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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

National 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.

Case No. CV-07-05669 ODW(VBKx)

[Assigned to the Honorable Otis D. Wright II - Courtroom 11]

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT FOR PRELIMINARY INJUNCTION

Date: September 24, 2007
Time: 1:30 pm
Courtroom: 11

[*Plaintiffs' Declarations and Exhibits in Support of Motion for Preliminary Injunction and Request for Judicial Notice filed separately*]

Complaint Filed: August 30, 2007

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I. INTRODUCTION

This case concerns acts by federal government agencies that so far outstrip the legal mandate for those acts, that the agencies can only be deemed to have engaged in bureaucratic legislation. Unfortunately, the new "legislation" created by the agencies involved implicates the most serious of Constitutional rights. Specifically, NASA is requiring, under pain of loss of their jobs, that JPL employees – including senior scientists and engineers, many of whom have been employed for decades, and none of whom work on classified materials – submit to 1) an open-ended background investigation prying into their protected associational activities as well as myriad private and irrelevant personal information, and 2) a determination of their suitability for employment that includes such dangerously vague criteria as sexual orientation, sexual history, medical and emotional history, financial history, "attitude," and "personality conflict." This action by NASA is putatively based upon HSPD-12, an executive order concerned exclusively with the establishment of a common identification standard for federal employees and contractors, and which contemplates no additional background investigation or suitability determination. NASA's action violates, *inter alia*, plaintiffs' Constitutional rights to be free of unreasonable searches; to privacy; and violates the Administrative Procedure Act and the Privacy Act. To the extent that NASA bases its authority for this act in standards promulgated by the Department of Commerce, the latter agency also has acted beyond its authority and violated plaintiffs' rights.

II. FACTS

Defendant National Aeronautics and Space Administration ("NASA") was created by Congress in 1958 as a purely civilian agency. NASA's statutory mandate is as follows: "activities in space should be devoted to peaceful purposes for the benefit of all mankind." Pub. L. 85-568, § 102, 72 Stat. 433. *See* Byrnes, ¶13 and Exh. M thereto. Defendant California Institute of Technology ("Caltech") is a non-profit educational institution and one of the premier research institutes in the world. The Jet Propulsion Laboratory is an operating division of Caltech, staffed entirely by Caltech employees whose compensation and benefit policies are established by Caltech. Since 1959, Caltech

has operated JPL pursuant to a written contract as a NASA Federally Funded Research and Development Center (FFRDC). *See* Appendix 1 to Prime Contract between NASA and Caltech, attached to Foster, as Exh. L, p. 1. The laboratories' actual physical facilities are owned by NASA. (*Id*.)

The 28 named class representatives in this action are scientists, engineers and administrative support personnel employed by Caltech to work at the JPL facility on NASA programs. Joining this lawsuit as class representatives are some of JPL's most senior and preeminent research scientists.[1] Class representatives also include numerous leading engineers, who have been in the forefront of many recent space missions, including the Mars Exploration Rovers Project, and the Galileo, Messenger (Mercury) and Magellan (Venus) missions.[2] As a group, the plaintiffs have published widely in scientific peer-reviewed journals, have been selected to serve on numerous national and international scientific advisory committees including the National Academy of Sciences, and have received hundreds of prestigious awards from NASA and the scientific community.[3] Many of them are pure research scientists, who have no direct contact with

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[1] Plaintiffs include Dr. William Banerdt, one of the highest ranking scientists at JPL, Project Scientist for the Mars Exploration Rover Mission (Banerdt, ¶¶4-5); Dr. Josette Bellan, a Senior Research Scientist and one of 9 elected members of the Senior Research Scientist Council at JPL (Bellan, ¶¶3-6); Dr. Robert Nelson, a Principal Scientist and Senior Research Scientist, who currently leads NASA's New Millennium Program which validates all new technology that NASA will use (Nelson, ¶¶3-9); and Dr. Matthew Golombek, the lead scientist on the Mars Pathfinder mission (Golombek, ¶6.).

[2] These include JPL's Chief Engineer for Flight Dynamics Dr. Dennis Byrnes; Riley Duren, Project System Engineer for the Kepler space observatory; and Andrew Mishkin, a Principal Engineer with a lead role on the Constellation program. Byrnes, ¶¶3-8; Shames, ¶7; McElrath, ¶¶4-5; Mishkin, ¶¶3-6; Lindensmith, ¶¶5-8; Walker, ¶3; Bell, ¶¶3-6; Laubach, ¶¶4-6; D'Addario, ¶¶3-4; Haw, ¶¶2-6; Maxwell, ¶¶3-5.

[3] Bellan, ¶¶6-9; Banerdt ¶9; Walker, ¶3; Lindensmith, ¶11; Eisenhardt, ¶¶4-5; Bell, ¶3; Mishkin, ¶¶7-8; Laubach, ¶7; V. Gorjian, ¶5; Haw, ¶10; Byrnes. ¶¶ 9-11; Nelson, ¶8; Weissman, ¶¶8-11; Shames, ¶9; Golumbek, ¶¶7-9.

any of the vehicles or hardware created or operated by JPL, e.g., Dr. Peter Eisenhardt, an astrophysicist who studies the evolution of galaxies (Eisenhardt, ¶¶3-6); Dr. Varoujan Gorjian, an astrophysicist who studies star formation history of the universe (Gorjian, at ¶4); Dr. Konstantin Penanen, a physicist who studies quantum fluids (Penanen, at ¶¶4-5); Dr. Paul Weissman, who studies asteroids and comet orbits (Weissman, ¶¶3-5); Dr. Amy Hale, who studies Mars atmospheric and polar studies (Hale, ¶4); and Dr. Bellan, who conducts research in the field of chemically reactive turbulent flows (Bellan, ¶5).

Most of the named plaintiffs have worked at JPL for more than twenty years. None of them have security clearances nor do they work with classified material of any kind.[4][5] Many of the plaintiffs only agreed to work for NASA with the understanding that they would not have to work on classified materials or to undergo any type of security clearance. *See, e.g.* Byrnes, ¶13; D'Addario, ¶10; Z. Gorjian, ¶10; Bell., ¶13. All research data generated by plaintiffs (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.[6] [7] Indeed, many of the plaintiffs have elected to do only on non-classified work expressly so that their research can be subject to peer review, and so that they can "collaborate with the best scientists worldwide and publish [their] results.

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[4] Bellan, ¶10; Lindensmith, ¶12; Banerdt, ¶14; Eisenhardt, ¶2; Bell, ¶9; Laubach, ¶8; Mishkin, ¶ 9; D'Addario, ¶7; Kulleck, ¶4; Z. Gorjian, ¶10; V. Gorjian, ¶8; McElrath, ¶9; Penanen, ¶10; Haw. ¶11; Byrnes, ¶ 12; Maxwell, ¶8; Nelson, ¶10; Foster,¶ 6; Shames, ¶10; Crossin, ¶5; Hale., ¶5; Golumbek, ¶10; Carlisle, ¶ 8.

[5] While a handful of plaintiffs held security clearances in the past, all their clearances expired more than 10 years ago and since that time they have elected not to work on classified . projects or to renew their security clearance. *See*, Mishkin, ¶9; Kulleck, ¶3; Byrnes, ¶3; Foster, ¶6; Weissman, ¶12; Satter, ¶9.

[6] Hale, ¶80; Weissman, ¶13; Nelson, ¶10; Penanen, ¶ 10; McElrath, ¶ 12; V. Gorjian, ¶9; Golumbek, ¶10; Lindensmith, ¶12.

[7] The only restraint on the free dissemination of data and research is that it must pass through ITAR (International Traffic in Arms Regulations) review to ensure that it does not have any weapons implications. See Weissman, ¶¶13 and 16.

Because of this deliberate policy, NASA attracts many of the world's top scientists who want to do research in a completely open environment." Golombek, ¶15.

On August 27, 2004, the President signed Homeland Security Presidential Directive 12 (HSPD-12), entitled "Policy for a Common Identification Standard for Federal Employees and Contractors," applicable to all Executive Branch departments and agencies.[8] The express purpose of HSPD-12 is to ensure that "secure and reliable forms of identification" are used by government employees and contractors. HSPD-12 directed that the Secretary of Commerce promulgate a Federal standard for "secure and reliable forms of identification" within six months of the directive. HSPD-12 defined "secure and reliable forms of identification" to mean identification that is (a) "issued based on sound criteria for verifying an individual employee's identity;" (b) "strongly resistant to identity fraud, tampering, counterfeiting and terrorist exploitation;" (c) "can be rapidly authenticated electronically;" and (d) "is issued only by providers whose reliability has been established by an official accreditation process." Exh. 1, at 1. Nowhere does HSPD-12 authorize or require implementation of a background investigation process for current or new federal employees or contractors, nor does it authorize or contemplate any requirement that applicants for the new identification form waive any of their privacy rights. Indeed, HSPD-12 expressly states that it "shall be implemented in a manner consistent with the Constitution and applicable laws, including the Privacy Act (5 U.S.C. 552a) and other statutes protecting the rights of Americans." Exh. 1, at 2.

In response to HSPD-12, in March 2006, the U.S. Department of Commerce ("Commerce"), also named as a defendant in this action, promulgated a standard entitled "Personal Identify Verification (PIV) of Federal Employees and Contractors," codified at FIPS PUB 201-1. Exh. 2. The PIV standard explained that its sole authority was based on HSPD-12. Exh. 2, p. iii. iv, p. 1. While stating that it seeks to meet the four criteria set forth in HSPD -12 (Exh. 2, at 1), the PIV standard proceeded without explanation to

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[8] Filed concurrently herewith as Exh. 1 to Request for Judicial Notice. All numerically designated exhibits (1, 2, 3, etc.) are attached to the Request for Judicial Notice and are hereinafter referred to simply as "Exh. 1," etc.

impose a background investigation requirement on all employees or contractors seeking to obtain the new form of identification.[9] Despite the absence of any such directive in HSPD-12, the PIV standard mandates that "only an individual with a background investigation on record is issued a credential." Exh. 2, at 5. 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 Questionnaire for Non-Sensitive Positions," or its equivalent. Exh. 2, at 6 and 53, emphasis added.

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. Foster, ¶10, and Exh. A and H thereto. To obtain one of these new badges, JPL employees had to provide basic personal information, submit two forms of approved identification, and submit to fingerprinting. *Id*., at 10-11. None of the forms required that JPL employees provide detailed information about their work, residential or personal history, provide names of references for interviews about their suitability, or waive their privacy rights in anyway. *Id.*[10] Plaintiffs had no objection to this process, which fully met the objectives of HSPD-12 and posed no significant invasion of their privacy rights.

On or about May 24, 2007, NASA issued a NASA Interim Directive, NPR 1600.1, establishing a *new* "Agency-wide policy for the creation and issuance of federal credentials at NASA." Exh. 3. The Directive states that it is being implemented in compliance with HSPD-12 and the PIV standard established by Commerce. Exh. 3, p. 1.

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[9] The actual identification confirmation process outlined in FIPS PUB 201-1 is fairly straightforward and hardly novel: a fingerprint check had to be completed; the applicant had to appear in person; and the applicant had to provide "two forms of identity source documents in original form," at least one of which had to be a valid state or Federal government-issued picture identification." (Exh. 2, at 6.)

[10] The four forms which JPL employees had to complete as part of this initial rebadging process to comply with HSPD-12 are attached as Exhibits B-E to the Foster Declaration. The list of approved forms of identification is attached as Exhibit F. An example of the OneNASA badge is attached as Exh. G.

In this directive, NASA instituted a new identification badge known as the PIV or PIV II. Exh. 3, at p. 3. JPL personnel were informed for the first time that in order to receive the newly required PIV they would have to submit to a background investigation, the extent of which would be determined by their position's risk level. Exh. 3, p. 10.

Prior to implementing the new PIV system, NASA and JPL had jointly established the risk level for each position at JPL. Byrnes, Exh. N, at 260. Each position was to be designated as "high, moderate or low risk" based on the "overall responsibility of the position" and "any possible adverse impact the position could have in terms of integrity and efficiency of NASA assets/operations." Exh. N, at 262. All employees determined to be low risk level are required to complete SF-85 and submit to a background check known as a "National Agency Check with Inquiries" ("NACI"). Exh. N, at 264. Moderate and high risk employees were required to complete Standard Form SF-85 P and submit to a more extensive background investigation.[11] Id. Plaintiffs have been informed by JPL directors and administrators that 97-98% of JPL personnel have been designated as "non-sensitive personnel" by JPL and NASA. Laubach Decl., ¶8; *see also* Exh. M, at 266; Foster, Exh. J. Plaintiffs do not currently seek to represent employees who have been designated as moderate or high risk, and who have been informed that they must complete SF-85P and submit to the more rigorous background investigation.

All the plaintiffs in this case have been notified that they have been deemed "non-sensitive personnel" by NASA and JPL and therefore required to go through a NACI, and complete the Form SF-85.[12] None of the plaintiffs have previously undergone a NACI

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[11] High risk and moderate risk employees are those whose "stated role has opportunity to cause damage to a significant NASA asset or influence the design or implementation of a security mechanism designed to protect a significant NASA asset." Exh.N, at 270-271.

[12]Foster, ¶14; Laubach, ¶ 8; Bellan, ¶10; Lindensmith ¶12; Banerdt, ¶10; Eisenhardt, 2; Bell, ¶9; Mishkin ¶9; D'Addario, ¶7; Kuleck, ¶8; Z. Gorjian, ¶10; V. Gorjian, ¶11; McElrath, ¶9; Penanen, ¶12; Haw, ¶17; Byrnes, ¶18; Lindensmith, ¶15; Nelson, ¶3; Bellan, ¶10; Weissman, ¶13; Shames, ¶10; Satter, ¶¶10-14; Crossin, ¶5; Hale, ¶5; Maxwell, ¶8; Golumbek, ¶10.

background investigation, nor have they ever been told that in order to work at JPL they would be forced to waive their privacy rights or undergo a background investigation.[13] Many of the plaintiffs had previously completed the more basic National Agency Check ("NAC"), which merely required that they provide their name, social security number and current address, but did not require any inquiries to be made of former employers, neighbors, or references, nor did it include any privacy waiver.[14]

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 requires information about employment and residential history for the last five years; educational history starting with high school; and the names of three individuals who know the applicant well; and a statement as to whether the applicant has used illegal drugs in the past year – none of which information is mentioned or contemplated by HSPD-12. Exh. 4. 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 "<u>any information relating to my activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information</u>." *Id.*, p. 6 (emphasis added). JPL employees have been informed that they must sign the authorization "without any modification or alteration." Foster, Exh. J.

The three references applicants are required to provide, together with their employers and landlords for the past 5 years, are then sent an Investigative Request for Personal Information, which asks that they report any adverse information they have on the plaintiff with respect to "abuse of alcohol or drugs," "financial integrity," "mental or

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[13] Hale Decl., ¶10; Maxwell Decl., ¶14; Nelson Decl., ¶14; Haw Decl., ¶16; Byrnes Decl., ¶21; Haw Decl., ¶16; Penanen Decl., ¶15; McElrath Decl., ¶¶14, 10; D'Addario Decl., ¶9; Kulleck Decl., ¶7; Golombek Decl., ¶16; Mishkin Decl., ¶11; Laubach Decl., ¶11; Bell Decl., ¶13; Banerdt Decl., ¶14; Lidensmith Decl., ¶17; Eisenhardt Decl., ¶10; Bellan Decl., ¶15; Carlisle Decl., ¶12.

[14] Hale Decl., ¶10; Nelson Decl., ¶14; Maxwell Decl., ¶14; Haw Decl., ¶16; Byrnes Decl., ¶21; McElrath Decl., ¶14; Golombek Decl., ¶16; Mishkin Decl., ¶11; Banerdt Decl., ¶14; Carlisle Decl., ¶12.

emotional stability," "general behavior or conduct," and "other matters." Foster, Exh. K.

NASA's Interim Directive states that if the Badge issuance process yields any "derogatory or unfavorable information," it will be forwarded to the Human Relations Officer for JPL, who will determine "employment suitability." Exh. 3, §13.1.1 (p. 17). In public meetings regarding the new identification process, JPL employees have been informed that the adjudication of their suitability will instead be performed by a "federal employee," and a negative outcome "would prevent [the] individual from access to a federal facility." Exh. M at 282. JPL has posted on its internal website the various grounds upon which an employee can be determined unsuitable. The grounds include ""infrequent, irregular but deliberate delinquency in meeting financial obligations," "pattern of irresponsibility as reflected in . . . credit history," "sexual misconduct with impact on job," "sodomy," "attitude," "personality conflict," "absenteeism or attendance problem," "homosexuality," "judgment, reliability and dependability issues," "physical health issues," "mental, emotional, psychological or psychiatric issues," "issues . . . that relate to an associate of the person under investigation," and "issues . . . that relate to a relative of the person under investigation." Penanen, ¶ 20 and Exhibit R thereto.

JPL employees have been informed at public meetings and by JPL senior administration that if they do not have their PIV badge by October 27, 2007, they will not only be barred from the premises, but will be deemed to have terminated their employment with JPL. Laubach Decl., ¶12; Foster, Exh. J at 46-47. Further, they have been informed that if they do not complete all of the paperwork (SF-85 and waiver) by September 28, JPL will be unable to process their requests by October 27, 2007.

The plaintiffs are deeply concerned that implementation of a background investigation and waiver of privacy rights, as currently required by NASA of all JPL employees, including those in non-sensitive positions, will have a serious impact on the scientific freedom necessary for successful research in such ground-breaking areas as those pursued by JPL. As explained by Dr. James Kulleck, senior member of the Technical Staff at JPL: "the information that is garnished can be used to categorize people politically, to intimidate individuals into suppressing scientific discoveries that contradict

popular policies, or to manipulate individuals based on various types of subjective criteria." Kulleck, ¶9. *See also* Shames, ¶17 ("directive also undermines the open, collegial environment that has been a hallmark of JP; an environment that has nurtured the unorthodox and creative approaches to solving technical problems that has been so essential to JPL's success"); Laubach, ¶16 (undermining open collegial relationship between employees and supervisors as supervisors have stated that they are required to report anything related to suitability to background investigators).[15]

All of the plaintiffs will suffer irreparable harm if they are denied access to JPL and deemed to have voluntarily resigned from employment with Caltech, as they will lose their livelihood.[16] Several of the plaintiffs, who are over 60, may find it difficult to find new jobs.[17] Foster, ¶ 18; D'Addario, ¶12; Bellan, ¶16. For all of the plaintiffs, loss of their position at JPL will deprive them of a unique and irreplaceable job, which will imperil their ability to continue their research and remain active in space exploration.[18]

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[15] *See also* Bellan, ¶18; Byrnes, ¶25; Haw, ¶20; Penanen, ¶20; V. Gorjian, ¶13; Kulleck, ¶12; Nelson, ¶18; Maxwell, ¶18; Weissman, ¶20; Bell, ¶16.

[16]See, e.g. Banerdt, ¶16; Satter, ¶15; Hale, ¶12; Nelson, ¶16; Maxwell, ¶16; Byrnes, ¶23; Haw, ¶18; Penanen, ¶21; McElrath, ¶16; V. Gorjian, ¶12.

[17] One plaintiff, Susan Foster, has already been forced to resign due to her refusal to sign SF-85 and the waiver. Foster, ¶18.

[18] *See, e.g.*, Weissman, ¶18 (loss of job and access to telescope necessary to conduct NASA-funded research on comets and asteroids); Crossin, ¶10 ("working to support space exploration and scientific research has been my life's objective since childhood"); Nelson, ¶16 ("deprived of access to computer systems which have already installed software vital to the research" on the Cassini program); Byrnes, ¶23 ("I will be deprived of my profession, the work that defines me as a person, the ability of continuing to serve my country with skills and capabilities that contribute to the success of our civilian exploration of space"); Laubach, ¶13 ("there is no comparable job in the world, as JPL is the premier institution for robotic exploration of space"); Bellan, ¶17 (if she ceases to work at JPL her research which relies on unique databases created by her team would cease altogether, causing irreparable harm to NASA and the public interest); Banerdt, ¶16 (will be deprived of critical access to the laboratory).

Of equal if not greater significance, the public will suffer irreparable harm if JPL and NASA lose these critical employees, many of whom play indispensable roles on current space exploration missions and are irreplaceable because of their knowledge, experience, and intimate involvement with these missions over the past years. Hale, ¶12. For example, JPL and NASA would lose Mr. Shames, who heads JPL's Data System Standards Program leading an international program of work to develop space communications and navigation standards for interoperability, seriously disrupting this program (Shames, ¶16), and Dennis Byrnes, whose technical expertise is "critical across essentially every project at JPL," and who has been entreated not to leave by senior JPL management because of the importance of his contributions to the lab (Byrnes, ¶24).[19]

In addition, NASA will be deprived of the talents of other scientists and engineers who will be deterred from applying to work at JPL because of the newly-required background investigation and waiver of privacy rights, both of which are antithetical to

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[19] *See also* Maxwell, ¶ 17 (projects will face increased delay if he is forced to leave as he developed crucial software for the Mars Exploration Rover mission); Crossin, ¶11 ("high probability that quality testing could not be done to meet scheduled deadlines" causing delays to multiple programs); Haw, ¶19 (departure from JPL would upcoming mission to Mars because it would impact completion of the rough terrain landing system); D'Addario, ¶13 (without my work [on new technologies] this project will go forward much more slowly, delaying our capability to support more sophisticated spacecraft"); Kulleck, ¶11 ("there is an accumulated history which will not be available if I am forced to leave JPL, which will have a direct impact on all of the flight and research projects on which I work"); Golombek, ¶19 (forced departure from JPL would have immediate negative impacts on the projects on which he works as he has successfully selected three landing site on Mars); Mishkin, ¶15 (immediate negative impact on NASA's work, as he leads two teams which are critical to President's vision for space exploration); Laubach, ¶14 (as one of a handful of people who "understand planetary surface operations" and most knowledgeable about how JPL commands the Mars rover, it would be "extremely difficult for the people remaining to sustain the mission" if she was forced to leave); Banerdt Decl., ¶17 ("projects would face increased costs and delays which threaten schedule completion"); Carlisle Decl., ¶15 (forced departure would have immediate disruptive impact on Dawn Mission).

the type of autonomy and academic freedom needed to maintain JPL's status as the preeminent research institution for space exploration. Some employees have already announced their resignation or retirement over this issue; others are seeking work outside of JPL. Laubach, ¶¶15-16. JPL is currently experiencing a shortage of experience in Mars science and has faced difficulties recruiting senior talented scientists in this area, a problem which will be compounded by any change which deters new hires. Banerdt, ¶17.

III. ARGUMENT

Plaintiffs face the impossible choice of losing their jobs or sacrificing their right to keep confidential the most intimate details of their personal lives. Because of this irreparable harm and their strong likelihood of success on the merits, they are entitled to a preliminary injunction. In determining whether to enter a preliminary injunction, a court looks for "either (1) a combination of probable success on merits and the possibility of irreparable harm, or (2) that serious questions are raised and the balance of hardships tips sharply in the moving party's favor." *Rodeo Collection, Ltd. v. West Seventh*, 812 F.2d 1215, 1217 (9th Cir. 1987) (noting that these are not two distinct tests, but rather the opposite ends of "continuum in which the required showing of harm varies inversely with the required showing of meritoriousness.") (internal citations omitted).

A. Plaintiffs are Likely to Succeed on the Merits.

1. Defendant's Policy Violates Plaintiffs' Fourth Amendment Rights Because the Background Investigation and Privacy Waiver Constitute Unreasonable Searches.

Defendants' requirement that plaintiffs execute a broad waiver of their privacy rights and submit to an open-ended background investigation violates plaintiffs' Fourth Amendment right to be free from unreasonable searches and seizures. The Fourth Amendment protects employees from unreasonable searches conducted by the government, even when the government is their employer. *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987). As a rule, a search requires a warrant and probable cause; in some rare instances, however, courts will allow generalized policies that intrude on employees' privacy for employment if they satisfy the requirements of a balancing test. *Bluestein v. Dept. of Transp.*, 908 F.2d 451, 455, (9th Cir.1990). If a search such as a drug test "serves

special government needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656-66 (1989); *Int'l Brotherhood of Electrical Workers, Local 1245 v. U.S. Nuclear Regulatory Comm'n*, 966 F.2d 521, 525 (9th Cir. 1992). Therefore, in only "limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Skinner v. Ry. Labor Executives' Ass'n.*, 489 U.S. 602, 624 (1989). Importantly, defendants must show both a compelling government interest in obtaining personal information about plaintiffs, and plaintiffs' reduced expectation of privacy to pass this test. *AFGE, Local 1533 v. Cheney*, 754 F.Supp. 1409, 1419 (N.D. Cal. 1990).

The government bears the burden of demonstrating a "compelling" interest in order to justify intruding on its employees' privacy. *Von Raab*, 489 U.S. at 706; *United States v. Kincade*, 379 F.3d 813, 838 (9th Cir. 2004). The government can show that it has a compelling interest in searching its employees "only when a clear, direct nexus exists between the nature of the employee's duty and the nature of the feared violation." *AFGE, Local 1533*, 754 F. Supp. at 1419 (internal citation omitted); *see also Von Raab*, 489 U.S. at 711. Thus, courts often scrutinize the specific job duties of each class of employees to determine if their responsibilities actually bear on the compelling interest underlying the search policy. *See, e.g., Von Raab*, at 711; *Nuclear Regulatory Comm'n*, 966 F.2d at 526-27. When the challenged policy fails to demonstrate such a nexus, an "injunction is an appropriate remedy until such time as the agency refashions its program to meet constitutional requirements." *AFGE, Local 1533*, 754 F. Supp. at 1419. The mere fact that plaintiffs work for NASA is not a justification for such a search; a more particularized showing is required. *Id*. at 1422 (dismissing the argument that plaintiffs could be searched simply because they work for the Navy).

Defendants cannot justify subjecting plaintiffs to intense scrutiny of their extra-professional lives under any legitimate government interest. First, defendants cannot justify their policy based on the need to verify their employees' identities. Although defendants have a legitimate interest in secure and reliable identification, this goal does not justify the open-ended background investigation and waiver of privacy rights because there is absolutely no causal nexus whatever between the end and the putative means. None of the irrelevant personal information is pertinent to verification of an employee's identity, and thus this justification cannot be used to support current HSPD-12 policy.

Second, the defendants do not have a compelling interest in protecting the material on which plaintiffs work because none of the plaintiffs works on classified or national security materials. Almost all of their work is within the public domain and is subject to Freedom of Information Act requests; they are free to share their work and publish freely. *See* Part II, at pp. 5-6, *supra*. NASA itself has been dedicated to civilian exploration of space since its creation, and does not handle classified projects. Exh. M. Therefore, there can be no nexus between this interest and the proposed means to achieve it, as required under the clear rule set out above. The Supreme Court in *Von Raab* confirmed that "the Government has a compelling interest in protecting truly sensitive information . . ." *Von Raab*, 489 U.S. at 709. However, the Court rejected the Navy's drug-testing program in part because it was unclear whether all of the tested employees had access to classified information. *Id.* The court was concerned that the Navy had defined the category of employees to be tested "more broadly" than was necessary to protect classified materials, and thus remanded for clarification about which employees actually worked with such documents. *Id. See also Harmon v. Thornburgh*, 878 F.2d 484, 492 (D.C. Cir. 1989). As in *Von Raab*, the defendants have defined the class of employees required to submit to the inquiry in question too broadly.

Third, the government's interest in enhancing public safety is not furthered by defendants' acts. To establish this interest for Fourth Amendment purposes, the government must not only demonstrate a great risk to public safety, but it must also show that the significant safety risk arises from the potential of a "momentary lapse" on the part

of an employee. *Gonzalez v. MTA,* 73 Fed. Appx. 986 (9th Cir. 2003); *AFGE, Local 1533,* 754 F. Supp. at 1422; *Skinner,* 489 U.S. at 628. Supreme Court and Ninth Circuit cases that have approved broad-based employee inquiries (such as drug tests) for Fourth Amendment purposes have emphasized the potential for huge accidents that could cause harm to many people because of a single employee's unpredictable split-second error, and have often looked to whether the feared harm has ever actually occurred. *See e.g., Skinner v. Ry. Labor Execs.*, 489 U.S. at 628; *Von Raab,* 489 U.S. at 670 (noting that customs officers have been shot, stabbed, run over, dragged by automobiles, and assaulted with blunt objects); *International Brotherhood of Teamsters v. Dept. of Transp.*, 932 F.2d 1292, 1304 (9th Cir. 1991); *IBEW, Local 1245 v. Skinner*, 913 F.2d 1454, 1457 (9th Cir. 1990); *Nuclear Regulatory Commission,* 966 F.2d at 521 (allowing drug-testing on employees who have access to vital areas of the nuclear plant).

The NASA employees at issue in this case are not in positions where they could cause serious harm to any persons or equipment due to a momentary lapse in judgment. None of the plaintiffs works with hazardous or explosive materials or solely controls any spacecraft or technical instruments connected to spacecrafts. The employees whom the defendants wish to subject to intense personal invasion include scientists and researchers who work in the area of theoretical physics. Their data analysis and consultation on how to best utilize spacecraft to collect data cannot in any way jeopardize public safety. The scientists who use data collected from outer space do not even have the power to permanently corrupt the data, because it is archived within different NASA sources outside of JPL. *See, e.g.* Weissman, ¶16; McElrath, ¶12; V. Gorjian, ¶4.[20] Indeed, all of this data is within the public domain. In addition, the JPL engineers forced to fill out the SF-85 questionnaire and releases are not in positions where they could single-handedly,

[20] The data used by the plaintiff research scientists is collected from spacecraft and telescopes and is neither confidential nor sensitive. Once data is collected it is archived by NASA and a copy of the data is given to the scientists requesting it. They have no ability to change the data that was originally collected by the mission. After a brief period of time (six months to one year), all of the data that the scientists analyze become part of the public domain. (Weissman, ¶16.)

inadvertently or intentionally, sabotage the design, building, or command of any spacecrafts.[21] Indeed, the plaintiffs and the class they seek to represent have all been designated as non-sensitive personnel by NASA, meaning that their position has no "opportunity to cause damage to a significant NASA asset or influence the design or implementation of a security mechanism designed to protect a significant NASA asset." Exh. N, at 262-64. Most importantly, however, unlike in drug testing case, there is no nexus between the proposed inquiry and the government interest. This point is amply demonstrated by the fact that NASA is not requiring Caltech faculty to undergo the NACI investigation, because of privacy concerns raised by faculty, even if they regularly go to the JPL facility, unless they physically work on a JPL computer. (Nelson, ¶18 and Exh. T and U; see also Hamkins Decl.)

On the other side of the balancing test to be undertaken by the Court, JPL employees have a high expectation of privacy in information regarding their intimate associations; medical and emotional lives; and political and social activities – all of which are expressly made subject to inquiry by the combination of SF-85 with privacy waiver, and NASA's suitability criteria. This side of the balancing test requires the plaintiffs to have a "markedly reduced" expectation of privacy *AFGE, Local 1533*, 754 F. Supp. at 1419. In evaluating the strength of the plaintiffs' privacy interest, courts consider two

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[21] Many of the engineers are purely involved with designing instruments and are not actually in charge of their actual use. D'Addario, ¶6. All designs go through extensive review processes by committees of external and internal experts before they are actually built. Then, as each component of any instrument is constructed it goes through many tests, checks, and reviews. Similarly, any computer codes used to maneuver any instruments go through a series of tests and checks. Maxwell, ¶12 (numerous cross-checks of commands to the Mars Rover precisely in order to ensure that no one person can intentionally or accidentally hurt the Rover). The safeguards against any one person being a single point of failure, capable of damaging or destroying a spacecraft or other NASA equipment, are legion and are in place whenever a JPL employee has significant access to such assets. Laubach., ¶9; Carlisle, ¶4; Bell, ¶¶5-6. The procedures are organized such that no one person has complete control over any aspect of the spacecraft, and thus no "momentary lapse" on the part of any engineer can harm the spacecraft.

factors: "(1) whether as a result of other circumstances employees in this industry already have a diminished expectation of privacy; and (2) whether the particular testing program minimizes the intrusion of privacy." *Nuclear Regulatory Comm'n*, at 525 (citing *IBEW, Local 1245 v. Skinner*, 913 F.2d at 1463). Both factors militate in plaintiffs' favor.

First, plaintiffs have generally worked at JPL for long periods of time without any background checks, thus both enhancing their expectation of privacy and undermining the government's claim of compelling interest. Plaintiffs reasonably expect that they should not have to waive their privacy rights in order to maintain, non-classified, non-safety sensitive jobs. Throughout the course of their entire employment histories, none of the plaintiffs have been required to complete any background checks or go through any other examinations that would indicate that they have a diminished sense of privacy.[22] Indeed, each individual member of this class was hired without the expectation that they would have to undergo this type of personal invasion, and many of them chose JPL precisely to work in that type of open environment. These expectations and history create an even higher expectation of privacy among these long-term employees. *National Treasury Employees Union*, 838 F. Supp. at 637-38 (seniority of even five years confers both a heightened expectation of privacy and a reduced risk of damage to the government). Second, defendants' sweeping inquiry is far from minimizing the intrusion of privacy. Through there are many less intrusive means to comply with HSPD-12, NASA's plan is not tailored in any way to minimize its intrusion on the plaintiffs' privacy. In order to comply with HSPD-12, defendants only had to implement a secure identification card system; there was no requirement to make suitability determinations. Therefore, the questions OPM sends to plaintiffs' references about their mental health, "emotional stability," and finances are wholly unnecessary. The broad waiver of privacy rights defendants require plaintiffs to execute is even more troubling. The release is in no way

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[22] A handful of plaintiffs at one point in time agreed to undergo a security clearance check because they wanted to work on classified projects. Those security clearances have long since lapsed and plaintiffs (and they class they represent) no longer work on classified materials.

limited to verifying the plaintiffs' identities or confirming the information they fill in on the SF-85 questionnaire. Instead, the release can be used to obtain information for the purpose of establishing that employees are "suitable for the job." Exh. 4.

Because the defendants cannot articulate a compelling interest that has a nexus with any of the employees' job duties, and because plaintiffs do not have a diminished expectation of privacy, defendants' acts violate the Fourth Amendment

2. Defendants' Policy Intrudes on Plaintiffs' Fourteenth Amendment Right to Non-Disclosure of Personal Information.

Individuals have a constitutionally protected interest in avoiding disclosure of personal matters. *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (Fourteenth Amendment recognizes a privacy interest in "avoiding disclosure of personal matters."). This interest, often referred to as the right to "informational privacy," applies to government employees both when an individual chooses not to disclose highly sensitive information to the government and when an individual seeks assurance that such information will not be made public. *Planned Parenthood of S. Ariz. v. Lawall*, 307 F.3d 783, 789-90 (9th Cir. 1999) (citations omitted). An employee of the state "may not be required to forego his or her constitutionally protected rights simply to gain the benefits of state employment." *Thorne v. City of El Segundo*, 726 F.2d 459, 469 (9th Cir. 1983). Instead, this right can only be infringed upon when the government demonstrates a legitimate interest. *In re: Crawford*, 194 F.3d 954, 959 (9th Cir. 1999).

Therefore, in evaluating an informational privacy claim, a court "engages in the delicate task of weighing competing interests" to determine whether the government may force disclosure of personal information. *Id.* Relevant factors courts consider include:

> the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated pubic policy, or other recognizable public interest militating toward access.

Id. (internal citation omitted). Though this list is not exhaustive and varies in different scenarios, in each case "the government has the burden of showing that its use of the information would advance a legitimate state interest and that its actions are narrowly

tailored to meet the legitimate interest." *Id.*

The balancing test used to evaluate Plaintiffs' Fourteenth Amendment privacy claim closely matches the balancing test analyzed in the previous section with regards to the Fourth Amendment. *See, e.g., National Treasury Employees Union,* 838 F. Supp. at 637-38 (using the Fourth Amendment test to evaluate whether the Customs Service violated plaintiffs' privacy right to nondisclosure of personal information). Therefore, defendants' policy must be enjoined because its interest in forcing disclosure of details of plaintiffs' lives does not outweigh their right to privacy.

Further, the courts have consistently held that the government cannot collect the type of information at issue, under the circumstances presented here. This Circuit has consistently held that the government cannot force disclosure of personal information, including medical records or diagnoses, or details of one's sexual affairs, except in rare circumstances. *See, e.g., Tucson Woman's Clinic v. Eden,* 379 F.3d 531 (9th Cir. 2004); *Doe v. Attorney General*, 941 F.2d 780, 796 (9th Cir. 1991) (information regarding an individual's medical diagnoses would fall within the ambit of the privacy protection); *Thorne v. El Segundo*, 802 F.2d 1131, 1139 (9th Cir. 1986) ("the Constitution prohibits unregulated, unrestrained employer inquiries into personal, sexual matters.")

Given the Ninth Circuit's protection of informational privacy and the analogy to *National Treasury Employees*, a preliminary injunction is clearly warranted. As with the Fourth Amendment claim, the government does not have a compelling interest in making these particular employees fill out the SF-85 and waiver, and thus they should not have to forfeit their privacy rights to maintain their jobs researching the bounds of space at JPL.

3. Defendants' Requirement that JPL Employees Submit to Background Investigations and Waive their Privacy Rights Violates the Administrative Procedure Act

NASA's requirement that all JPL employees execute an extremely broad waiver of their privacy rights and submit to a background check, in order to obtain an identification badge and maintain their jobs, violates the Administrative Procedure Act because it has no basis in HSPD-12, or in any other executive order or statute. The Administrative Procedure Act requires courts to "hold unlawful and set aside agency action found to be . .

. not in accordance with law." 5 U.S.C. § 706(2)(c).

Certainly, agencies generally have broad discretion in the application of law with which they are entrusted. Executive agencies are tasked with applying a particular area of law and generally have factual, often technical, expertise in the domain to which that law applies. As a result, a court may defer to executive agencies in fact-finding and in decisions and determinations involving technical, specialized, or fact-intensive matters specific to the domain with which that agency is entrusted and in which it has expertise. On the other hand, agencies are not lawmakers and are not free to simply create legal mandates from whole cloth. *See, e.g.*, *Kurzner v. United States*, 413 F.2d 97 (5th Cir. 1969) (agency authorized only to implement statutes, not to effectively legislate by promulgating regulations). As a result, judicial review of an agency's observance of law (whether in the context of rule-making or quasi-judicial determinations) is far more exacting than review under the "arbitrary and capricious" standard employed for review of agency fact-finding under the APA. *See National Ass'n of Metal Finishers v. EPA*, 719 F.2d 624 (3d Cir. 1983), *rev'd on other grounds*, 470 U.S. 116 (1983). Questions of law implicated in agency decisions, unlike questions of fact, are freely reviewable. *Pollgreen v. Morris*, 770 F.2d 1536 (11th Cir. 1985); *see also ACEMLA v. Copyright Royalty Tribunal*, 763 F2d 101 (2d Cir. 1985) (despite "exceptionally broad discretion" granted to agency, its decision overturned because not authorized by governing statute).

An agency not only must conform to the law as it exists; it also must desist from widening the mandate of the existing law to create new rights or obligations. *See, e.g.*, *Brungart v. BellSouth Telecomms., Inc.*, 231 F.3d 791, 796 (11th Cir. 2000) (Department of Labor rule amounted to bureaucratic legislation by widening the scope of the rule contained in the statute). In this case, the Department of Commerce effectively acted as a lawmaker by creating a heretofore unknown mandate that federal contractors must execute a broad privacy waiver and submit to an extensive background check in order to gain access to federal facilities (which, in the case of JPL employees, is coextensive with retention of their jobs). HSPD-12 itself contains no directive or policy whatever regarding a background investigation or suitability check of the federal employees and contractors

for whom it seeks to establish a common and secure identification system. Instead, the Order is concerned purely with the establishment of a "Federal standard for secure and reliable forms of identification." HSPD-12(2).

Yet, Commerce went beyond the authority and the task set for it by HSPD-12 when it promulgated FIPS PUB 201-1. Although the standard is primarily devoted to logistical facets of implementing a common identification system, it also states that "[o]nly an individual with a background investigation on record is issued a credential." FIPS PUB 201-1 at 2.1 (p. 5). The regulation goes on to require an "investigation as required for Federal employment," specifying the "National Agency Check" (NAC) or "National Agency Check with Written Inquiries" (NACI). *Id.*, at 2.3 (p. 6). As elaborated *supra*, the NACI is a highly intrusive process, which plaintiffs, most long-term JPL employees, have not previously undergone and which is in no way necessitated by their jobs.

NASA, in turn, broadened this unjustified mandate by requiring the much more invasive NACI, rather than the alternative background inquiries allowed under the Commerce regulation (Exh. N, p. 15.); and importing myriad irrelevant and inappropriate, suitability criteria into the suitability determination (Penanen, ¶20 and Exh, R thereto).[23]

Nor do any of the other executive orders and regulations referenced by Commerce and NASA in instituting a background investigation and suitability determination for JPL employees supply the missing legal mandate for a background investigation or suitability check of federal contractors. Each of these refer only to federal employees. For example, Executive Order 10450, which is referenced repeatedly, was signed on April 27, 1953, in order to establish security requirements for government employees. By its terms, the Executive Order only applied to civilian officers and employees of departments and agencies of the government. See E.O. 10450 Sec. 3(a). That Executive Order required

[23] NASA's action is even less entitled to deference. HSPD-12 itself is an executive order aimed at the administration of internal federal government operations and it designates Commerce as the implementing agency. HSPD-12(1). Other agencies are referenced in the Order only insofar as they must follow the directives contained in it and in the implementing regulation; they are tasked with no implementing or interpretive power.

that all employees undergo at minimum a National Agency Check with Inquiries, while employees in sensitive positions would have to undergo a "full field investigation." *Id.*, at Section 3(b). The regulation codified at 5 C.F.R. 731.105, which establishes "criteria and procedures for making determinations of suitability," also applies only to "employment in positions in the competitive service and for career appointments in the Senior Executive Service." 5 C.F.R. 731.101. The criteria set forth in this regulation (referred to repeatedly throughout the PIV standard promulgated by Commerce, and the NASA interim directive), therefore, only apply to employees and career appointments, and have never been extended by law, regulation or executive order to employees of entities which contract with the government.[24] *See also* 5 C.F.R. 731.104 (appointments to positions in the competitive service); 5.C.F.R. 731.105 (OPM or its delegate can make suitability determinations only as to applicants or appointees); 5 C.F.R. 731.106 (risk designation only made for "competitive service positions"). Thus, there is no statute or executive order to justify the mandate, created by the agencies involved, that JPL employees, who are not federal employees, must submit to the invasive background check and inappropriate suitability determination proposed by NASA.

To the extent that NASA and/or Commerce have overstepped their implementation roles and have legislated a wholly new legal mandate –that federal contractors must be subjected to a background investigation and suitability check– their actions violate the

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[24] Indeed, the criteria set forth in in Section 731.202 are in any case far more limited than the suitability determinations being imposed on JPL employees. The criteria are: (1) Misconduct or negligence in employment; (2) Criminal or dishonest conduct; (3) Material, intentional false statement or deception or fraud in examination or appointment; (4) Refusal to furnish testimony as required by Section 5.4 of this title; (5) Alcohol abuse of a nature and duration which suggests that the applicant or appointee would be prevented from performing the duties of the position in question, or would constitute a direct threat to the property or safety of others; (6) Illegal use of narcotics, drugs, or other controlled substances, without evidence of substantial rehabilitation; (7) Knowing and willful engagement in activities designed to overthrow the U.S. Government by force; (8) Any statutory or regulatory bar which prevents the lawful employment of the person involved in the position in question.

APA and should be struck down by this Court.

4. Defendant's Policy Violates the Privacy Act.

Defendants' policy directly violates several sections of the Privacy Act of 1974, codified at 5 U.S.C. §§ 552a(a)-(q), which requires departments and agencies of the executive branch to observe certain rules in the computerization, collection, management, use, and disclosure of personal information about individuals. Importantly, the Act clearly prohibits improper gathering of information, regardless of whether the information is subsequently kept confidential, disseminated, etc. As the D.C. Circuit observed in *Albright v. United States*, 631 F.2d 915 (D.D.C. 1980): "The legislative history [of the Privacy Act] also reveals a concern for unwarranted collection of information as a distinct *harm in and of itself*. '[T]he section is directed to inquiries made for research or statistical purposes which, even though they may be accompanied by sincere pledges of confidentiality are, (by the very fact that government make (*sic*) the inquiry), infringing on zones of personal privacy which should be exempted from unwarranted Federal inquiry.' " 631 F.2d at 919 (internal citation omitted).

a. Defendants Violate Section (e)(1) Because No Executive Order or Congressional Statute Authorize NASA's Collection of Personal and Irrelevant Information Regarding JPL Employees.

The Privacy Act requires that a federal agency "maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President." 5 U.S.C. § 552a(e)(1). "Maintain" in the context of the Act clearly includes the gathering of information, regardless of whether and how it is subsequently disseminated, and whether it is kept confidential.[25] *See also Albright* 631 F.2d at 919.

The information NASA seeks to gather is not "relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order." First, as set out *supra*, the information NASA seeks bears no relevance to the agency's general purpose – to promote the civilian exploration of space – nor to plaintiffs' specific

[25] "Maintain" includes "maintain, collect, use, or disseminate." § 552a(a)(3).

jobs. Second, as set out in detail in Section C *supra*, the information is not required to be accomplished by any statute or executive order: NASA has precisely overstepped the legal mandate for agency action provided in HSPD-12 (and indeed, in any other statute or executive order), by requiring federal contractors to submit to an extensive background check and improper suitability determination. Therefore, NASA's action violates Section (e)(1). To the extent that this Court finds that NASA's action is authorized by the regulations promulgated by Commerce, that agency has in turn overstepped the legal mandate for its action, as set out in Section C.

b. Defendants Violate Section (e)(7) of the Privacy Act By Collecting Information Regarding Plaintiffs' First Amendment Activities.

Section (e)(7) of the Act prohibits a government agency from maintaining records that describing "how any individual exercises rights guaranteed by the First Amendment" unless expressly authorized by statute; by the individual in question; or unless "pertinent to and within the scope of an authorized law enforcement activity." Defendants' acts violate this section because they propose to collect information regarding plaintiffs' associational activities, which are clearly protected by the First Amendment. Further, the fact that defendants' acts will chill additional clearly protected activity, i.e., the free expression of plaintiffs' scientific ideas, also militates in favor of the applicability of the section (and the inapplicability of any exception to it that defendants might assert).

First, it is clear that the materials to be collected here constitute "records." A "record" for purposes of the Act is "any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. Section 552a(a)(4). Here, the records consist of government forms containing personal information about plaintiffs. *See MacPherson v. IRS*, 803 F.2d 479, 481 (9th Cir. 1986).

Second, it is clear that the information collected will describe plaintiffs' exercise of First Amendment rights. The broad-based inquiry into plaintiffs' financial history; sexual

orientation and sexual history; medical and emotional history; and open-ended inquiries to neighbors, former employers, and others regarding plaintiffs' "suitability" clearly implicate protected associational activities. NASA's identification of sexual orientation and history as factors going to suitability, alone, puts its actions afoul of this provision of the Privacy Act. Plaintiffs' intimate associations are protected First Amendment activity. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984) ("choices to enter into and maintain certain intimate human relationships" are protected by the First Amendment). Moreover, the other associational activities that NASA's agents may uncover as a result of their open-ended inquiries to those associated with plaintiffs are also protected – including political and social associations, etc. The suitability criteria proposed by NASA are so broad and problematic that past political activity and associations may easily come within their purview. Indeed, whether or not NASA agents explicitly ask for such information (by that name), the breadth of the inquiries posed are very likely to elicit information regarding such protected activities. Collecting this information, then, again puts the agency afoul of the Act, regardless of whether the information is preserved. *See Albright*, 631 F.2d at 919. This is perfectly logical, given the massive chilling effect worked by the open-ended inquiries themselves.

B. Plaintiffs Will Suffer Irreparable Harm as a Result of Defendants' Acts.

As set forth, supra at 11-13, and in the attached declarations, defendants' acts will cause irreparable harm to the plaintiffs and to the public, if not enjoined. Courts in this Circuit have soundly held that a violation of an individual's Fourth Amendment right categorically consists in irreparable harm. *AFGE, Local 1533 v. Cheney*, 754 F. Supp. 1409, 1416 (N.D. Cal. 1990). Accordingly, plaintiffs in the present case will suffer irreparable injury as a matter of law if defendants' acts constitute unreasonable searches. *Id.* Violation of plaintiffs' informational privacy rights under the Fourteenth Amendment also constitute irreparable harm because "once this type of highly personal information is disclosed to the government, the revelation cannot be undone." *National Treasury Employees Union v. U.S. Dept. of Treasury*, 838 F. Supp. 631, 639 (D.D.C. 1993) (holding that in filling out an SF-85P form there is an "obvious threat of significant harm

if the plaintiffs are forced to disclose this information to the Customs Service.").

Moreover, NASA will deny the plaintiffs access to JPL facilities if they do not complete the SF-85 form and execute the attached waiver; they will then be deemed to have resigned. *See* p. 12 *supra.* As a result, plaintiffs will lose their livelihoods and access to continue their academic pursuits. NASA and the public will also suffer great injury because they will lose valuable scientists, thereby weakening the caliber of its projects, delaying the completion of work in progress, and hiking up program costs.

The balance of the hardships also tips sharply in the plaintiffs' favor because the defendants would not suffer any significant injury if their policy were enjoined. The defendants have maintained secure and effective facilities at JPL for decades without this policy. *National Treasury Employees Union*, 838 F. Supp. at 639 (noting that the "threat of harm to the government is negligible" because the "Customs Service continues to function without the collection of this information, government waited a year to gather questionnaires, and additional delay should pose little problem.). In addition, there are many less intrusive methods that NASA could follow in order to enhance security and implement the identification system required by HSPD-12. Indeed, the OneNasa card issued to all JPL employees, purportedly to comply with HSPD-12, had the same basic identification confirmation process as PIV-II (fingerprints, two forms of identification and in-person meeting), except that it did not require a background investigation or privacy waiver. At a minimum, NASA had determined in implementing the OneNASA badge that it was sufficient to comply with HSPD-12 and to ensure that only authorized personnel entered JPL. The former OneNasa badge process or other less intrusive identification methods will bring JPL in compliance with the federal directive without causing plaintiffs irreparable harm.

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Respectfully Submitted,

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