

In the
**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 07-56424

Robert M. Nelson, et al.
Plaintiffs-Appellants,

vs.

National Aeronautics and Space Administration, et al.
Defendants-Appellees.

**On Appeal From the Order Denying Motion for Preliminary Injunction of the
United States District Court for the Central District of California
Case No. CV-07-05669 ODW(VBKx)**

**AMICUS CURIAE BRIEF BY THE UNION OF CONCERNED
SCIENTISTS IN SUPPORT OF APPELLANTS**

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I. INTRODUCTION

Pursuant to Fed. R. App. P. 29, Amicus Curiae Union of Concerned Scientists (“UCS”) submits this brief in support of the Appellants. Appellees, the National Aeronautics and Space Administration (“NASA”) and the California Institute of Technology (“Caltech”) have consented to the filing of this brief.

Appellants are twenty-eight scientists and engineers employed as researchers by Caltech at Caltech’s Jet Propulsion Laboratory (“JPL”), which performs scientific research for NASA. Appellants conduct research on scientific issues deemed “non-sensitive” by NASA, *i.e.*, having no security-related sensitivity. They seek protection from unlawful and intrusive federal “background” investigations by NASA into their personal lives. While the alleged purpose of these investigations is to firmly establish the identities of JPL employees, their wide-ranging scope includes sensitive personal information that has no apparent bearing on an employee’s identity. NASA has failed to show that its proposed inquiries into constitutionally protected private information are justified and that they are tailored to the agency’s precise informational needs. Therefore, UCS supports Appellants’ appeal of the District Court’s decision denying Appellants’ motion for a preliminary injunction.

UCS submits this amicus brief out of concern that if NASA’s intrusive investigations are allowed to stand, they will discourage Appellants and many

other scientists from working at the JPL and other federal research institutions, and could chill the atmosphere of open debate. As a result, these investigations threaten to adversely affect the quality of scientific work performed on behalf of the federal government and diminish the effectiveness of federally sponsored research in solving the pressing scientific problems of our day.

II. INTERESTS OF THE AMICUS CURIAE UNION OF CONCERNED SCIENTISTS IN THIS PROCEEDING

As the leading U.S. non-profit organization dedicated to the use of science to foster a healthy environment and a safer world, UCS has a strong interest in preserving and protecting an intellectual environment of scientific independence and vigorous debate in the United States. UCS is an alliance of more than 200,000 citizens and scientists that combines independent scientific research and citizen action to develop innovative, practical solutions and to secure responsible changes in government policy, corporate practices, and consumer choices. UCS has worked to forge bi-partisan solutions for a range of issues, from global warming and the dangers of nuclear weapons to vehicle pollution and the safety of the nation's food supply.

UCS believes that a crucial ingredient in achieving a healthy environment and a safer world is the maintenance of research institutions that attract talented scientists and engineers by fostering an environment of independent and rigorous scientific inquiry. Among the most important of these research institutions are

federal scientific agencies and their research arms because they establish our first line of defense in protecting public health and safety, providing needed scientific assessments on everything from drug safety to air pollution to global warming, and producing basic scientific knowledge indispensable to national security.

The health of the federal scientific workforce has long been a topic of concern for UCS. Thus, UCS has advocated for the right of government scientists to do their jobs free from political interference, for their right to freely communicate their findings with the wider scientific community (unless these findings are classified), and for greater transparency and openness in federal science and regulatory agencies. *See* the description of UCS' *Scientific Integrity* program at www.ucsusa.org/scientific_integrity/. UCS is concerned that the background investigations proposed by NASA are wide-ranging, highly personal, and unwarranted in light of the unclassified and non-sensitive nature of the Appellants' work. While the investigations purportedly are intended to verify the Appellants' identities, in fact the subjects covered by the investigations include a host of irrelevant and personal issues, including credit history, "personality conflict," physical and mental health, and sexual orientation. *See* ER 1332-1342.

UCS is concerned that wide-ranging and intrusive background investigations such as those proposed by NASA could have a three-fold adverse effect on the quality of scientific inquiry in U.S. research institutions:

- Highly qualified and experienced scientists may leave research institutions rather than be subjected to intrusive and unnecessary background investigations. In this case, for example, many of the Appellants are senior level scientists with job responsibilities that include management of major NASA initiatives and several have indicated a willingness to leave the JPL rather than submit to the background check. The potential loss of this brain-trust of technical expertise and institutional memory has serious implications for the research and engineering capacity of NASA and the JPL, both of which are critical to this country's space exploration enterprise.
- Similarly, the unwillingness of these scientists to submit to background checks indicates that there may be a large class of scientists who would not consider taking a job at a government laboratory where that is a requirement for work. Therefore, adopting this policy may reduce the pool of scientists interested in work at the JPL and may have a chilling effect on recruitment of the best and the brightest scientists in similar settings elsewhere.
- For those scientists who remain at the JPL, the prospect of regular identity checks by the federal government that probe into every aspect of an employee's life, including vague employment-related issues such as "attitude" and "personality conflict," could create an atmosphere of intimidation. In effect, background checks could become secret and

arbitrary employment reviews, where dissenters are eliminated by termination on the ground that they did not satisfy a background check. Such an intimidating environment could stifle the atmosphere of open debate that is so important to rigorous scientific inquiry.

UCS recognizes that background checks are an established part of government employment. Nevertheless, it is possible, appropriate and necessary for the government to balance its own need for information against the privacy interests of employees and contractors, to tailor its investigations to the circumstances of the employment, and to limit its inquiries to essential information rather than straying into irrelevant and intrusive personal issues. For instance, for employees or contractors with access to classified information, it may be necessary to make inquiries into private matters in order to rule out individuals who are vulnerable to blackmail or bribery. Similarly, for employees or contractors with jobs that require the handling of dangerous equipment, it may be appropriate to investigate drug use. Here, however, where the Appellants' work on scientific research is deemed by the government to be non-sensitive, the intrusiveness of NASA's proposed inquiries is not only unwarranted but potentially destructive to the atmosphere of open scientific debate that is crucial to the production of high-quality scientific work in federal research institutions.

III. ARGUMENT: NASA'S PROPOSED BACKGROUND INVESTIGATIONS ARE UNCONSTITUTIONAL.

The Ninth Circuit recognizes a constitutional right to privacy that includes both an individual's interest in avoiding disclosure of personal matters and the individual's interest in independence "in making certain kinds of important decisions." *Thorne v. City of El Segundo*, 726 F.2d 459, 468 (9th Cir. 1983), cert. denied, 469 U.S. 979 (1984), quoting *Whalen v. Roe*, 429 U.S. 589, 599 (1977). For these Appellants, both types of interests are implicated. First, NASA proposes to invade their privacy by forcing them to agree to be investigated on highly personal matters as a condition of their employment; and second, NASA's potential refusal to retain the Appellants based on the same personal considerations interferes with Appellants' privacy interests. *Thorne*, 726 F.2d at 468.

In seeking private information, the government bears 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 interests." *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999). Here, the government's professed interest is in establishing the identity of JPL employees. It is not apparent how personal information about an individual's finances, sexual orientation, personal life, or personality would aid the establishment of his or her identity. Rather than being tailored to meet the interest of establishing identity, the inquiry appears designed to

give NASA unlimited grounds on which to terminate an employee, even including grounds of questionable legality such as sexual preference and physical health.

IV. CONCLUSION

NASA has failed to justify its proposed investigations into constitutionally protected information about the personal lives of the Appellants, or to tailor those investigations to fit the agency's purpose of establishing Appellants' identities. Instead, NASA proposes a wide-ranging inquiry into a host of irrelevant and potentially sensitive personal issues. Accordingly, this Court should reverse the District Court's decision refusing to enjoin NASA from conducting the proposed background investigations.

Respectfully submitted,



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CERTIFICATE REGARDING WORD COUNT

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), undersigned counsel for Amicus Curiae Union of Concerned Scientists hereby certifies that the number of words in UCS' Amicus Curiae Brief of October 30, 2007, excluding the Table of Contents and Table of Authorities, is less than 7,000 words.

Respectfully submitted,



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Certificate of Service

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