No. 09-530

# In the Supreme Court of the United States

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL., PETITIONERS

*v.*

ROBERT M. NELSON, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

**REPLY BRIEF FOR THE UNITED STATES**

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The court of appeals held that conducting basic background checks of contract employees seeking access to NASA's Jet Propulsion Laboratory (JPL)—using forms that for many years have been routine in the federal sector—intrudes upon and likely violates a federal constitutional right to informational privacy. The court so held even though the government collects only employment-related information, acquires this information only from the individuals themselves and persons they designate, and protects the information from public disclosure. The Ninth Circuit's decision extends well beyond any decision of this Court, stands in stark contrast to decisions from two other courts of appeals, and has potentially far-reaching consequences. This Court's review is warranted.

1. a. The decision below is unprecedented and wrong. The court of appeals recognized a constitutional privacy

right that is implicated any time the government collects information that a person would "not generally disclose[] * * * to the public." Pet. App. 22a (internal quotation marks omitted). The court drew no distinction between the government's mere collection of information for legitimate governmental purposes and its disclosure of such information to the public, and it ignored the Privacy Act, which protects against public disclosure of the information collected. Pet. 19-20. Further, the court failed to give weight to the reduced expectations of privacy in the employment context or to distinguish between the government's interests as a regulator and its interests as a proprietor or employer. Pet. App. 110a-111a (Callahan, J., dissenting from denial of rehearing en banc). And the court ignored the widespread and longstanding use of the forms at issue. *Id.* at 126a-127a (Kozinski, C.J., dissenting from denial of rehearing en banc). The court of appeals' holding thus restricts the government's ability to gather information, including of the most routine kind, in circumstances never before thought to raise any issues.

b. The decision below extends far beyond this Court's decisions. In *Whalen* v. *Roe*, 429 U.S. 589 (1977), the informational privacy concerns the Court identified stemmed not from the collection and use of the information, which the Court recognized served important public purposes, but from the prospect of public disclosure of sensitive information. *Id.* at 598-605. The Court further concluded that statutory and regulatory protections against public dissemination of the information collected satisfied any constitutional privacy concerns. *Id.* at 605-606; see also *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 455-457 (1977). By contrast, here the court decided that the government's mere solicitation and receipt of information through widely used forms that ask questions typical in such inquiries could

violate a constitutional privacy right, even if the information was never publicly disclosed. Respondents' *post hoc* attempt (Br. in Opp. 21-23) to harmonize the decision below with *Whalen* and *Nixon* is unavailing, but ultimately beside the point, for the court of appeals did not even cite *Whalen* and *Nixon*, much less analyze this case under the framework those decisions applied.[1] Nor did the court cite the Privacy Act, which addresses the privacy concerns that those decisions raised. See Pet. 19-20 (outlining Privacy Act protections). Contrary to respondents' contention (Br. in Opp. 22), the court nowhere suggested that the Privacy Act's protections against disclosure are inadequate, let alone explained such a conclusion.

c. Nor can the decision below be reconciled with decisions of the Fifth and D.C. Circuits upholding materially indistinguishable employment-related inquiries against privacy-based challenges. See Pet. 25-29 (discussing *NTEU* v. *United States Dep't of the Treasury*, 25 F.3d 237 (5th Cir. 1994), and *AFGE* v. *HUD*, 118 F.3d 786 (D.C. Cir. 1997)); see also Pet. App. 98a (Callahan, J., dissenting from denial of rehearing en banc). Respondents observe (Br. in Opp. 23-24) that the other circuits considered challenges brought by federal employees, not contractors. But that factual difference does not explain the circuits' wide divergence in legal approach.

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[1] Contrary to respondents' suggestion (Br. in Opp. 21-22), whether the information collected would be disclosed publicly was not merely "one of many" factors in the Court's analysis; it was the Court's central focus. See *Nixon*, 433 U.S. at 458-459 (*Whalen* "[e]mphasiz[ed] the precautions utilized by New York State to prevent the unwarranted disclosure of private medical information"; "the Act challenged here mandate[s] regulations similarly aimed at preventing undue dissemination of private materials").

The Fifth and D.C. Circuits emphasized that "the individual interest in protecting the privacy of the information sought by the government is significantly less important where the information is collected by the government but not disseminated publicly." *AFGE*, 118 F.3d at 793-794; see *NTEU*, 25 F.3d at 244 ("[T]he [background check] questionnaire requires these public trust employees only to disclose information to the IRS, as their employer—not to anyone else, and certainly not to the public."). The Ninth Circuit made no such distinction. See Pet. App. 17a-18a. Had this case been brought in the Fifth or D.C. Circuits, the result would have been different.

2. The effects of the decision below are potentially dramatic and far-reaching. The Ninth Circuit overrode the considered judgment of the federal agencies that basic background checks of federal contract employees are necessary to ensure the security of federal facilities and information systems to which those employees would have access. Pet. App. 22a-23a, 25a-26a. That judgment was reached after a 2004 Presidential directive required the agencies to improve credentialing of persons working at federal facilities so as to address the serious security concerns that arose as a result of the September 11, 2001, attacks. Pet. 6-8, 24. Both the Department of Commerce and NASA determined that security concerns justified use of the National Agency Check with Inquiries (NACI) process or a substantially equivalent alternative for contract employees. Pet. 6-8 & n.2. The result of the Ninth Circuit's decision is to "sharply curtail[] the degree to which the government can protect the safety and security of federal facilities"—in particular, the multi-billion-dollar JPL, which houses "some of the most sensitive and expensive equipment owned by NASA." Pet. App. 96a, 120a (Callahan, J., dissenting from denial of rehearing en banc). Contract em-

ployees occupy all positions at JPL, with access to NASA facilities and information systems similar to their civil service counterparts. C.A. App. 469-470.[2]

The decision below casts a constitutional shadow far beyond JPL. The government conducts background checks for millions of civil service employees and contract employees annually, using the same NACI process and forms at issue here. Such a process has been used for federal employees for over 50 years. See Pet. 3 (citing Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953 comp.)). As a result of the decision below, the federal government faces significant uncertainty about what background checks might be constitutional in the Ninth Circuit, and this uncertainty may have still broader consequences because the federal government promulgates standard forms and procedures on a nationwide basis.

The majority's broad ruling provides no guidance to the United States or to the numerous state and local governments in the Ninth Circuit. On denial of rehearing en banc, the author of the majority opinion suggested that "reasonable" background checks may be justified when the government has a "sufficiently great" justification and "adheres to proper limiting standards." Pet. App. 85a (Wardlaw, J., concurring in denial of rehearing en banc). But the judge did not provide any explanation of what would count as "reasonable," "sufficient[]," or "proper." Other judges expressed concern that the panel's holding could "undermine personnel background investigations performed daily by

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[2] Although one of the respondents characterizes JPL as an open "university campus type environment," Br. in Opp. 3 (quoting C.A. App. 145), that assertion lacks foundation in the record. There are security checkpoints at all entrances to JPL, and everyone who gains access to JPL, including Caltech faculty, "must apply for and receive a badge from NASA." C.A. App. 766, 771.

federal, state, and local governments." *Id.* at 97a (Callahan, J., dissenting from denial of rehearing en banc). Indeed, Judge Kleinfeld suggested that federal judges hiring law clerks may not be able to "talk to professors and past employers and ask some general questions about what they are like." *Id.* at 124a (Kleinfeld, J., dissenting from denial of rehearing en banc).

The disruptive effects of the decision below on critical government operations warrant this Court's review. See, *e.g.*, *Butz* v. *Economou*, 438 U.S. 478, 480-481 (1978) (granting certiorari in part to ensure "the effective functioning of government"); *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 400 (1966) (granting certiorari "because of the importance of these questions in the administration of government contracts").

3. Respondents contend (Br. in Opp. 2, 12) that review is premature because the decision arises in the context of a preliminary injunction. They are mistaken.

The Ninth Circuit set out a legal framework for assessing informational privacy claims that will bind the district court on remand and the court of appeals in future cases. See, *e.g.*, *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am.* v. *United States Dep't of Agr.*, 499 F.3d 1108, 1114 (9th Cir. 2007) ("the general rule" that "decisions at the preliminary injunction phase do not constitute the law of the case" does not apply to "conclusions on pure issues of law"; such conclusions are "binding" as law of the case and in future cases). In particular, the court determined that the government's collection of employment-related information for contract employees implicates a constitutional right to informational privacy, Pet. App. 22a, and that the framework for assessing whether that right has been violated requires ad hoc balancing of the intrusion on privacy interests against the government's need for the

information sought, *id.* at 17a-18a. The court also decided that it makes no difference in the constitutional analysis whether the information is collected by the government for its own use or is widely disclosed to the public; whether the government is acting as a proprietor or employer or instead as a regulator when collecting the information; or whether any statutory or regulatory provisions protect the information from public disclosure. Pet. 19-22.

Respondents do not seriously contend that the district court may vary from the court of appeals' legal framework for assessing informational privacy claims. Instead, they claim (Br. in Opp. 14, 16) that the Ninth Circuit did not hold that they would likely succeed on the merits of their claims. That is wrong. See, *e.g.*, Pet. App. 22a ("Appellants are likely to succeed on this * * * portion of their informational privacy challenge to SF 85."); *id.* at 36a-37a (respondents "are likely to succeed on the merits"); *id.* at 44a-45a ("the district court erred in finding that [respondents] were unlikely to succeed on their" Form 42 claim).

Respondents also argue (Br. in Opp. 11-12) that further development of the record is necessary to explore why the government is seeking the information, how the government gathers the information, and what the government does with the information once collected. The only issue before the court of appeals was the collection of information through Standard Form 85 (SF-85) and Form 42, which by their terms are limited to employment-related purposes. No further information is required to review the court of appeals' legal conclusions about those two forms. The court held as to SF-85, which asks an individual who has acknowledged using illegal drugs within the past year whether he received any treatment or counseling, Pet. App. 143a, that the balancing inquiry it thought appropriate should be resolved in respondents' favor because "the gov-

ernment has failed to demonstrate a legitimate state interest" supporting the collection of the information, *id.* at 22a. The court reached that conclusion even though acknowledging that "any treatment or counseling received for illegal drug use * * * *lessen[s]* the government's concerns regarding the underlying activity," *ibid.*, which is precisely why the government has an interest in the information. Further, the court determined as to Form 42, a two-page form sent to designated references asking for information bearing on the applicant's "suitability for government employment or a security clearance," *id.* at 146a, that although the government had legitimate interests in seeking such information, *id.* at 24a, the government had failed to show that the Form's "open-ended" questions were "narrowly tailored to meet" those needs, *id.* at 24a-25a. In light of these rulings, respondents' assertion (Br. in Opp. 12) that "[n]othing in the decision below precludes the government from fully making its case on remand" rings hollow.

Review by this Court of interlocutory decisions is appropriate when an "important" issue of law "is fundamental to the further conduct of the case," "particularly if the lower court's decision is patently incorrect and the interlocutory decision, such as a preliminary injunction, will have immediate consequences for the petitioner." Eugene Gressman et al., *Supreme Court Practice* 281 (9th ed. 2007) (citing cases). For example, the Court granted certiorari in *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 489 (2001), to review an interlocutory decision requiring a district court to consider a "medical necessity" defense to a Controlled Substances Act violation, because the court of appeals' decision "raise[d] significant questions as to the ability of the United States to enforce the Nation's drug laws." Review likewise is warranted here: the Ninth Circuit's expansive and erroneous legal ruling leaves little

room for the government on remand and casts into doubt an important means for the government to ensure that it hires trustworthy employees and appropriately protects federal facilities.

4. Contrary to respondents' repeated contention, the background checks at issue seek only employment-related information, and the case presents no issue regarding whether the government relies on improper factors in making employment-related decisions.

a. As explained in the petition, SF-85 and Form 42 collect only employment-related information, and all information collected is subject to the extensive protections in the Privacy Act. Pet. 3-6, 22-23. An examination of SF-85 and Form 42 makes that point clear: both forms limit their scope to questions, routine in the employment context, regarding whether the applicant is "suitable for the job" (Pet. App. 137a; see *id.* at 145a-146a), and both expressly state that the Privacy Act protects any information collected (*id.* at 138a, 145a). There is no basis for respondents' suggestion (Br. in Opp. 16) that Form 42 is used to obtain information about private sexual activity: Nothing on the face of Form 42 requests such information, Pet. App. 145a-146a; the form is not "used for any purpose other than a personnel background investigation," 75 Fed. Reg. 5359 (2010); it asks only for information that "may have a bearing on this person's suitability for government employment or a security clearance," Pet. App. 146a; it is sent only to persons the applicant designates, *id.* at 145a-146a; and it takes only five minutes to complete, see 70 Fed. Reg. 61,230 (2005).

b. Respondents contend (Br. in Opp. 7, 16, 19-20) that the government's credentialing decisions "could delve into unquestionably private matters," appending to their brief a chart (matrix) they say evidences this possibility. That claim is not before this Court. Respondents brought two

privacy-based claims: that the inquiries on SF-85 and Form 42 are "overly broad and intrusive," and that, once that information is collected, JPL will make credentialing decisions on improper grounds. Pet. App. 62a. Both the district court and the court of appeals decided that the second challenge was "unripe and unfit for judicial review," because the government had not even begun the background checks of respondents and respondents' claims are "strictly speculative." *Id.* at 8a-9a, 61a-63a; see Br. in Opp. 8 (acknowledging those holdings). And contrary to respondents' repeated assertions and intimations (Br. in Opp. 9, 10, 11, 16, 20), the court of appeals' constitutional analysis of respondents' informational privacy claim concerning SF-85 and Form 42 was not linked to the use of the chart they have appended. The court's opinion mentions the chart only once, in a footnote in the opinion's background portion (see Pet. App. 5a n.2), and it is not referred to at all in the court's analysis of respondents' informational privacy claim (see *id.* at 17a-26a).

In any event, at no point in this litigation has the government claimed authority to make credentialing determinations on criteria unrelated to employment. See Pet. 9 n.5. NASA has informed this Office that it does not use the chart appended to respondents' brief to decide whether to provide identity credentials to federal contract employees and that NASA management has so instructed officials within the agency on several occasions. Further, in response to Executive Order No. 13,467, 3 C.F.R. 196 (2009), in which the President charged the Office of Personnel Management (OPM) with "developing and implementing uniform and consistent policies and procedures" for determining "eligibility for logical and physical access" to federal facilities, *id.* § 2.3(b) at 200, OPM has issued standards that all agencies must use in credentialing federal contract em-

ployees. Those standards do not consider private sexual activity or any other improper factors.

Although approximately 39,000 NASA contract employees had completed the requisite background investigations as of September 21, 2007, C.A. App. 473-474, respondents cite neither any irregularities in the credentialing process nor any denials of credentials based on the use of improper criteria. If an employee believes that an adverse decision was made on any such improper ground, he is afforded a right of review. See *id.* at 951. The opinion at issue here does not concern that kind of claim. The decision below instead calls into constitutional question the government's ability to use standard employment forms in deciding whether to provide security credentials to contract employees working at a sensitive federal facility. That unprecedented ruling warrants review.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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*Solicitor General*

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