

ATTACHMENT A

IN THE SUPREME COURT OF THE UNITED STATES

No. A-_____

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL., APPLICANTS

v.

ROBERT M. NELSON, ET AL.

APPLICATION FOR AN EXTENSION OF TIME WITHIN
WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the National Aeronautics and Space Administration (NASA); Charles F. Bolden, Jr., Administrator of NASA, in his official capacity; the United States Department of Commerce; and Gary Locke, Secretary of Commerce, in his official capacity, respectfully requests a 30-day extension of time, to and including October 2, 2009, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The judgment of the court of appeals was entered on June 20, 2008. A petition for rehearing was denied on June 4, 2009. Unless extended, the time within which to file a petition for a writ of certiorari will expire on September 2, 2009. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1). Copies of the

opinion of the court of appeals and the order of the court of appeals denying rehearing en banc are attached.

1. a. This case involves a challenge to the government's background investigation process for federal contract employees. Since 1953, the government has required a minimum level of background investigation for federal employees in the competitive civil service. See Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953), reprinted as amended in 5 U.S.C. 7311 note. As relevant here, the background check process involves the completion of two forms: Standard Form 85 (SF-85), Questionnaire for Non-Sensitive Positions, which is completed by the applicant; and Form 42, Investigative Request for Personal Information, which is completed by the applicant's references. SF-85 asks, among other things, whether the applicant has used illegal drugs in the past year. If the answer is yes, the form asks the applicant to provide further details, including whether he received any treatment or counseling. Form 42 is sent to the applicant's references, and a similar form is sent to his educational institutions and former employers. Form 42, which seeks information regarding the applicant's suitability for federal employment, solicits, inter alia, any adverse information concerning the applicant's financial integrity, mental and emotional stability, and drug or alcohol abuse.

b. In 2004, the President issued a directive to the Department of Commerce to develop a federal standard for "secure

and reliable forms of identification" that would be used to control access to federally controlled facilities and information systems. Homeland Security Presidential Directive / HSPD 12 -- Policy for a Common Identification Standard for Federal Employees and Contractors Pub. Papers 1765-1766 (2004). The Commerce Department then put in place minimum requirements for the issuance of identity credentials, which include the background check process described above.

c. The Jet Propulsion Laboratory (JPL) is a federal facility operated by the California Institute of Technology (Caltech) pursuant to a contract with NASA. All JPL employees are employed by Caltech and therefore are contract employees of NASA. In 2007, in accordance with the Commerce Department's guidance and under NASA's own authority under the Space Act, 42 U.S.C. 2455, NASA modified its contract with JPL to require that JPL employees undergo background checks as described above.

2. Respondents are 28 JPL employees who sought a preliminary injunction to enjoin implementation of the background check process at JPL. As relevant here, they argued that the background checks violated the Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., because NASA lacked the statutory authority to require background investigations as part of the security screening of contractors, and that the checks violated a constitutional right to

informational privacy. The district court disagreed on both counts and denied respondents' motion for a preliminary injunction.

3. The court of appeals granted respondents an injunction pending appeal. See Nelson v. NASA, 506 F.3d 713 (9th Cir. 2007). It then issued an opinion reversing the district court's denial of a preliminary injunction. See Nelson v. NASA, 512 F.3d 1134 (9th Cir. 2008). As relevant here, the court held that respondents were likely to succeed on their APA claim because NASA lacked the authority to perform the background investigations of JPL employees, see id. at 1143-1144, and were likely to succeed on their informational privacy claim because SF-85's request for information regarding illegal drug use implicates a constitutional right to informational privacy and what the court characterized as Form 42's "open-ended and highly private questions * * * do not appear narrowly tailored to any legitimate government interest," id. at 1144-1145.

In response to the government's petition for rehearing, the court of appeals withdrew its first opinion and issued a second opinion. See Nelson v. NASA, 530 F.3d 865 (9th Cir. 2008). The court reversed its previous holding that NASA did not have the authority to conduct background investigations of federal contractors, id. at 874-875, but continued to adhere to the view that respondents demonstrated a likelihood of success on their informational privacy claim, id. at 877-881. The court determined

that SF-85's requirement that contractor employees disclose treatment or counseling for drug problems was not supported by a legitimate government interest, id. at 879, and that Form 42 is not narrowly tailored to the government's legitimate interests in verifying its contractors' identities and ensuring the security of the JPL facility, id. at 880-881.

The government filed a second petition for rehearing en banc. The court of appeals denied the petition over three published dissents joined by a total of five judges. See Nelson v. NASA, 568 F.3d 1028 (9th Cir. 2009). Judge Callahan's dissent explained that "the panel's opinion constitutes an unprecedented expansion of the constitutional right to informational privacy" that "reaches well beyond this case and may undermine personnel background investigations performed daily by federal, state, and local governments." Id. at 1039 (Callahan, J., joined by Kleinfeld, Tallman, and Bea, JJ.). Judge Kleinfeld's dissent focused on Form 42, explaining that the panel's opinion calls into question the most basic investigation of an applicant by a prospective employer, such as when a federal judge about to "hire law clerks and secretaries * * * talk[s] to professors and past employers and ask[s] some general questions about what they are like." Id. at 1051-1052 (Kleinfeld, J., joined by Callahan and Bea, JJ.). And Chief Judge Kozinski's dissent questioned whether a constitutional right to informational privacy even exists, particularly a right to

prevent collection of information, as opposed to disclosure of information. See id. at 1052-1054 (Kozinski, C.J., joined by Kleinfeld and Bea, JJ.) (observing that this Court "hinted" at a constitutional right to informational privacy in two cases in the 1970s and then "never said another word about it").

4. The court of appeals' decision raises important questions about the constitutionality of the background check process applicable to federal contractors. The Solicitor General is examining the legal and practical significance of the court of appeals' decision. Additional time is needed for further consultation with other components of the Department of Justice and with a number of interested federal agencies, and, if certiorari is authorized, for preparing and printing the petition.

Respectfully submitted.

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AUGUST 2009