

1 UNITED STATES DISTRICT COURT
2
3 SOUTHERN DISTRICT OF CALIFORNIA
4

5 HENRY McCOY, KATHERINE “KITTY”
6 PRYDE, and DOES 1-30, inclusive,
7
8 Plaintiffs,

9 vs.

10 WILLIAM STRYKER, President of the
11 United States, U.S. DEPARTMENT OF
12 DEFENSE, CHRIS CLAREMONT,
13 Secretary of US Department of Defense,
14 U.S. DEPARTMENT OF JUSTICE and
15 JOHN BYRNE, Attorney General,
16
17 Defendants.

Case No. 17-civ-9636-MDD

GOVERNMENT’S BRIEF

Date: 18 February 2017
Time: 3:15 p.m.
Judge: Hon. Mitchell D. Dembin

18 WILLIAM STRYKER, President of the United States, U.S. DEPARTMENT OF
19 DEFENSE and its Secretary, CHRIS CLAREMONT, and U.S. DEPARTMENT OF
20 JUSTICE and JOHN BYRNE, Attorney General (“Defendants”), by and through their
21 counsel of record, and submits the following brief in support of Executive Order No.
22 09101963 and the Mutual Registration Action (“MRA”).

23 **INTRODUCTION**

24 We are living a new, unprecedented world where mutants can control the weather,
25 infiltrate our minds, shapeshift, phase, destroy cities, and enslave entire civilizations. But,
26 what are mutants? They are humans with extraordinary special abilities granted by what
27 is known as “the Mutant X-gene.” They have lived among us, unregulated by the laws of
28 mankind for too long. Today, we present mutants with a simple choice: be a threat to
29 humanity or become a part of it.

Not all mutants seek to co-exist peacefully. We must confront the reality that there
are those who would rule mankind, rather than join it. We must act today to create a

1 future for everyone, or there will be no future for anyone. This is a war for survival that
2 only together we can win.

3 Our enemies have made themselves known: Magneto, Mystique, Mr. Sinister,
4 Omega-Red, Sabretooth, Wolverine, Apocalypse and Phoenix. Their terrorist
5 organizations are known as “The Brotherhood of Evil Mutants,” “Weapon-X,” “The
6 Hellfire Club,” “The Horsemen of the Apocalypse,” “The New Mutants,” and “The X-
7 Men,” and the foreign mutant terrorist group, “Excalibur.” Each of these groups include
8 both radicalized U.S.-born mutants and foreign-born mutants. Make no mistake; these
9 groups advocate for the interests of their own members, not for mutants generally, despite
10 their propaganda and deceptive rhetoric.

11 The offenses these mutants and groups have committed are innumerable. They
12 have intentionally and recklessly destroyed our cities. They have kidnapped, enslaved
13 and murdered both humans and mutants alike. They have infiltrated the highest levels of
14 governments and militaries worldwide. These mutant-terrorists have acted with complete
15 disregard for the law, with zero consequence. As a result, America has lived in quiet
16 discomfort with mutant misbehavior. That ends now.

17 Who, then, will protect the innocents – men, women and children – from injury,
18 enslavement, or death? We, the People, – mutant and human alike – must act together to
19 protect our way of life from those who seek to crush us without a second thought, like
20 ants under a boot. The United States has tolerated lawlessness for too long. We need law
21 and order, now.

22 The Mutant Registration Act (MRA) is the ultimate answer to the mutant question.
23 It is an olive branch between humans and mutants – a reasonable request that makes us
24 all more free and secure in the new world we all live in now. The MRA is implemented
25 in the best interests of not only mutants, but also humans. This is the U.S. Government’s
26 attempt to reach out to mutants in an effort to help them control their abilities, which will
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1 not only protect others from mutants’ powers, but also protect mutants from losing
2 control of their own powers.

3 All mutants have the choice whether to comply with the law, but if they don’t, then
4 a warrant for their arrest will be issued and all necessary force to apprehend and detain
5 will be authorized. The law is designed to (1) eliminate vigilantes and super-villains by
6 uncovering the “secret identities” of mutants through registration; (2) train and educate
7 mutants in harnessing and controlling their powers; and (3) hold those mutants
8 accountable who violate the law or act with impunity. The MRA represents the natural
9 evolution of the role of super-humans and mutants in society. Mutants can no longer act
10 outside the law; instead, they must go legitimate and earn back public trust. This law will
11 allow mutants to come out from the shadows and use their powers for the benefit of the
12 entire country, which will create progress and prosperity for both humans and mutants,
13 together.

14 **FACTUAL BACKGROUND**

15 Executive Order 09101963 applies to every mutant involved in the New York
16 Mutant Hostilities, colloquially known in the press as “The Inferno¹,” whether they are
17 domestic- or foreign-born. High level government officials have concluded, on the basis
18 of the mutant’s action in New York, that these mutants pose a “continued and imminent
19 threat” of violence to United States persons and interest. The U.S. Department of
20 Defense has ordered that all individuals with the Mutant X-Gene are to be registered to
21 ensure national security in compliance with Executive Order 09101963.

22 The Government’s brief will address the following issues: (1) the President’s
23 Executive Authority to implement the Mutant Registration Act; (2) the constitutionality
24 and reasonableness of the Government’s mutant registration request; and (3) the
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26 ¹ Mutants attacked the Empire State Building and surrounding buildings, causing damage to the
27 buildings’ façade and internal structure. Mutants released a nerve agent in the New York subway system,
28 resulting in mass hallucinations, including riders believing that their trains took them “to hell,” and inducing
hysteria and injuries attributed to perceived attacks by inanimate objects to exposed city residents.

1 authorization and constitutional use of the SENTINEL program to bring defiant and
2 subversive mutants into compliance with the law.

3 ARGUMENT

4 5 **A. THE EXECUTIVE BRANCH IS AUTHORIZED TO IMPLEMENT THE** 6 **MUTANT REGISTRATION ACT (MRA) PURSUANT TO THE U.S.** 7 **CONSTITUTION.**

8 “Citizenship has its responsibilities as well as its privileges, and in time of war the
9 burden is always heavier.” *Korematsu v. United States*, 323 U.S. 214 (1944). Our country
10 has been attacked, invaded, and sabotaged. Right now, New York City and its nearly 8.4
11 million residents are under continuous siege as a result of mutant activity. The law is
12 clear that when invasion is threatened, every possible precaution against espionage and
13 sabotage must be taken and “[p]ressing public necessity may sometimes justify the
14 existence of such restrictions.” *Id.* at 216; *see also*, *Hirabayashi v. United States*, 320
15 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943); *Ex parte Mitsuye Endo*, 323
16 U.S. 283 (1944).

17 The Japanese attack on Pearl Harbor and World War II provided that justification.
18 On February 19, 1942, President Franklin D. Roosevelt issued Executive Order 9066
19 authorizing the Secretary of War and certain military commanders to “prescribe military
20 areas from which any persons may be excluded as protection against espionage and
21 sabotage.” *Korematsu v. United States*, 584 F. Supp. 1406, (1984). Congress also enacted
22 §97(a) of Title 18 of the United States Code, enforcing the exclusions authorized under
23 the Executive Order.

24 Then, on March 2, 1942, General John L. DeWitt, Military Commander of the
25 Western Defense Command, issued Public Proclamation No. 1 pursuant to Executive
26 Order 9066, designating the entire Pacific Coast “subject to espionage and acts of
27 sabotage, thereby requiring the adoption of military measures necessary to establish
28 safeguards against such enemy operations.” *Id.* at 1409. The U. S. Supreme Court applied

1 the strictest scrutiny in reviewing the Executive Order and was “unable to conclude that it
2 was beyond the war power of Congress and the Executive to exclude those from the West
3 Coast war area at the time they did.” *Korematsu* (1944) at 217-218.

4 The internment of the Japanese has been criticized as a reaction to racial hysteria
5 and wartime frenzy, but that is not the situation today. The Government’s response to the
6 mutant crisis is not based on hysteria, frenzy or some military general’s opinion, but on
7 freedom and security concerns in response to a chain of sustained, mutant-related attacks
8 within our borders. The chaos gripping the nation’s most famous metropolis can be
9 viewed on cable television and live video stream every single day. There is no deception
10 or fraud necessary for all to realize that our homeland is under attack, including
11 significant acts of terror and espionage. Without urgent attention, we risk losing control
12 not only of our national sovereignty, but also of our own future.

13 Numerous mutants have declared war on humanity: Magneto seeks to create a
14 future where mutants live superior to humans with the aid of Mystique, who can steal the
15 identity of any person; Apocalypse has declared himself superior to humans and mutants
16 and seeks to destroy them both; and Mr. Sinister creates plagues and viruses while he
17 experiments with cloning, creating, enhancing and controlling mutant powers.

18 These mutants are the saboteurs and spies of the new war confronting us. The
19 Inferno incident is our Pearl Harbor, so we must remember “hardships are part of war,
20 and war is an aggregation of hardships.” *Korematsu* (1944) at 219. The Government
21 recognizes that forcing the exclusion of large groups of citizens from their homes, except
22 under circumstances of the gravest emergency and peril, is “inconsistent with our basic
23 governmental institutions”, but when “our shores are threatened by hostile forces, the
24 power to protect must be commensurate with the threatened danger.” *Id.* at 219-220. Just
25 as the curfew, registration, and detainment of American citizens was justified during
26 World War II, it is so justified in response to the mutant crisis we face today.
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1 **B. THE MRA IS A REASONABLE REQUEST AUTHORIZED BY ACT OF**
2 **CONGRESS, EXECUTIVE AUTHORITY, AND JUDICIAL PRECEDENT.**

3 We no longer can afford to take half-measures to confront the reality of mutants
4 living among us who intend to do us harm. The Mutant Registration Act is a reasonable
5 request that will protect us from malevolent mutants, including amateurs and sociopaths.
6 We no longer live in the Wild West, where mutants can create alter-egos, run around in
7 masks and tights, and refuse to obey the law. The Government simply requests that
8 mutants provide their true names and identities, so when an innocent is harmed or killed,
9 those responsible can be held accountable. After this law's implementation, if Storm,
10 Cyclops, or Beast destroys your home, they can be identified and held to answer for their
11 acts. If Mystique impersonates the President or Professor Xavier invades your mind, they
12 can be brought to justice. When mutants with super-strength, speed or flight cause
13 collateral damage, the Government can recover damages.

14 The MRA does not discriminate among different sub-groups of mutants, they are
15 all treated equally under the law regardless of politics, religion, race, ethnicity,
16 nationality, sex, gender, sexual orientation, mental or physical disability, employment,
17 veteran status, national origin, ancestry, age, military service, or any other protected
18 status. The only distinguishing characteristic is the "X-gene" which grants these mutants
19 their superhuman abilities. The Government cannot know the extent of the mutant threat
20 unless we register the range of powers and number of individuals whose allegiance to our
21 nation can change at a moment's notice. We must act swiftly and definitively to assess
22 the scope of the mutant population; only then can the Government formulate an effective
23 response to the mutant threat and keep our country safe.

24 This is not a radical proposition. When the war-making branches of the
25 Government have ground for believing that "in a critical hour such persons could not be
26 readily isolated and separately dealt with, and constituted a menace to the national
27 defense and safety," then "prompt and adequate measures must be taken to guard against
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1 it.” *Korematsu* (1944) at 218. Further justification comes from *Ex parte Mitsuye Endo*,
2 323 U.S. 283 (1944), where the Supreme Court ruled that those detained under the
3 Executive Order who could demonstrate their loyalty to the United States and the lack of
4 any relationship to the enemies of the country could justify their release from detention.
5 Under the MRA, once detained mutants can demonstrate their loyalty to the United
6 States, they too may claim their release from detention.

7 Finally, as citizens of the United States, we have all dealt with registration in some
8 form. What the MRA is requesting is nearly identical to the registration required under
9 the Selective Service Act, which requires individuals to register for the military or face
10 penalties, including detainment. When Americans are born, they are registered with a
11 Social Security number and birth certificate. All minor children are required to attend
12 school for the benefit of both the child and the future of society as a whole. In order to
13 operate a motor vehicle, drivers have to pass a test certifying they are not a danger to
14 themselves or others. There are even classes of licenses required to drive larger, more
15 dangerous vehicles, like buses and semi-trucks. The ideas of compulsory registration and
16 compliance with the law are not novel or ground-breaking; they are reasonable requests
17 necessary for our shared economy and society to function properly.

18 19 **C. THE USE OF UNMANNED AIRCRAFT SYSTEMS TO BRING MUTANTS** 20 **INTO COMPLIANCE IS NOT A VIOLATION OF THE FOURTH** 21 **AMENDMENT.**

- 22 1. Law enforcement’s use of unmanned aircraft systems to bring mutants
23 into compliance with the registry is not a violation of Fourth
24 Amendment right to protection from unreasonable searches.

25 In determining whether a person has a legitimate expectation of privacy, the courts
26 asks two questions: has the individual, by his conduct, exhibited an actual, subjective
27 expectation of privacy and whether the individual’s subjective expectation of privacy is
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1 one that society is prepared to recognize as reasonable. *People v. Stanislawski* (1986) 180
2 Cal.App.3d 748, 751. “While ‘the so-called curtilage’ (*i.e.*, the land immediately
3 surrounding and associated with the home) is constitutionally protected against
4 unreasonable searches, the special safeguard accorded by the Fourth Amendment is not
5 extended to the open fields.” *Hester v. United States* (1924) 265 U.S. 57, 59.

6 In asking the two questions to determine if there is a legitimate expectation of
7 privacy in this case, the Court should determine that the mutants in this case do not have
8 a legitimate expectation of privacy in the air space that the Sentinel unmanned aircraft
9 systems (UAS) will patrol because it is open air space that is above the public streets and
10 roads. This type of monitoring is analogous and identical to the kind of surveillance
11 helicopters conduct on a daily basis or cameras on light poles and street corners of busy
12 streets. The UAS will simply be able to capture more footage because of the expansive
13 area it will cover.

14 Secondly, Plaintiffs’ claim of an expectation of privacy is not one that the public is
15 willing to recognize as reasonable. Society is aware and accepting of the fact that certain
16 cities have cameras on the corner streets in busy neighborhoods. We are aware of the
17 cameras and we know that walking down the street is being captured on video
18 surveillance for the purpose of protecting society. Additionally, society is also aware that
19 helicopters, be it law enforcement or media outlets, hover the skies above homes, cities,
20 parks and roadways. We are fully aware that there is no expectation of privacy when this
21 is happening.

22 The mutants have not exhibited conduct that amounts to an actual subjective
23 expectation of privacy. The mutants have not placed barriers above their fields. They
24 have not made active efforts to make law enforcement aware of their expectation of
25 privacy in the space the executive order intends to send UAS to patrol, and they have not
26 made such an actual attempt to make citizens aware of their expectation of privacy in the
27 intended patrol area.
28

1 Lastly, the UAS that will be used to bring the mutants into compliance and enforce
2 the Executive Order will be flying around the airspace of open fields. The airspace above
3 city streets, neighborhoods, and other areas open to the public will be monitored to track
4 unregistered mutants and bring them into compliance with the order. Courts have ruled
5 that the Fourth Amendment safeguards against unreasonable searches and seizures do not
6 extend to open fields. *Id.* Because the area that will be searched here will be open-fields
7 where the general public – human and mutant – is free to roam about without necessary
8 permission, this open field space of surveillance is not subject to the protections
9 guaranteed by the Fourth Amendment.

10 For these reasons, this Court should find that the Fourth Amendment protection
11 against unreasonable searches and seizures is not violated by the use of UAS to bring
12 mutants into compliance with the Order because the mutants have not by their conduct,
13 exhibited an actual, subjective expectation of privacy and society is not prepared to
14 recognize this area as one where a person has a reasonable expectation of privacy.
15 Additionally, because the space where the surveillance will take place is considered open
16 fields, it is not subject to protections of the Fourth Amendment.

- 17 2. Law enforcement’s use of UAS to seize mutants who are not in
18 compliance with the registration section of the Executive Order is not
19 a violation of the Fourth Amendment protection against seizure.

20 When determining the constitutionality of a seizure, “a court must balance the
21 nature and quality of the intrusion on the person’s Fourth Amendment interests against
22 the importance of the governmental interests alleged to justify that intrusion.” *Tenn. v.*
23 *Garner* (1985) 471 U.S. 1, 3; *Scott v. Harris* (2007) 550 U.S. 372, 374. Factors that the
24 court may consider in this analysis include “the severity of the crime at issue, whether the
25 suspect poses an immediate threat to the safety of the officers or others, and whether he is
26 actively resisting arrest or attempting to evade arrest by flight.” *Graham v. Connor*, 490
27 U.S. 386, 396 (1989).

1 The intrusion on Plaintiffs' Fourth Amendment seizure interest is justified because
2 the protection of the public and society, innocent people, has a higher value than that of a
3 temporary detention of non-humans who refuse to comply with the Executive Order. The
4 government interests here are not only to protect the public from physical harm and
5 imminent death, but also to protect them from damage to infrastructures destroyed by the
6 mutants. Specifically, the mutant attack on the Empire State Building in New York is
7 what prompted this Executive Order. This calls for a mutant registry and the enforcement
8 of the Executive Order to bring those not registered into compliance.

9 The government's interest in this Fourth Amendment seizure is to protect the
10 public, keep them safe and hold the mutants involved in "The Inferno" accountable. This
11 is the severity of the crime at issue, a factor this Court must consider in analyzing the
12 government's justification of the use of this force. Another factor this Court must
13 consider, whether the suspect poses a threat to officers' or public safety, weighs very
14 heavy in favor of the government given the numerous casualties during the mutant attack
15 and the fact that mutants' super-human power and ability makes them much more
16 powerful than any officer posing an immediate danger to them.

17 Therefore, law enforcement's use of the UAS is not a violation of the Fourth
18 Amendment protection against seizures because the government's interest in not only
19 protecting not only officers from the superhuman power the mutants possess but also
20 keeping the public from the harm and danger their abilities cause to non-civilians, is
21 justified given the nature and quality of the intrusion.

22 **D. THE USE OF UAS TO BRING MUTANTS INTO MRA COMPLIANCE IS**
23 **NOT A USE OF EXCESSIVE FORCE BY LAW ENFORCEMENT.**

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25 1. Law enforcement's use of drones to bring mutants into compliance with
26 the MRA is not use of excessive force because it is reasonable.

27 When determining the reasonableness or unreasonableness of the force used to
28 detain a suspect, a court may consider: "the relationship between the need for the use of

1 force and the amount of force used; the extent of the plaintiff's injuries; any efforts made
2 by the officer to temper or to limit the amount of force; the severity of the security
3 problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff
4 was actively resisting. *Kingsley v. Hendrickson* (2015) ___U.S.___ [135 S.Ct. 2466,
5 2468, 192 L.Ed.2d 416, 416] The reasonableness of a particular use of force must be
6 judged from the perspective of a reasonable officer on the scene. *Graham, supra*.

- 7 a. The amount of force used by the UAS is necessary given the need to
8 use this much force to stop a mutant that possesses super human
9 strengths and abilities.

10 The mutants possess a force that no other non-mutant human possesses. The UAS
11 will use the amount of force necessary to bring the mutants that are not registered into
12 compliance. For example, Plaintiff Hank McCoy, known as Beast, can jump up to 25 feet
13 in the air. If he tried to flee a human law enforcement officer in pursuit, his ability to
14 jump this high would give him an overwhelming advantage over any possible human
15 form of law enforcement. In addition, Beast has super human strength that can crack
16 concrete with his hand in a fist. The force of ten (10) officers cannot overcome the
17 strength Beast possesses. On the other hand, Plaintiff Katherine ("Kitty") Pryde is a
18 teenager, about 5'5" and a mere 100 lbs. Kitty possesses a "phasing" ability that allows
19 her, as well as objects or people she is in contact with, to become intangible. Her power
20 also disrupts any electrical field she passes through and lets her simulate levitation. No
21 officer could follow her through a brick wall, survive an electrical surge or hover while in
22 pursuit of Kitty. Her mere contact with the officer could cause him to "phase" into a solid
23 surface from which he could never escape. Therefore, the amount of force used by the
24 UAS is necessary given the extraordinary strength and super human abilities these
25 individuals possess.

- 26 b. The severity of the security problem at issue is grave because The
27 Inferno and mutant attacks in New York City are only a preview of
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1 the amount of non-mutant civilian casualties that can come from not
2 restraining the mutants for purpose of compliance.

3 If UAS cannot be used to enforce the Executive Order and bring mutants into
4 compliance with the MRA, the security issue is likely to reach the level of a national
5 security issue. During the Inferno, the mutants caused significant damage to many to the
6 exterior and internal structure of buildings in New York City. Included in this structural
7 damage were locations that non-mutant civilians frequent quite often, such as a movie
8 theatre and various other small businesses. In addition, this specific attack in New York
9 City cost the lives of numerous non-mutant civilians. People's lives and safety are at
10 stake if the mutants who refuse to register are not brought into compliance. Only mutants
11 know the extent of their super powers and the damage they are capable of doing. No one
12 knows – even a mutant may not know – what the trigger can set off their super power.

13 Therefore, the severity of the security problems is very high because it places at
14 risk the lives and safety of numerous non-mutant civilians and the infrastructure and
15 internal structures of buildings in the cities if the UAS are not used to bring the
16 unregistered mutants into compliance with the Executive Order.

- 17
18 c. A police officer can reasonably perceive the threat to be very high and
19 grave because mutants possess a power that they do not even know
20 how to control at times and super human strength.

21 Not all the mutants have been identified, but to use an example of a threat that can
22 be reasonably perceived by an officer, the government points to the strength of Beast. If a
23 mutant like Beast encounters an officer, the officer can reasonably perceive that the threat
24 will be very high because Beast can crush concrete floors with his bare fist. A punch that
25 can do that damage to concrete can surely be a deadly threat to an officer. Additionally,
26 power like the one Magneto possesses, the ability to attract anything of metal using his
27 mind, poses a very reasonable threat to an officer. Magneto is able to use his mind,
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1 without ever approaching or coming within feet of the officer, and remove the officer's
2 firearm, baton and Taser gun.

3 An officer can reasonably perceive that the threat from one of these two mutants is
4 very high. If unregistered mutants can present that kind of threat to an officer, it would
5 not be safe to have our law enforcement officers attempt to contact any mutant in order to
6 enforce the Executive Order and bring them into compliance. Therefore, the use of UAS
7 is reasonable, given the threat to officers charged with enforcement of the Executive
8 Order on mutants who possess super human powers that are no match for the weapons of
9 a non-mutant civilian or law enforcement.

10
11 **CONCLUSION**

12 The Executive Branch is authorized to implement the Mutant Registration Act
13 (MRA) Pursuant to the U.S. Constitution. The MRA is a reasonable request authorized by
14 Act of Congress, Executive Authority, and Judicial Precedent. The use of SENTINEL
15 drones does not violate the Fourth Amendment protections from unreasonable searches
16 and seizures, and is not a use of excessive force given the severity of the mutant threat.
17 For the foregoing reasons Defendants respectfully request that this Court render judgment
18 in favor of the United States Government.

19
20 DATED: 13 February 2017

Respectfully submitted,

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22
23 Clark C. _____
24 Sylvia L.
Assistant United States Attorneys