2d 570, 574 (3d Cir. 1980).

Defendants' argument that plaintiffs cannot establish a constitutional violation without showing that the government intends to disclose private information to third parties also fails. The panel properly rejected this argument, relying on *Thorne v.*

City of El Segundo, 726 F.2d 459 (9th Cir.1983), in which this court considered pre-employment questions directed to a police department applicant as part of a polygraph examination. The court held that questions into the applicants' private, off-duty personal activities violated constitutional guarantees of privacy; it was irrelevant to the court's analysis that the information remained internal to the agency. *Id.* at 471. Similarly, in *Nat'l Treasury Employees Union v. U.S. Dept. of Treasury,* 838 F. Supp. 631, 637-38 (D.D.C. 1993), the court found that plaintiffs had demonstrated the likelihood of prevailing on the merits of their claim that requiring them to fill out a very similar form (SF-85P) violated their right to privacy, regardless of whether the information would subsequently be disclosed to any third party. The court held that disclosure to the government alone was sufficient:

> there is an obvious threat of significant harm if the plaintiffs are forced to disclose this information to the Customs Services. Obviously, *once this type of highly personal information is disclosed to the government, the revelation cannot be undone.* As plaintiffs correctly point out, "the injury is the threatened loss of constitutional rights. That injury occurs when plaintiffs are forced to choose between revealing their constitutionally protected information by submitting completed forms and preserving their rights at the cost of possible further discipline or discharge." *Id.* at 640.

There is also no conflict between the panel's decision and decisions from the D.C. and Fifth Circuits. *American Federation of Gov't Employees, AFL-CIO v. Dept. of Housing & Urban Devel.,*118 F.3d 786 (D.C.Cir. 1997), considered whether employees in *sensitive public trust* positions, as distinct from the low risk, non-sensitive positions here, could be required to disclose drug use as part of an

employment application.[3] The D.C. Circuit's decision that the government can require such disclosure creates no conflict with the panel's decision, as the latter considered a very different question: whether such questions could be posed to *low risk* employees. Similarly, *National Treasury Employees Union v. U.S. Dept. of the Treasury*, 25 F.3d 237 (5th Cir. 1994), only considered the limited question whether employees in public trust positions could be required to disclose prior drug use.

Finally, the panel properly found that the government had not sufficiently justified the intrusive aspects of the background investigation: questions regarding drug use and treatment; the open-ended waiver giving the government access to all information about the applicant from any source; and the questions posed to all references, landlords and prior employers on Form 42. Defendants' justification remains completely without substance or support. The primary factual basis for requiring this background investigation, as stated by defendants, is that contractors may get "very close to facilities where sensitive . . . work is conducted." (Defs. Pet., at 12.) Defendants admit that plaintiffs and other non-sensitive employee at JPL cannot "actually enter the buildings where sensitive or classified work is conducted." (ER 766.) Yet thousands of visitors regularly have access to JPL *without any type of background investigation* and can get just as "close" to buildings as the long-term JPL employees involved in this case. (ER 0145-0149.) If the government could

[3] "A public trust position is one 'involving policy making, major program responsibility, law enforcement duties, or other duties demanding the highest degree of public trust.'" *Id.*, at 788.

justify requiring an intrusive background investigation of anyone who can get "close" to a federal facility, it would reduce the requirement that the government establish a legitimate need to a nullity. On this slim evidentiary showing, the panel properly found that defendants had not established a legitimate need for the private information sought as part of the background investigation.

II. The Panel Properly Found that Defendants' Conduct Violated the APA

Defendants' advanced three statutory and regulatory sources allegedly authorizing the imposition of background investigations on contract employees at JPL: HSPD-12, the Federal Information Security Management Act ("FISMA") and the Space Act. The panel correctly determined that none of these executive or legislative acts authorized the broad background investigations at issue here. HSPD-12, while authorizing an identification card for workers, nowhere discussed a background investigation involving the types of questions imposed by SF 85 and Form 42. While FISMA gives the Secretary of Commerce authority to "prescribe standards and guidelines pertaining to Federal information systems," 42 U.S.C. Sec. 11331(a)(1)(2002), the NACI requirement and suitability determination could not in anyway be construed as protecting a federal information system. As the court noted, "the background investigations are required of all JPL personnel, whether or not they have access to information systems, and therefore cannot be entirely justified, if at all, by FISMA." The panel found NASA's reliance on HSPD and FISMA further suspect because NASA claimed on appeal that the "decision to require at a minimum a NACI

for NASA contractor employees dates back to the 2000 to 2001 time frame," well before passage of FISMA in 2002 or HSPD-12 in 2004. A11.

The panel's decision in rejecting HSPD-12 and FISMA as authority for the NACI check for contractors at JPL was fully justified. With respect to FISMA, that statute on its face does not contemplate any type of investigation of employees and certainly not the far-reaching investigation implemented here. FISMA does not mention any standards with respect to hiring or employment, nor does it make mention of background investigations or suitability determinations. At most, it authorizes a physical security system for the technical maintenance of data. HSPD-12 likewise only authorizes creation of a "secure and reliable form[] of identification," not a background investigation, collection of private data, and suitability analysis.

The panel also properly concluded that the Space Act did not authorize the broad background investigation contemplated here for low risk contractors at JPL. While the Space Act does authorize the NASA Administrator to establish security requirements as "he deems necessary in the interests of the national security," the panel held that the latter phrase had to be interpreted in light of *Cole v. Young*, 351 U.S. 536 (1956). In that case, the Supreme Court analyzed a similar statute which allowed the government to summarily dismiss certain employees when "deemed necessary in the interest of the national security." *Id.* at 538. Interpreting the term "interests of national security" in this very similar act, the Supreme Court had concluded that Congress only intended such employment measures to apply to

employees in sensitive positions. The panel agreed with appellants that the use of identical language in the Space Act so soon after *Cole* strongly suggested that Congress expected the term "national security" to be similarly construed in the context of security measures at NASA. Because the plaintiffs occupied non-sensitive positions, the court concluded that the Space Act's language could not be used as the basis for requiring sweeping background investigations of such employees.

Defendants' efforts to distinguish *Cole* are unavailing. Congress did include the "identical limiting language" at issue in *Cole* in the Space Act. The Act under consideration in *Cole* provided that the heads of various enumerated agencies, "may, in his absolute discretion and when deemed necessary *in the interests of national security*, suspend without pay, any civilian officer or employee of [those agencies.]" Public Laws, 64 Stat. 476 (1950). The Space Act provides: "The Administrator shall establish such security requirements, restrictions, and safeguards as he deems necessary *in the interest of the national security*." It is this limiting language that *Cole* considered and which the panel properly found must limit NASA's actions here.

The cases cited by defendants do not undermine the panel's reliance on *Cole*. *Carlucci v. Doe*, 488 U.S. 93, 102 (1988), considered the termination of an individual with access to classified information. Not surprisingly, the court held that because his continued access to such information could "cause serious damage to the national security" that *Cole*'s termination procedure for non-sensitive employees did not apply. *Vitarelli v. Seaton*, 359 U.S. 535, 538-39 (1959), approves the decision in

Cole, holding that the Act of 1950 did not apply to government employees in positions not designated as "sensitive," but concluded that *Cole* was irrelevant to the situation before it, as the government had issued regulations providing *more* protections for employees in plaintiff's situation when they were dismissed for "security reasons." Those courts to consider the legacy of *Cole* have concluded that it precludes in-depth background investigations of non-sensitive personnel. *Flake v. Bennett*, 611 F.Supp. 70, 75-77 (D.D.C. 1985)(pursuant to *Cole* Department of Education may not impose a security investigation requirement on applicants for a position that does not implicate national security concerns).

Finally, defendants' assertion that the panel gave inadequate deference to NASA's interpretation of its enabling statute fails. Agencies are not lawmakers and cannot create legal mandates from whole cloth. *See, e.g., Kurzner v. United States*, 413 F.2d 97 (5th Cir. 1969). Judicial review of an agency's observance of law is far more exacting than review under the "arbitrary and capricious" standard employed for review of agency fact-finding under the APA. *See ACEMLA v. Copyright Royalty Tribunal*, 763 F2d 101 (2d Cir. 1985). An agency must desist from widening the mandate of the existing law to create new rights or obligations. *Brungart v. BellSouth Telecomms., Inc.*, 231 F.3d 791, 796 (11th Cir. 2000).

DATED: March 26, 2008

Respectfully Submitted,
HADSELL & STORMER

By _____
Virginia Keeny

CERTIFICATION OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

No. 07-56424

Appellant certifies that this brief complies with the type-volume limitation pursuant to the Circuit Rule 35-4 and 40-1, because it uses a proportionally spaced font with a typeface of 14 points and contains 3,787 words, as calculated by WordPerfect 11, the word-processing system used to prepare the brief.

DATED: March 26, 2008

Respectfully submitted,
HADSELL & STORMER, INC.

By _____
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STATEMENT OF RELATED CASES

No. 07-56424

Because the order on review is interlocutory, the matter is still pending before the district court, Nelson v. NASA, CV-07-05669. (C.D. Cal.).

PROOF OF SERVICE BY MAIL
(FRCP 5(b))
(FRAP 25(c,d))

I, the undersigned, say: I am employed with the law corporation of Hadsell & Stormer, whose address is 128 North Fair Oaks Avenue, Suite 204, Pasadena, California 91103; I am not a party to the within cause; I am over the age of eighteen years and I am readily familiar with Hadsell & Stormer's practice for collection and processing of correspondence for mailing with the United States Postal Service and know that in the ordinary course of Hadsell & Stormer's business practice the document described below will be deposited with the United States Postal Service on the same date that it is placed at Hadsell & Stormer with postage thereon fully prepaid for collection and mailing.

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Telephone: (415) 556-9800

XX I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 26, 2008, at Pasadena, California.

Yuritzy Anaya
Declarant

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XX I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 26, 2008, at Pasadena, California.

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