IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT NELSON, et al.,	)	
Plaintiffs-Appellants,	)	
v.	)	No. 07-_____
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, et al.,	)	
Defendants-Appellees.	)	

FEDERAL DEFENDANTS' RESPONSE TO PLAINTIFFS' EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL

INTRODUCTION AND SUMMARY

The federal defendants respectfully ask this Court to deny plaintiffs' request for an emergency injunction pending appeal. As the district court concluded, plaintiffs have demonstrated no likelihood of success on the merits and no irreparable injury.

This case arises from the President's order, in 2004, that required creation of uniform standards to govern security credentials at the facilities of government contractors. The Department of Commerce promulgated standards at the President's directive. These have been implemented by federal agencies, including the National Aeronautics and Space Administration, which has required that its contractors comply with these requirements.

Plaintiffs are employees of the California Institute of Technology ("Caltech"), which operates the Jet Propulsion Laboratory ("JPL"), a federal facility, pursuant to a contract with NASA. As a result of the current security standards, plaintiffs are required to complete a form – SF 85 – which is applicable to low risk contract employees. This form requires that plaintiffs provide information regarding their education, past employment, and past residences and asks the employee to indicate whether he has engaged in drug use in the past year. The form also asks for authorization to conduct a background check. Plaintiffs' employers are to implement credentials under the new security requirements by October 27, and have informed employees that they must complete the required forms by October 5.

In an opinion issued on October 3, the district court rejected a series of constitutional and statutory contentions challenging the validity of the SF 85. The court denied plaintiffs' motion for an injunction, concluding that their arguments failed on the merits and that they had failed to show that the absence of an injunction would result in irreparable harm.

Plaintiffs now ask this Court for an injunction pending appeal. In their motion, plaintiffs pursue only their claim that

the form violates a constitutional interest in informational privacy.

This argument is wholly without basis. This Court has recognized a limited right to protect of information of a particularly personal kind. In general, even when particularly personal information is at issue, the right to privacy implicates only the dissemination of that information to third parties. That situation is not presented here. Whatever limits exist on the government's ability to ask questions of its employees or the employees of its contractors are not tested here. It cannot plausibly be claimed that the government is barred from asking such employees about drug use in the preceding year. Nor is the government barred from conducting background checks.

As the district court recognized, plaintiffs' asserted irreparable harm is illusory. Plaintiffs urge that background investigators might ask irrelevant or inappropriate questions. If government investigators step over a statutory or constitutional line, a ripe controversy will exist at that point. As the district court concluded, no such controversy exists now.

STATEMENT

A. In the wake of the 9-11 Commission Report, the President issued a number of Executive Orders and Homeland Security Presidential Directives ("HSPD"). Among those was HSPD-12, which

recognized the need to eliminate the "[w]ide variations in the quality and security of forms of identification used to gain access to secure Federal and other facilities where there is a potential for terrorist attacks." HSPD-12 ¶ 1 (Aug. 27, 2004) (Pls' Ex. 1). The Secretary of Commerce was tasked with promulgating a "Federal standard for secure and reliable forms of identification." Id.

The Federal Information Security Management Act ("FISMA"), 40 U.S.C. § 11331, authorizes the Department of Commerce to promulgate Federal Information Processing Standards. Pursuant to HSPD-12 and its authority under the FISMA, the Department of Commerce issues Federal Information Processing Standards Publications ("FIPS PUB") 201 and its revision, 201-1. FIPS PUB 201-1 set out a standard for "identification issued by Federal departments and agencies to federal employees and contractors (including contractor employees) for gaining physical access to Federally controlled facilities and logical access to Federally controlled information systems." FIPS PUB 201-1 at v.

Under FIPS PUB 201-1, the process for issuance of identity credentials would begin with "initiation of a National Agency Check with Written Inquiries (NACI) or other Office of Personnel Management (OPM) or National Security community investigation required for Federal employment." Id. at 6. FIPS PUB 201-1 is made applicable to contractors through the Federal Acquisition

Regulation ("FAR") at 48 C.F.R. § 4.1300(a). These requirements were also incorporated into NASA's NPR 1600.1, and the contract between Caltech and NASA. Herbert Decl. ¶ 17.

For "low risk" employees, a NACI begins with completion of form SF 85, Questionnaire for Non-Sensitive Positions. The form requires information about employment and residential history for the past five years, educational history starting with high school, 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.

SF 85 also requires authorization to allow "any investigator, special agent, or other duly accredited representative of the authorized Federal agency conducting my background investigation, to obtain any information relating ,to my activities from residential management agents, employers, criminal justice ... agencies, retail, business establishments, or other sources of information." The release states that this "information may include, but is not limited to, my academic, residential, achievement, performance, attendance, disciplinary, employment history; and criminal history record information."

On May 24, 2007, NASA incorporated these requirements through a NASA Interim Directive, NPR 1600.1, that established a new "agency-wide policy for the creation and issuance of federal credentials at NASA." The NASA Directive was implemented

in compliance with HSPD-12 and the PIV standard established by the DOCo.

B. Plaintiffs are employees of the California Institute of Technology (“Caltech”) at the Jet Propulsion Laboratory ("JPL"), who perform duties under a government contract at a government facility with access to a significant amount of government information. They are subject to the SF 85 requirements for low risk employees.

JPL will be implementing the badge requirements pursuant to NPR 1600.1 by October 27 and, accordingly, has informed its employees that they must provide the required forms by no later than October 5, 2007.

Plaintiffs filed this suit on August 30, 2007. On October 3, the district court denied plaintiffs’ motion for a preliminary injunction, concluding that they demonstrated neither a likelihood of success on the merits or irreparable injury. The court rejected a series of constitutional and statutory contentions regarding the validity of SF-85. With regard to plaintiffs’ asserted irreparable injury, the court explained that, with the exception of the question regarding their drug use within the past year, plaintiffs had not been asked to disclose private information. If plaintiffs were to be denied a badge based on information provided, that decision would be subject to

review by an appeals panel and plaintiffs could seek monetary compensation.

REASONS THAT THE MOTION SHOULD BE DENIED

It is well established that a preliminary injunction is an "extraordinary remedy" that may not be granted absent a clear entitlement to relief. Mazurek v. Armstrong, 520 U.S. 968, 972 (1997). A "mandatory injunction" of the type sought here – which "goes well beyond simply maintaining the status quo pendente lite" – "is particularly disfavored." LGS Architects, Inc. v. Concordia Homes of Nevada, 434 F.3d 1150, 1158 (9th Cir. 2006) (quotation marks and citation omitted).

As an initial matter, however, it appears that plaintiffs have failed to meet the prerequisites for seeking an injunction pending appeal in this Court. "Under Rule 8 of the Federal Rules of Appellate Procedure, '[a] party must ordinarily move first in the district court" for an injunction pending appeal. Fed. R. App. P. 8(a)(1)(C). This is '[t]he cardinal principle of stay applications.'" Baker v. Adams County/Ohio Valley School Bd.,310 F.3d 927, 930 (6th Cir. 2002) (quoting 16A Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3954 (3d ed. 1999)). It does not appear that plaintiffs asked the district court for relief pending appeal and they could plainly have done so. If that is the case, the Court should decline to consider the motion.

I. Plaintiffs Have Failed To Demonstrate Even the Existence of A Serious Legal Question Much Less a Likelihood Of Success On The Merits.

The district court considered and addressed a variety of statutory and constitutional claims. In their motion, plaintiffs rely exclusively on their assertion that requiring them to comply with the security requirements for low risk employees violates their constitutional right to informational privacy.

Their claim is without basis. This Court has "observed that the relevant Supreme Court precedents delineate at least two distinct kinds of constitutionally-protected privacy interests: 'One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.'" In re Crawford, 194 F.3d 954, 958 (9th Cir. 1999) (quoting Doe v. Attorney General, 941 F.2d 780, 795 (9th Cir. 1991)).

Plaintiffs have not indicated how the disclosure requirements at issue here fall within the parameters of such a right.

The rights found within the guarantee of personal privacy "must be limited to those which are 'fundamental' or 'implicit in the concept of ordered liberty" such as those relating to "marriage, procreation, contraception, family relationships, and child rearing and education." Paul v. Davis, 424 U.S. 693, 713

(1976). This Court has identified illustrative factors to be considered in determining whether the right has been infringed:

> the [type] of information requested, . . . the potential for harm in any subsequent nonconsensual disclosure, . . . the adequacy of safeguards to prevent unauthorized disclosure, the degree of need of access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

Planned Parenthood v. Lawell, 307 F.3d 783, 790 (9th Cir. 2002) (internal quotations omitted).

As these factors indicate, issues of informational privacy generally implicate a concern that personal information will be disclosed to third parties. When the government has established adequate safeguards to prevent unauthorized disclosure of personal information, courts routinely find there is no violation of the right to informational privacy. See, e.g., Whalen v. Roe, 429 U.S. 589, 600 (1977) (unsubstantiated fear of public disclosure of information where state had enacted security provisions protecting privacy of patients did not provide reason sufficient to invalidate statute); AFL-CIO v. Dept. Housing and Urban Devel., 118 F.3d 786, 793 (no violation of right to privacy where information collected by the government was not disseminated publicly, and where government had enacted reasonable devices to secure the confidentiality of records, including Privacy Act protections); Lawall, 307 F.3d at 790 (no violation of right to informational privacy where adequate

safeguards against disclosure existed); Tucson Woman's Clinic v. Eden, 379 F.3d 531, 551-54 (9th Cir. 2004) (right to privacy violated where no safeguards prevented release of patient information such as names and full medical histories to members of public and government employees with no need for information, and inadequate safeguards existed governing protection by private contractor of patient information; no violation where safeguards prohibited release of patient information to the public).

No reason exists to conclude that information provided to the government or obtained by the government will not be subject to adequate safeguards.

Nor do plaintiffs allege the type of informational interest that has generally formed the subject of prior decisions. Plaintiffs cite no basis for the proposition that the government cannot ask employees or employees of its contractors whether they have engaged in drug use within the last year. Whatever privacy interest might exist in that knowledge is plainly outweighed by the government's interest as employer.

Plaintiffs also complain that they are required to provide basic information about past residences and their prior educational and employment history, and that the government may then ask questions of educational institutions, prior employers or persons who have known plaintiffs. It is unclear precisely how the prospect of government investigators asking questions of

third parties implicates a constitutional interest in informational privacy. Plaintiffs raise the specter of investigators asking inappropriate or irrelevant questions. Such activity is wholly speculative. If an investigator transgressed a statutory or constitutional line, an action would be ripe at that point. Hypothetical concerns, which, in any event, do not fall within the protections accorded to informational privacy, provide no basis for this action.

B. The District Court Did Not Abuse Its Discretion In Concluding That Plaintiffs Had Failed To Demonstrate Irreparable Injury Warranting An Injunction.

As the district court recognized, plaintiffs' asserted harms are all conjectural with the exception of the "injury" resulting from answering the question regarding drug use in the past year. It is equally clear, however, that plaintiffs have demonstrated no constitutional basis for declining to answer that question. As the district court held, the government has safeguarded plaintiffs' Fifth Amendment rights by noting that responses to the drug use question will not be used against the applicant in subsequent criminal proceedings. Moreover, if it were ultimately concluded that the government had no legitimate interest in requesting this information, any consequences resulting from the provision of the information could presumably be addressed at that time.

Plaintiffs' suggestion that immediate enforcement of the district court's order will cost them their jobs – and that such a loss is an irreparable harm – is incorrect. Motion at 2. First, as the district court noted, even if plaintiffs were denied badges upon failure to complete the SF 85 form, they could seek redress from a three-person appeals panel, and thus any loss of employment is not irreparable. D. Ct. at 16. Second, even if plaintiffs did lose their jobs, such a loss is not irreparable; should plaintiffs succeed on appeal, there is no reason that plaintiffs could not be restored to their jobs or paid money damages. See Stanley v. University of Southern California, 13 F.3d 1313, 1320 (9th Cir. 1994).

Nor is the provision of the basic information requested on this form an irreparable harm. Plaintiffs provide no support for their assertion that completing the SF 85 constitutes the release of "highly personal information" whose "revelation cannot be undone," thus representing a violation of the Fourth Amendment right to privacy. Motion at 11-14. Most of the information employees must themselves provide on the SF 85 is not "highly personal." See Plaintiffs' Exhibits 84-92 (requesting names, addresses, and educational information). Moreover, as discussed above, none the information requested on the SF 85 form – even the request for information about drug use – is the sort in which plaintiffs have an informational right to privacy or can have a

reasonable expectation in keeping confidential from a governmental employer. See National Treasury Employees Union v. U.S. Dept. of Treasury, 25 F.3d 237, 244 (5th Cir. 1994) (holding that IRS employees had no reasonable expectation of privacy in the information requested by the more comprehensive SF 85P form). Even in the unlikely event that plaintiffs eventually prevailed on their Fourth Amendment claim, the Government could be ordered to destroy the personnel records in its possession. Cf. L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 634 F.2d 1197, 1201 (9th Cir. 1980) ("The key word in this consideration is irreparable. . . . The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." (quoting Sampson v. Murray, 415 U.S. 61, 90 (1974)). Thus, any possible harm caused by the employees' provision of the information requested by the SF 85 is not irreparable.

CONCLUSION

The emergency motion should be denied.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October, 2007, I caused a copy of the foregoing document to be served on the following counsel by e-mail:

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